SC 5/19/14 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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ZBIGNIE KOSINSKI and ZOFIA KOSINSKI,

Plaintiff,

-against -

BRENDAN MORAN CUSTOM CARPENTRY, INC., CONCORDIA GENERAL CONTRACTING, INC. and LYNN DeGREGORIO,

Defendants.

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DECISION & ORDER

Index No. 3014/12

Sequence No. 2 & 3
Motion Date: 1/27/14

LUBELL, J.

The following papers were considered in connection with **Motion Sequence #2** by plaintiffs for an Order pursuant to CPLR 3212 granting summary judgment on liability on the Labor Law 240(1) and 241(6) causes of action and **Motion Sequence #3** by defendants for an Order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiffs' complaint, plus the costs and disbursements of this action, together with such other and further relief as this Court deems just and proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS A-P	1
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-N	2
AFFIRMATION IN OPPOSITION/EXHIBIT A	3
REPLY AFFIRMATION	4
AFFIRMATION IN OPPOSITION/EXPERT AFFIDAVIT/EXHIBIT A	5
REPLY AFFIRMATION	6

This Labor Law action was commenced by plaintiffs, Zbignie Kosinski and his wife Zofia Kosinski, in connection with personal injuries sustained by plaintiff Zbignie Kosinski ("Plaintiff") on February 1, 2012, when he fell from a ladder while performing work on a construction project involving two separate structures on property owned by defendant, Lynn DeGregorio (the "Owner") and located at 103 Mills Road, North Salem, New York (the "Premises").

More particularly, the Premises consists of fifteen acres improved by a single-family dwelling (the "Main House") and a separate garage structure with accessory apartment above (the "Accessory Building"). The underlying construction project included a kitchen and bathroom expansion to the Main House and the addition of a third garage bay to the Accessory Building and the conversion of living space above the garage from a loft to a more traditional apartment set-up.

The Owner resides in the single family dwelling. Non-party George Roberts ("Roberts") resides in the second floor living area of the Accessory Building, in exchange for Premises caretaker services. Roberts also operates his painting contractor business out of the apartment by, for example, using that location to generate business invoices, to send and receive correspondence by mail and facsimile transmission and for the receipt of payments by mail. Roberts also uses one side of the garage area for the storage of various business related items, including paint cans and a step ladder.

In connection with the underlying construction project, the Owner retained an architectural firm sometime in April 2011. Thereafter, she hired defendant Brendan Morgan Custom Carpentry, Inc., which served as the general contractor (the "General Contractor"). In turn, the General Contractor engaged defendant Concordia General Contracting, Inc. (the "Subcontractor") to perform work at the Premises which, in turn, engaged Plaintiff as a carpentry subcontractor.

On the morning of the incident, Plaintiff reported to the Subcontractor's office where he received his assignment. While Plaintiff contends that he was tasked with assisting the Subcontractor's crew with finishing the roof rafters, installing plywood and finishing a wall of the Accessory Structure addition, defendants contend that Plaintiff was assigned to place felt paper around newly installed bedroom windows. Upon the completion of his tasks on the left side of the Accessory Building, Plaintiff proceeded to the right side where the accident would eventually occur.

The accident site is situated outside of the then under construction second floor improvements to the Accessory Building and on top of the protruding and angled roof of the garage bay addition. Defendants' version of the facts is that Plaintiff placed a fully extended 14' or 16' folding aluminum ladder upon a nearby flat wood deck and secured its feet with a cedar shake placed between two deck boards. In contrast, Plaintiff contends that he used the 14' portion of one-half of an extension ladder to

perform his assigned tasks. He contends that he placed the rubber feet of the ladder approximately five feet from the wall with the top of the ladder placed to the right of the window. Either way, there is no dispute that the ladder upon which Plaintiff stood slid out from under him causing him to fall onto the roof of the garage bay causing injury.

Homeowner's Exemption:

> [Although] "[b]oth Labor Law §240(1) and §241 impose nondelegable duties upon contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities ... [,] the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work" (Landon v. Austin, 88 A.D.3d 1127, 1128, 931 N.Y.S.2d 424 [2011] [internal quotation marks and citations omitted]. . . That exemption, however, "is not available to an owner who uses or intends to use [the] dwelling only for commercial purposes" (Truppi v. Busciglio, 74 A.D.3d 1624, 1625, 905 N.Y.S.2d 291 [2010] . . . If it is established that the property has both a residential and a commercial use, "the availability of the exemption [then] depends upon the site and purpose of the work performed" (Sanchez v. Marticorena, 103 A.D.3d at 1058, 962 N.Y.S.2d 425 . . .)

(Bagley v. Moffett, 107 AD3d 1358, 1360-61 [3d Dept 2013]). The burden is on the defendant seeking the statutory exemption (id.)

Taking into account the fact that the accident took place on the Accessory Building portion of the Premises which was being renovated to add a bedroom over an additional garage bay for the benefit of non-party Roberts who provided caretaker services in lieu of rent and who used a portion of the garage in connection

with his painting business, the Court concludes that defendant DeGregorio has not come forward in the first instance establishing entitlement to the statutory exemption.

