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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 102130/2010
RAMNANAN, YUWANAND
vs
LEE DESIGN & MANAGEMENT GROUP
Sequence Number : 004
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, **were read on this motion to/for** Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: March 25, 2014

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------x

YUWANAND RAMNANAN,

Index No. 111631/05

Plaintiff,

- against -

LEE DESIGN & MANAGEMENT GROUP, INC., WARDAK SUPERMARKETS 2, CORP. WARDAK CORP, ME & MORGAN LLC, and MIDWOOD MANAGEMENT CORP.,

Defendants.

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WARDAK CORP.,

Index No. 590691/11

Third-party plaintiff

- against -

MOHAMMED WARDAK and WARDAK SUPERMARKETS #2, INC.,

Third-party defendants

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ME & MORGAN LLC, and MIDWOOD MANAGEMENT CORP.,

Index No. 590905/11

Second Third-party plaintiff

- against -

MOHAMMED WARDAK and AIRPLUS CONTRACTING,

Second Third-party defendants

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JOAN A. MADDEN, J.:

In this action arising out of a workplace accident, plaintiff moves for summary judgment as to liability on his Labor Law §240(1) and §241(6) claims against defendants

ME & Morgan ("M&M") and Midwood Management Corp. ("Midwood").[1] M&M and Midwood oppose the motion.

Background

Plaintiff was injured on January 20, 2010, while working as a carpenter's helper at 535 Morgan Avenue, in Brooklyn ("the Building). Plaintiff was employed by Airplus Contracting ("Airplus"), a renovation contractor. Plaintiff's boss was third-party defendant Mohammed Wardak ("Wardak"), who owns Airplus. Defendant M&M, through its exclusive managing agent Midwood, leased the commercial space in the Building to defendant Wardak Supermarkets 2 Corp. Wardak Supermarkets 2 Corp. hired Airplus to renovate the space, which involved the interior demolition of the existing building and the construction of a supermarket in that space.

Plaintiff testified at his deposition that his brother, Yukteshwar Ramnanan ("Yukteshwar"), was working as a foreman for Airplus on the project (Plaintiff's Dep. 25-26). On the date of the accident, plaintiff was removing pipes from the ceiling as instructed by Wardak (*id.* at 45). To reach the pipes, plaintiff used a straight metal extension ladder already in the Building on the day of the accident (*id.* at 32, 34-36). Plaintiff was working alone and no one was holding the ladder, but Yukteshwar was behind him, and was about 10 to 12 feet away(*id,* at 69-70). To remove the pipes, plaintiff had to climb the ladder, cut a part of the pipe, which would fall to the floor, then move the ladder to cut the new portion of pipe, and repeat (*id.* at 54-56).

Plaintiff testified that the day before the accident, he complained to Wardak that the one side of the ladder on the foot did not have rubber, but Wardak told him that he

[1]Plaintiff has been granted a default judgment against defendants Lee and Wardak Supermarkets 2 Corp. The action against Wardak Corp have been dismissed. In addition, the third party defendants have never appeared.

could use the ladder like that and there was no problem with it (*id.* at 62-63). Plaintiff supported the ladder by resting it against the horizontal beam, held the horizontal beam with his left hand so he could cut with his right hand (*id*, at 34, 41, 43-44, 65, 66). When plaintiff started to cut the pipe the ladder moved and plaintiff let go of the horizontal beam, causing the ladder to tip and fall, and plaintiff landed on his right side (*id.* at 67). Plaintiff's brother tried to catch him when he fell but could not (*id,* at 72-73). Plaintiff's head hit the floor and he fractured his skull and injured his neck, back and ribs on his right side (*id.* at 75).

Yukteshwar testified before the workers' compensation board that the accident occurred when plaintiff was working on a ladder, that plaintiff was cutting pipe and the ladder fell, causing plaintiff to fall 20 to 25 feet (Workers' Compensation Hearing Transcript, at 20-21). In support of plaintiff's summary judgment motion, plaintiff also submits Yukteshwar's affidavit in which he states that he saw the accident, and that it occurred when plaintiff was cutting a pipe and the ladder fell from under him causing him to fall. Yukteshwar further states that he tried to catch plaintiff but he fell to the floor.

Gary Greene ("Greene"), who is currently employed by Midwood and a related entity, testified on behalf of M&M and Midwood. Greene testified that M&M is a real estate management limited liability corporation and is the owner of the Building and that Midwood is the Building's exclusive managing agent pursuant to a managing agreement. ("the Management Agreement") (Green, Dep, at 10, 11; Exhibit J to moving papers). Greene testified that the Management Agreement is signed by John Usdan ("Usdan"), who Greene identified as the President of M&M and an officer of Midwood (*id*, at 14).

