SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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ANGEL PAVON,

Plaintiff,

-against-

PETERS CONSTRUCTION CORP, INC., TREBONIAS JOKHAI and SHERON JOKHAI,

Defendants.

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Index No.: 14908/2012

Motion Date: March 13, 2014

Seq. No.: 1

The following papers numbered 1 to 13 were read on the motion of the plaintiff, pursuant to CPLR 3212, seeking an order granting summary judgment on the issue of liability as against all defendants, as same relates to Labor Law §§ 240(1) and 241(6). Also read was the cross-motion of the defendants Trebonias Jokhai and Sheron Jokhai ("Jokhai"), pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and any cross-claims, on the ground that plaintiff has failed to establish a prima facie case of negligence as against them.

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At the outset, court notes that the sur-reply sent in by defendant Peters, after the motions were marked fully submitted, will not be considered with the motion papers. As counsel himself acknowledges, this court does not consider sur-replies as such is not recognized by the CPLR. Further, even if the court were willing to consider same, Rule 18 of the NY Uniform Rules -

Trial Courts specifically states that "[a]bsent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, . . . Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind."

Plaintiff claims to have suffered a work-related accident when he fell from an unsecured ladder. On the date of the accident plaintiff was employed and working as a roofer for a roofing subcontractor hired by defendant Peters Construction Group, Inc. ("Peters"). Plaintiff was employed to shingle the house and garage owned by defendants Jokhai. Defendant Peters hired by Jokhai as a general contractor to renovate their property. Plaintiff further states that the property served dual purposes for Jokhai. First, as a home, and second, the basement was the location of Ms. Sheron Jokhai's law office. Plaintiff was working on shingling the roof of the garage, a structure approximately ten feet high.

Plaintiff describes the occurrence as follows: He placed an A-frame fiberglass ladder on level concrete, leaning the ladder against the garage. The ladder was in level, and the concrete was in good condition. As the plaintiff was standing on the ladder working, it suddenly moved, causing the plaintiff to fall. Plaintiff claims his feet were on the 5th or 6th rung of the ladder when the ladder moved, causing him to fall approximately 10 to 12 feet, hitting the ground and sustaining injuries. He testified that on the date in question the ladder he used belonged to the defendant Peters; that Peters allowed workers other than those directly employed by Peters, to use the ladder as needed.

The instant motion is brought, alleging that defendants failed to provide any safety equipment to prevent the ladder from slipping. More specifically, plaintiff alleges that defendants failed to provide any safety equipment such as ties, ropes or tethers, or an additional worker standing ground level to keep the ladder from moving. As to the defendants Jokhai, plaintiff contends that the homeowner exemption to Labor Law §§ 240(1) and 241(6) does not apply inasmuch as part of the residence was used for the commercial purpose of a law office for Mrs. Jokhai. Particularly, plaintiff points out that Mrs. Jokhari had no other office for her law practice other than the subject premises; and further, there was a computer, fax, phone, and desk located in the basement for the purpose of her work. Moreover, the house had a separate side entrance as a means of ingress/egress for clients. However, the court notes that there was no exterior signage indicating the existence of the law office on premises. Plaintiff claims that the work on the project, when taken as a whole, was calculated to improve and accommodate the needs of defendant's law practice as well as to enhance the home.

Labor Law 240(1) creates a duty that is nondelegable and a general contractor who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work. (see *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993].) The "exceptional protection" provided for workers by section 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*see Ross*

v Curtis-Palmer Hydro-Electric Co., supra; *Rocovich v Consolidated Edison Co.*,78 NY2d 509 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985].) The legislative purpose behind section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the general contractor instead of on workers who are "scarcely in a position to protect themselves from accident." (see *Rocovich v Consolidated Edison*, supra) Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see *Ross v Curtis-Palmer Hydro-Electric Co., supra*; *Rodriguez v Tietz Center for Nursing Care*, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed." (*Ross v Curtis-Palmer Hydro-Electric Co.,* supra.)