Labor Law §240(1) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

Whatever Plaintiff was exactly doing at the time of the accident, be it passing a 3 foot by 4 foot piece of plywood to a co-worker above him while standing on a ladder at the accident site (as Plaintiff contends) or placing felt paper around a newly installed window located above the garage roof (as Patrick Donovan, President of Concordia, contends), Plaintiff has made "a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the defendants violated Labor Law §240(1) by failing to provide him with adequate safety devices to afford him proper protection for the work being performed, and that this failure constituted a proximate cause of his accident" (Pichardo v. Aurora Contractors, Inc., 29 AD3d 879, 880 [2d Dept 2006] Zimmer v. Chemung County Performing Arts, 65 NY2d 513 [1985]; Sztachanski v. Morse Diesel Intl., Inc., 9 AD3d 457 [2004]; Gardner v. New York City Tr. Auth., 282 AD2d 430 [2001]). Since it is not disputed that the ladder slipped causing Plaintiff to fall from an elevated work site, Plaintiff met his initial burden under Labor Law §240(1) of establishing that the ladder was "not so placed . . . as to give proper protection to him" (Woods v. Design Ctr., LLC, 42 AD3d 876, 877 [2007]; see, Kirbis v. LPCiminelli, Inc., 90 AD3d 1581, 1582 [4th Dept 2011]; Kin v. State, 101 AD3d 1606, 1607 [4th Dept 2012]).

The Court is not persuaded that Plaintiff's conduct in the use of the ladder, by any view of the evidence, constitutes a "unilateral misuse of the device which was the sole proximate cause of the accident" (Pichardo v. Aurora Contractors, Inc., supra at 880-81; see e.g. Montgomery v. Federal Express Corp., 4 NY3d 805 [2005]; Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]; Weininger v. Hagedorn & Co., 91 NY2d 958 [1998]). Nor have defendants shown that Plaintiff's actions were so extraordinary as to constitute a superseding cause of the accident (see e.g. Vouzianas v. Bonasera, 262 AD2d 553 [1999]; Styer v. Vita Constr., 174 AD2d 662 [1991]) or that Plaintiff declined the use of an appropriate safety device (Gardner v. New York City Tr. Auth, supra at 880).

> In order to raise an issue of fact whether [Plaintiff's] own conduct was the sole proximate cause of the accident, defendant[s] [are] required to establish that "the safety devices that [plaintiff] alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [Plaintiff] knew [he] was expected to use them but for no good reason chose not to do so, causing an accident" (Gallagher v. New York Post, 14 NY3d 83, 88 [2010]; see Ganger v. Anthony Cimato/ACP Partnership, 53 AD3d 1051, 1052 [2008])

(Kin v. State, 101 AD3d 1606, 1607-08 [4th Dept 2012]). No such showing has been made.

Defendants' expert submission does not warrant a different result. While it provides an interesting biomechanical analysis of the incident, whether viewed from Plaintiff's or defendants' version of the incident, it does not otherwise raise triable issues of fact in response to Plaintiff's prima facie showing of his entitlement to judgment in his favor as a matter of law (see e.g. Belding v. Verizon New York, Inc., 65 AD3d 414, 425 [1st Dept 2009] affd, 14 NY3d 751[2010]). Nor does it matter if Plaintiff was using his own ladder, as defendants contend, since, in any event, there is no dispute that it was inadequate for the task being performed especially in the absence of other necessary safety devices.

Labor Law §241(6)

Plaintiff has not established entitlement to summary judgment in his favor on his Labor Law §241(6) claim. Section 241(6) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> . . .
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Plaintiff has come forward in the first instance with a prima facie showing of entitlement to judgment in his favor a matter of law on his Labor Law §241(6) cause of action by establishing a violation of sections 23-1.21(b)4)(ii) and 23-1.21(b)(4)(iv) of the Industrial Code, dealing with ladder footings and installation and use of ladders, and that such violations were a proximate cause of his injuries (see, Kim v. D&W Shin Realty Corp., 47 AD3d 616 [2d Dept 2008]).

However, "[a]n owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability

under section 241(6), including contributory and comparative negligence [citations omitted]" (Rizzuto v. L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 350 [1998]). Here, defendants have properly raised questions of fact as to whether Plaintiff failed to proceed with reasonable care under the existing conditions. As such, the Court cannot find, as a matter of law, that plaintiff was free from negligence. As such, summary judgment is denied.

Labor Law §200

Defendants' motion for summary judgment dismissing the complaint is granted, without opposition, as to defendants BMCC and DeGregorio and is denied as to defendant Concordia. The Court finds that there are extant questions of fact as to Concordia's liability including, but not limited to, whether Concordia, through Mr. Donovan, directed and/or controlled Plaintiffs' work.

Based upon the foregoing, it is hereby

ORDERED, that the respective summary judgment motions are granted to the extent that Plaintiff is granted summary judgment as against all defendants on his Labor Law §240(1) claim; and defendants BMCA and DeGregorio are granted summary judgment dismissing the Labor Law §200 cause of action as against them; and, it is further

ORDERED, that, to any further extent, the motions for summary judgment be and are hereby denied.

The parties are to appear for a Status Conference on May 19, 2014 at 9:30 AM.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
April 14, 2014

S/ _____
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