On the fourth page of the Management Agreement, Usdan's signature appears on the line titled "owner" for M&M's signature (*id* at 19; Exhibit J). Usdan signed on behalf of Midwood as well (*id*, at 21; Exhibit J).

According to Greene, Wardak Supermarket 2 Corp. was a tenant of the Building (*id.* at 25-26). Greene testified that there was lease between Wardak Supermarket 2 Corp., as tenant, and M&M, as landlord but he never dealt with lease (*id* at 28). The record contains a copy of the lease, which is dated October 1, 2008 ("the Lease," Exhibit K to moving papers).

Under the Lease, the premises was to be used "solely as a first-class, high quality supermarket and for no other purpose." (Exhibit K, at 4, para. 4A). The Lease further provided that Wardak Supermarket 2 Corp was to construct a supermarket and open for business as a supermarket (*id*, at 4, para. 9). Under the construction clause of the Lease, Wardak Supermarket 2 Corp. was, *inter alia*, required to submit construction plans to M&M in accordance with certain specifications, and to obtain M&M's written approval for all adjustments and alterations (*id*, at 4, paras. 9-10).

Greene testified, however, that neither M&M nor Midwood were responsible for overseeing the construction or renovations going on in the supermarket and did not look for unsafe conditions at the site (*id,* at 31-34). He testified that he visited the Building approximately every two weeks (*id* at 17), but that the visits were not related to the construction (*id* at 33). Greene also submits an affidavit in support of the M&M's defendants' opposition, stating that Midwood did not hire any contractors, supervise any work or provide any equipment, including the ladder used by plaintiff.

Plaintiff moves for summary judgment as to liability on its Labor Law §§ 240 (1) and 241 (6) against M&M and Midwood. With respect to the Labor Law § 240 (1) claim, plaintiff argues that the evidence in the record demonstrates that the statute was violated based on the failure to provide plaintiff with a sufficient safety device to protect him from the elevation risk posed by the work he was performing, and that this failure was a proximate cause of his accident. As for his § 241 (6) claim, plaintiff argues that the record shows that the ladder violated specific provisions of the New York State Industrial Code and that such violation was a proximate cause of the accident.

M&M and Midwood oppose the motion, arguing that there are triable issues of fact as to whether plaintiff's conduct in holding the beam with one hand was the sole proximate cause of the accident. They also argue that plaintiff's testimony conflicts with that of his brother since plaintiff denied at his deposition that his brother could see the accident. These defendants further assert that they cannot be held liable to the plaintiff, as plaintiff has not established that either M&M or Midwood is a statutory owner, general contractor or statutory agent, and there is no evidence that the M&M defendants supervised or controlled plaintiffs' work. They further argument that there is no nexus between either M&M or Midwood and the plaintiff.

In reply, plaintiff points out that Greene testified that M&M was the owner of the Building, and that M&M is identified as the owner of the Building in its Management Agreement with Midwood. Plaintiff also argues that as pursuant the Lease, M&M was the landlord and Midwood was the managing agent of the premises being renovated, and thus a sufficient nexus exists to render these defendants liable as, respectively, a statutory owner and agent under Labor Law §§ 240 (1) and 241 (6). Plaintiff also asserts that there

is no basis for finding that his conduct was the sole proximate cause of the accident as the record shows that the ladder failed to provide him adequate protection and thus there was a violation of § 240 (1). Plaintiff also argues that his testimony does not conflict with his brother's testimony or his affidavit and that, in any event, even if the accident were unwitnessed summary judgment is appropriately granted.

DISCUSSION

It is well settled that summary judgment is proper where there are no issues of fact for trial (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden of proof is on movant for a motion for summary judgment who must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the motion's opposing party to lay bare its evidentiary proof and present a genuine, triable issue of fact (*id.*).

Labor Law § 240

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The purpose of the statute is to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually

belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991] [internal quotation marks and citations omitted]). As a result, the statute "is to be construed as liberally as possible for the accomplishment of the purpose for which thus framed" (*Patrick v. Country of Albany*, 99 NY2d 452, 457 [2007] [internal citations and quotations omitted]). The statute imposes a nondelegable duty and absolute liability on owners and contractors for failing to provide adequate safety devices to workers who sustain gravity-related injuries (*Jock v Fien*, 80 NY2d 965, 967 [1992]; *Rocovich*, 78 NY2d at 513). As the duty is "nondelagable...an owner or contractor who breaches the duty may be liable for damages regardless of whether it has actually exercised supervision or control over the work" *(Ross v. Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 500 [1993]).