In order to prevail upon a claim pursuant to Labor Law 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries. (see *Robinson v East Med. Ctr., LP*, 6 NY3d 550 [2006]; *Weininger v Hagedorn & Co.*, 91 NY2d 958 [1998]; see also *Cahill v Triborough Bridge & Tunnel Auth*., 4 NY3d 35 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280 [2003]; *Marin v Levin Props., LP*, 28 AD3d 525 [2006].)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers. (see *Comes v New York State Elec. & Gas Corp*., 82 NY2d 876, 878 [1993].) In order to establish his Labor Law § 241(6) claim, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common-law standards of care. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, supra; *Ares v State*, 80 NY2d 959 [1992]; *Fair v 431 Fifth Avenue Assocs*., 249 AD2d 262 [2d Dept. 1998]; *Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept. 1995]; *Adams v Glass Fab, Inc.*, 212 AD2d 972 [2d Dept. 1995].) Plaintiff must also present some factual basis from which a court may conclude that the regulation was in fact violated. (*Herman v St. John's Episcopal Hospital*, 242 AD2d 316 [2d Dept. 1997]; *Creamer v Amsterdam H.S.*, 241 AD2d 589 [2d Dept. 1997].)

Plaintiff submits a copy of the pleadings; bill of particulars; affidavit of merit from the plaintiff himself; deposition transcripts of the plaintiff; defendant Peters; defendant Sheron Jokhai; copies of email transmissions between the defendants concerning the renovations; copy of the contract between Peters and Jokhai, all in support of his motion. Defendants Jokhai submit a copy of the pleadings; bill of particulars; copies of the deposition transcripts of Mr. And Mrs. Jokhai; the plaintiff; co-defendant Peters; and an affidavit of merit from the defendant Mrs. Jokhai, in support of their cross-motion.

The court shall first address the cross-motion of defendants Jokhai. It is uncontroverted that the renovations to the Jokhai property were quite extensive, involving, but not limited to, the gutting and renovation of the kitchen; renovation and addition for a total of 4 and ½ bathrooms;

new doors, new front and rear porch and steps; removal of partitions in basement, to be reinstalled as later requested; excavation and installation of new additional foundation; frame new 2-story rear extension; insulation of entire house; frame dormers to roof; re-shingle entire roof as well as that of separate garage; installation of new electric thru-out the house; build rear concrete patio; installation of new central a/c system; build two second floor balconies; installation of oak flooring throughout the first and second floors; installation of all new windows for the entire premises. Further, it is also undisputed that the defendants Jokhai were out-of-possession owners, inasmuch as they were not residing at the premises during the construction, and in particular, on the date of the subject incident. Clearly, the project, when taken as a whole, was designed primarily to upgrade the premises to be used as a single-family residence. According to the testimony of the defendants, and as supported by the contract between Peters and Jokhai, any upgrades to the use of the basement that could be attributed to Jokhai's practice of law were minimal.

"Owners of one-or two-family dwellings ... are exempt from liability under Labor Law §§ 240 and 241 unless they directed or controlled the work being performed." (*Bartoo v Buell*, 87 NY2d 362 [1996]; see *Cannon v Putnam*, 76 NY2d 644 [1990].) "The exception was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability" (*Id*., quoting *Milan v Goldman*, 254 AD2d 263 [2d Dept. 1998].) "The expressed and unambiguous language of [Labor Law 240(1) and 241(6)] focuses upon whether the defendants supervised the methods and manner of the work." (*Chowdhury v. Rodriguez*, 57 AD3d 121 [2d Dept. 2008], citing *Ortega v Puccia*, 57 AD3d 54 [2008]; *Boccio v Bozik*, 41 AD3d 754 [2d Dept. 2007]; *Arama v Fruchter*, 39 AD3d 678, 679 [2d Dept. 2007]; *Ferrero v Best Modular Homes, Inc*., 33 AD3d 847 [2d Dept. 2007], appeal dismissed 8 NY3d 841 [2007]; *Siconolfi v Crisci*, 11 AD3d 600 [2d Dept. 2004]; *Miller v Shah*, 3 AD3d 521 [2d Dept. 2004]; see also *Duarte v East Hills Constr. Corp*., 274 A.D.2d 493 [2d Dept. 2000]["... the appellant had no background in construction or building renovation and did not supply the ladder from which the injured plaintiff fell, or any other equipment. Under these circumstances, there is no triable issue of fact and the appellant is entitled to summary judgment dismissing the causes of action to recover damages pursuant to Labor Law §§ 240(1) and 241(6)"].)

The Court of Appeals has set forth the test to be applied when determining if a property is being used for residential or commercial purposes. (*Cannon v Putnam*, supra.) Specifically, the "site and purpose test" is what courts must apply when making the determination as to the applicability of Labor Law 240(1). "Use of a portion of a homeowners's premises for commercial purposes ... does not automatically cause the homeowner to lose the protection of the exemption under this statute." (*Ramirez v Begum*, 35 AD3d 578 [2d Dept. 2006], lv denied 8 NY3d 809 [2007].) Instead, "[t]he determination whether the exemption is available to an owner in a particular case turns on the site and purpose of the work" (*Khela v Neiger*, 85 NY2d 333[1995].)

Defendants Jokhai have made a prima facie showing entitling them to summary judgment

as to plaintiff's Labor Law §§ 240(1) and 241(6) causes of action. It is undisputed that defendants' house is a one-family private dwelling. In addition, defendants have made a prima facie showing that they did not direct or control the work plaintiff was performing. In this regard, Mrs. Jokhai testified that neither she nor her husband gave the workers any instructions as to how they were to perform work in and about the house, and that they did not engage in any conversations with the workers. Further, she testified that although there were emails back and forth between her husband and Peters, they were not in the nature of supervision and control of the particulars, but rather, to ensure that the project was moving forward as agreed upon. In fact, as plaintiff points out, the emails emphasize the defendants' concern that the contractor, Peters, provide the appropriate supervision of the overall job, including that of the plumber, electrician and architect. Further, despite the assertions of plaintiff's counsel, the fact that the defendants Jokhai had procured homeowners insurance is not relevant to the court's determination as to whether they should be held liable. In the normal course of home ownership virtually every property owner maintains insurance. Moreover, plaintiff's reliance on cases such as *Krukowski v Steffensen*, 194 AD2d 179 [2d Dept. 1993], is misplaced. In that action, "the evidence demonstrates that this site was utilized as much, if not more, for a commercial purpose than it was for a residential one. Specifically, the defendant testified that the house had previously been used for commercial purposes, and that he bought the house because he was looking for a commercial property for his photography business. In addition, the record indicates that . . . the defendants employed one part-time and two full-time employees at the premises and that these employees utilized not only the lower level of the house but also the upper level kitchen and bathroom on a regular basis, that expenses and depreciation of the property were handled on 70% business and 30% personal basis, that there was a separate entrance for the photography business, and that the defendants had obtained commercial insurance for the property."

Additionally, there is no evidence in the record that the defendants Jokhai had actual or constructive notice of any defect in the ladder or that they controlled the method or manner in which the work was performed. Moreover, plaintiff in opposition to the cross-motion fails to oppose or otherwise address the applicability of Labor Law § 200 and/or common-law negligence to his complaint. Thus, they are entitled to summary judgment on their cross-motion, seeking the dismissal of plaintiff's causes of action pursuant to Labor Law § 200 and for common-law negligence. (see, *Kolakowski v Feeney*, 204 AD2d 693 [2d Dept. 1994].)

As to that branch of defendants Jokhai seeking summary judgment on the cross-claim for common law indemnification, same is denied as moot.