Labor Law § 240 (1) applies to risks related to elevation differentials, including those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level (*Rocovich*, 78 NY2d at 514). To impose liability under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]).

To recover under the statute, the plaintiff must establish a violation of the statute, and that the statutory violation was a proximate cause of the injuries sustained (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Proximate cause is established where a

"defendant's act or failure to act as the statute requires was a substantial cause of the events which produced the injury" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993] [internal quotation marks and citation omitted]). However, where the plaintiff's actions are the sole proximate cause of the injuries, liability under Labor Law § 240 (1) does not attach under the statute (*see Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875 [1998]; *see also Robinson*, 6 NY3d at 554). Nevertheless, the plaintiff's comparative negligence does not "exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (*Blake*, 1 NY3d at 286).

The statute requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to construction workers (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason," there is a presumption that the ladder or scaffolding device was "not good enough to afford proper protection" (*Blake*, 1 NY3d at 289 n 8). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [internal quotation marks and citations omitted]). As noted by the First Department, "'[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [1st Dept 2008], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show

that the ladder was somehow defective (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008]).

The court finds that plaintiff has made a prima facie case for recovery under Labor Law § 240 (1) based on plaintiff's testimony that the ladder was missing rubber on one of its feet and that the ladder was not secured while he was performing work from the ladder (*see Felker v. Corning Inc.*, 90 NY2d 2 [1997]["[p]roper protection" under Labor Law § 240 means that the device must be appropriately placed or erected so that it would have safeguarded the employee and must itself be adequate to protect against the hazards entailed in the task assigned]).

The burden thus shifts to the M&M defendants to raise an issue of fact as to whether plaintiff is entitled to prevail on liability on his Labor Law § 240 (1) claim (*see Alvarez*, 68 NY2d at 324). "Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (*Blake*, 1 NY3d at 289 n 8). To defeat summary judgment on this basis, a defendant must establish that plaintiff "'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Ritzer v 6 E. 43rd St. Corp.*,

57 AD3d 412 [1st Dept 2008]). Mere "generic statements of the availability of safety devices" are insufficient (*Kosavick*, 50 AD3d at 289).

Here, the M&M defendants have failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident. They provide no evidence that other adequate safety devices were available to plaintiff and, in fact, the record shows that when plaintiff pointed out the defect in the ladder, he was told to use it. Notably, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" *(Blake*, 1 NY3d at 290). Here, the record shows the statute was violated when defendants failed to provide plaintiff with an adequate safety device for the performance of his work while elevated. In view of this failure, any negligence on the part of plaintiff was not the sole proximate cause of the accident.

Furthermore, contrary to the defendants' position, plaintiff's testimony does not conflict with the statements in Yukteshwar's affidavit that he witnessed the accident. In fact, plaintiff testified that Yukteshwar was nearby when the accident occurred, and that Yukteshwar tried to catch him. In addition, Yukteshwar's description of the accident in the affidavit and at the workers' compensation hearing is consistent with that of the plaintiff. In addition, even if the accident were unwitnessed summary judgment would be appropriately granted under the circumstances here (*Klein*, 89 NY2d at 833[summary judgment was properly granted where plaintiff was the sole witness to accident which occurred when the ladder used by plaintiff was not proper placed in violation of section 240(1)]; *Diaz v. 48th Avenue*, 111 AD3d 661 [2nd Dept. 2003][trial court erred in denying summary judgment where plaintiff established that unsecured ladder collapsed even if the accident were unwitnessed]).

Next, the record establishes that M&M is a statutory owner for purposes of Labor Law § 240, based on Greene's testimony that M&M owned the Building, and the Management Agreement which M&M's principal signed under the line entitled "owner." Moreover, M&M is not relieved of absolute liability as a statutory owner simply because it leased the Building (*Sawatass v. Iwucsting Co., Inc.*, 10 NY3d 333 [2008]; *Abdul Mutadir v. 80-90 Maiden Lane Del LLC*, 110 AD3d 641 [1st Dept 2003]). In *Mutadir*, as this action, the owner entered into a lease with a tenant-supermarket, under which the tenant was to perform substantial demolition and construction work on the lease premises. When plaintiff was injured in performance of this work, the Appellate Division, First Department found that the lease created a sufficient "nexus" for imposing liability on defendant as a statutory owner. *Id.* at 642. Here, as in *Mutadir,* the Lease mandates that Wardak Supermarket 2 Corp. perform certain construction work and at the premises, and provides a sufficient nexus to impose liability on M&M as a statutory owner.