As to plaintiff's motion seeking summary judgment as against the defendants Jokhai, based upon the foregoing, same is denied as moot. However, as to the defendant Peters, the court determines as follows:

Plaintiff established, through his own testimony and affidavit of merit, that the ladder was unsecured when it moved, causing him to fall. It is uncontested that the plaintiff fell from an elevation, and further, that the ladder was unsecured. Peters offers no evidence to rebut plaintiff's

allegation that it was due to the instability of the ladder that caused his fall. Counsel for defendant Peters argues that there are questions of fact based upon plaintiff's own testimony as to whether the ladder was stabilized at the bottom by plaintiff's co-worker, and thus, it was plaintiff's own negligence that was the proximate cause of his injuries. Further, defendant Peters testified that on the date in question, Peters arrived at the work site and told plaintiff's boss, Roberto Garay, the subcontractor/roofing company, that the garage was not ready for roofing, and that after their discussion, Roberto and his workers, specifically the plaintiff, left the premises. After Peters left, defendant contends that the plaintiff and his co-worker returned, and commenced working on the garage, without permission. Additionally, defendant Peters points out that plaintiff testified that he usually brought his own ladder to work, a ladder that would have belonged to his non-party employer, but on the date in question, plaintiff states that he saw Peters' ladder near where he planned on working and took it to use. Plaintiff testified that the ladders were available for anyone working at the site. Defendant Peters asserts that plaintiff contradicts his own deposition testimony by stating in his affidavit that he was not provided with any other ladder to use, and further, it was the only one available to him. Counsel for Peters further asserts that plaintiff contradicts his own testimony wherein he testified that he did not know if the ladder has being held stable by his co-worker because he did not turn around to look prior to the incident, whereas in his affidavit he testified that the ladder was not held or otherwise supported by anyone while he was on it. Peters also alleges that regardless of whether the ladder was held, plaintiff's own testimony precludes a finding of summary judgment in his favor because the plaintiff testified that it was his own actions in over-extending to nail in the shingles that caused the ladder to fall, not a defect in the ladder or a lack of support.

Plaintiff submits the affidavit of the co-worker, Juan Carlos Hernandez, in reply, wherein Mr. Hernandez states that his job was to hand shingles, nails and papers to the workers working on the roof. As a general rule, evidence submitted for the first time in reply papers is inadmissible. (see *Board of Managers of Foundry at Washington Park Condominium v. Foundry Development Co., Inc.*,111 AD3d 776 [2d Dept. 2013].) Specifically, that rule is applicable where the movant attempts to submit additional arguments with evidence to support same, for the first time in reply. Here, plaintiff testified a year prior to the making of the instant motion, identifying Carlos as the co-worker who was present at the time of the incident. Further, he stated several times during his deposition what Carlos' role was on the date in question, that Carlos lived in Florida, coming up to work when necessary and that Carlos was an eyewitness. Even if the court were to allow an objection to such affidavit, the defendant Peters cannot now claim that it was unaware of the identity of the non-party eyewitness, after repeatedly questioning plaintiff during plaintiff's deposition as to who witnessed the incident and being told that it was Carlos.

Moreover, even if the court were to conclude the affidavit of Carlos was inadmissible, despite the conclusions of defendant's counsel to the contrary, the plaintiff's affidavit sufficiently supports his deposition testimony. Clearly, defendant cannot claim unfair surprise when the facts surrounding the incident were known to it prior to the making of the instant motion. The court finds no prejudice to the defendant when considering the affidavit submitted with plaintiff's reply papers. (see e.g., *Jones v Geoghan*, 61 AD3d 638 [2d Dept. 2009].) Here, not only did plaintiff

identify Carlos with sufficient particularity, he testified that Carlo's job was to "hand me the shingles, nails, paper, that's his job." The plaintiff's affidavit clarified the earlier deposition testimony as to how the accident occurred. He states that on the date in question the only ladder provided to the plaintiff was that belonging to the defendant Peters, and further, it was the only one available at the job site. He testified that the A-frame ladder was made of fiberglass, and was approximately ten feet high. Mr. Hernandez, in his affidavit confirmed plaintiff's testimony by stating that he was not holding the ladder in place when it moved, causing the plaintiff to fall. He also supported plaintiff's claim that the plaintiff was not provided with any safety equipment, and that the upper end of the ladder was unsecured as against the garage.

Based upon the foregoing, the court finds that there are issues of fact precluding summary judgment pursuant to Labor Law 240(1). The testimony and affidavits proffered in support of the instant motion raise sufficient questions as to whether the plaintiff's own actions were the proximate cause of the injuries sustained.

As to that branch of the motion seeking summary judgment pursuant to Labor Law § 241(6), the plaintiff has relied on Section 23-1.5, 23-1.16 and 23-1.21 of the Industrial Code. Section 23-1.5 of the Industrial Code, "General Responsibility of Employers" is not sufficiently specific to support a Labor Law §241(6) cause of action (*see*, *Kropp v Town of Shandaken*, 91 AD3d 1087 [3d Dept. 2012]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904 [1st Dept. 2011].) Additionally, 12 NYCRR 23-1.16, which sets forth safety standards for safety belts, harnesses, tail lines, and lifelines, does not apply here because plaintiff was not provided with any such devices (see *Smith v Cari, LLC*, 50 AD3d 879 [2d Dept. 2008]). As to Section 23-1.21(a), the Court of Appeals has previously determined that "allegations such as plaintiff's, which rely on claimed failures to measure up to such general regulatory criteria as "adequate," "effective" and "proper," are not sufficient to give rise to a triable claim for damages under Labor Law § 241 (6)." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, supra.) Plaintiff specifically relies upon Section 23-1.21(b)(i)-(iv) to establish violations of the Industrial Code by defendant Peters.

Section 23-1.21 of the Industrial Code , "Ladders and ladderways," provides in relevant part:

> " (b) General requirements for ladders *** (4) Installation and use.
> (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.
> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
> (iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.

> (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.

While this section of the Industrial Code may be sufficiently specific to support a cause of action based on Labor Law §241(6) (see, *Kinsler v Lu-Four Associates*, 215 AD2d 631 [2d Dept. 1995]), clauses (b)(4)(i) and (ii) have no application to this case. The plaintiff's ladder was not "used as a *regular* means of access between floors or other levels *in* any building." (Emphasis added.) (see, *Jamison v County of Onondaga*, 17 AD3d 1142 [4th Dept. 2005]; *Spenard v Gregware General Contracting*, 248 AD2d 868 [3d Dept. 1998].) The plaintiff did not use the ladder in lieu of a stairway between floors. Moreover, the ladder did not fall because its footing was not "firm." As to 23-1.21(b)(4)(iii), plaintiff does not allege that he fell because there was any sagging in the ladder.

As to the applicability of 23–1.21(b)(4)(iv), such provision provides that, when work is being performed from ladder rungs between 6 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 the ladder is secured against side slippage by its position or by mechanical means. This subsection further provides that when work is being performed from ladder rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slippage 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. Here, the plaintiff testified that he was working on the fifth or sixth rung on the ladder which was eight to ten feet tall, and that he was 6 feet above ground. There is no dispute that the top of the ladder was not secured in any way. The court finds that such provision is therefore applicable to sustain a cause of action pursuant to Labor Law 241(6). However, based upon the foregoing, to the extent that there are questions of fact regarding the plaintiff's own comparative negligence in the occurrence, the court denies this branch of plaintiff's motion as well.

Accordingly, plaintiff's motion as against the defendant Peters is denied.

Dated: March 28, 2014

SIDNEY F. STRAUSS, J.S.C.