As for Midwood, as the managing agent of the owner Building, it may be held liable under Labor Law § 240 as a statutory agent of the owner if it has authority to supervise and control the employee (*Voultepsis v. Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 (1st Dept 2009); *Fox v. Brozman-Archer Realty Services, Inc.*, 266 AD2d 97, 98 [1st Dept 1999]). Here, Greene denied that he had any responsibility for the construction work or supervising plaintiff. Moreover, while under the Management Agreement, Midwood was responsible for repairs and alterations to the Building in connection with its maintenance, there is no evidence that Midwood was responsible for, or had authority over, the construction at the Building resulting in plaintiff's injuries or otherwise had

authority over plaintiff's work. Accordingly, as there is no evidence that Midwood had authority to control or supervise the work resulting in plaintiff's injuries, it is not a statutory agent, and the Labor Law § 240(1) against it must be dismissed.

Plaintiff's Motion for Summary judgment under Labor Law § 241 (6)

Here plaintiff is also entitled to summary judgment under Labor Law §241 (6). Labor Law 241 (6) states:

> "the owner of an area where construction, excavation or demolition is taking place is liable for injury to a worker in that area caused by the failure of a general contractor or a subcontractor to use reasonable care in constructing, shoring, equipping, or guarding the site in arranging, operating or conducting the work in that area. The owner is liable for an injury due to the failure of a general contractor or subcontractor to use reasonable care even though the owner did not control or supervise the area or the work being done there and did not or could not know of any danger to the plaintiff."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross.*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety performed.

(*id.*).

Industrial Code 12 NYCRR 23-1.1.21 (b) (1), (3), and (4), on which plaintiff relies,[2] are sufficiently specific to support a Labor Law § 241 (6) claim (*see Soodkin v.*

[2] Industrial Code 12 NYCRR 23-1.21 (b) states in relevant part:

General requirements for ladders: (1) Strength: Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four

Fragakis, 91 AD3d 535 [1st Dept. 2012]).

In *Soodkin v. Fragakis, supra*, "plaintiff established that he was supplied with an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery polyurethane-coated floor, and that the ladder toppled over, causing him to fall" (*id*). The First Department held that "[t]he evidence that the ladder collapsed or malfunctioned for no apparent reason ...establishes noncompliance with Industrial Code (12 NYCRR) § 23-1.21 (b)(3) (i)-(ii) and (iv) and (4) (ii), and found that the trial court should have granted summary judgment in plaintiff's favor on his §241(6) claims based on violation of these provisions (*id,* at 536).

Here, the record establishes that the extension ladder used by plaintiff to perform work at 25 feet lacked rubber on one of its footings, and was not otherwise secured so as to establish a violation of § 23-1.21 (b) (3) (i)-(ii) and (iv) and (4) (ii)(iv), which require, respectively, that ladders be maintained in good condition, not be used with a broken part, flaw or defect that may caused it to fail; have firm ladder footings; and when, as here, the work being performed is from rungs higher than 10 feet above the ladder footing, mechanical means be provided for securing the upper end of such ladder against side slip, and that the lower end be held in place by a person unless such lower end is tied

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times the maximum load intended to be placed thereon. (3) Maintenance and replacement: All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: (I) If it has a broken member or part, (iv) If it has any flaw or defect of material that may cause ladder failure, (4) Installation and use: (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings, (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

to a secure anchorage or safety feet are used. Furthermore, the record does not raise an issue of fact as to whether such violations were a proximate cause of the accident. In this connection, as explained above, it cannot be said on this record that plaintiff's conduct was the sole proximate cause of the accident.

Accordingly, summary judgment is properly granted as to liability on plaintiff's Labor Law § 241(6) claim against M&M, but dismissed as against Midwood which, for the reasons explained in connection with § 240 claim, is not a statutory agent against which liability may be imposed under § 241(6) (*Nascimento v. Bridgehampton Const. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011][agent may only be held liable under 241(6) if it has the authority to supervise and control the work giving rise to the obligations imposed by the statute]).

In view of the above, it is

ORDERED that plaintiff is granted summary judgment as to liability under Labor Law §§ 240(1) and 241(6) as against defendant ME & Morgan LLC; and it is further

ORDERED that the Labor Law §§ 240(1) and 241(6) claims against Midwood Management Corp. are dismissed; and it is further

ORDERED that the parties shall proceed to mediation.

Dated: March 7, 2014

J.S.C