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Defendant liable for injury under Labor Law 240(1) only.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

MAXIMO DE JESUS RODRIGUEZ,

Plaintiff,

-against-.

CONCOURSE FLATIRON ASSOCIATES, LP,

Defendant X

Index No: **305114/2011**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **4** read on this motion **for summary judgment**

No On Calendar of **November 7, 2014**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 2**
Answering Affidavit and Exhibits	**3**
Replying Affidavit and Exhibits	**4**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's common law negligence and Labor Law 200 claims, Labor Law 240(1) claim and Labor Law 241(6) claim. Plaintiff cross-moves for partial summary judgment on the issue of liability with respect to his Labor Law 240(1) claim. Plaintiff voluntarily discontinued his Labor Law 241(6) claim.

This action arose as a result of personal injuries sustained by plaintiff while removing sections of moist sheet rock from the ceiling of a building owned by defendant, Concourse Flatiron Associates L.P. Plaintiff was employed by non-party, Kraus Maintenance, Inc. Plaintiff testified that the ladder upon which he was standing moved. He tried to balance himself by grabbing onto metal beams holding the sheetrock but grabbed the sheetrock instead. An entire 4 foot by 8 foot sheetrock fell down onto him, causing injury. Plaintiff testified he jumped off the ladder because the ladder lost its balance.

Plaintiff served his cross-motion for summary judgment more than 120 days after the

filing of the note of issue. CPLR 3212(a). While defendant argues that plaintiff's cross-motion is untimely, "plaintiff's untimely cross motion was not improperly considered, since it sought relief on the same issues as were raised in defendants' timely motion (see *Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304, 304-305 [2006])." (*Conklin v Triborough Bridge & Tunnel Auth.*, 49 A.D.3d 320, 321 [1st Dept 2008]).

LABOR LAW 200 AND COMMON LAW NEGLIGENCE

> Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury.

(Comes v. New York State Electric and Gas Corp., 82 N.Y.2d 876, 877 [1993]) (citations omitted).

It is uncontroverted that defendant did not have authority to control the activity bringing about the injury. Nevertheless, plaintiff argues that since it was wet sheetrock that injured him, the owner of the building is liable for this dangerous condition. However, removal of the wet sheetrock was integral to the work performed and is therefore not actionable. *(Sanders v. St. Vincent Hosp.*, 95 A.D.3d 1195 {2 Dept 2012]).

Accordingly, plaintiff's Labor Law 200 claim is dismissed.

LABOR LAW 240(1)

Defendant argues that plaintiff's injuries were not gravity related, and therefore plaintiff's Labor Law 240(1) claims must be dismissed. The following citation is from a case with factual similarities the action at bar.

> Defendant landowners' argument that plaintiff worker's injuries, including a lacerated thumb, were not proximately caused by a gravity-related force when her unsecured, 12-foot ladder moved, causing her to lose balance at a height of nine feet and to grab onto an overhead air-duct brace as she slipped down two rungs of the ladder, lacks merit (see e.g. *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [2004]; *Lacey v Turner Constr. Co.*,

Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173 [2004]; *Lacey v Turner Constr. Co.*, 275 AD2d 734 [2000]). Unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240 (1), notwithstanding claims of comparative negligence (see *Velasco v Green-Wood Cemetery,* 8 AD3d 88 [2004]), or unsupported claims that plaintiff's conduct was the sole proximate cause of her injuries."

(Peralta v American Tel. & Tel. Co., 29 A.D.3d 493, 493-494 [1st Dept 2006]).

Defendant argues that plaintiff's accident was the result of plaintiff's direction to his coworker to work separately in the bathroom while plaintiff worked in the living room. "Even if plaintiff had been negligent in continuing his work in his coworker's momentary absence, no triable issue would therefore be raised as to whether liability should be imposed upon defendant pursuant to Labor Law § 240 (1), since such negligence would not be susceptible of characterization as the sole proximate cause of plaintiff's harm (see *Dasilva v A.J. Contr. Co.*, 262 AD2d 214 [1999])." (*Serrano v 432 Park S. Realty Co., LLC,* 8 A.D.3d 202 [1st Dept 2004]). Furthermore, "[c]ontrary to defendants' contention, coworkers are not a safety device contemplated by the statute." *(Kaminski v Carlyle One,* 51 A.D.3d 473, 474 [1st Dept 2008]).

Defendant argues that plaintiff was a recalcitrant worker because plaintiff was told to work with his partner. However, plaintiff's supervisor, Miguel Caban, testified that he told plaintiff to work as a team more than three months before plaintiff's fall. (Transcript, p. 31). There is no evidence that any immediate specific instructions was ever given to use any particular safety device. (*Ortiz v 164 Atl. Ave., LLC,* 77 A.D.3d 807, 809 [2nd Dept 2010]).

Defendant also asserts that since plaintiff jumped from the ladder rather than fell off the ladder, Labor Law 240 is not applicable in this action. Plaintiff herein, injured himself while attempting to steady himself on the ladder when the ladder moved. He jumped to prevent a fall from the ladder.

In *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 604 [2009]), the Court of Appeals confirmed that the touchstone of any case under Labor Law § 240 (1) is "whether the harm flows directly from the application of the force of gravity." Consistent with that concept, a long line of cases makes clear that a worker may recover pursuant to Labor Law § 240 (1) if he is injured by a gravity-related accident, even if he did not actually fall (see e.g. *Pesca v City of New York*, 298 AD2d 292 [2002]; *Carroll v Metropolitan Life Ins. Co.*, 264 AD2d 336 [1999]; *Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310 [1997]). This Court has consistently held that the statute applies where a worker was injured in the process of preventing himself from falling (see e.g. *Pesca,* 298 AD2d at 293; *Suwareh v State of New York*, 24 AD3d 380 [2005]), or preventing himself from being struck by a falling object (see e.g. Lopez v Boston Props. Inc., 41 AD3d 259 [2007]; *Skow v Jones, Lang & Wooton Corp.*, 240 AD2d 194 [1997], lv denied 94 NY2d 758 [1999]).

(*Reavely v Yonkers Raceway Programs, Inc.*, 88 A.D.3d 561, 563 [1st Dept 2011]).

CONCLUSION

Defendant's motion is granted to the extent that plaintiff's claims for common law negligence, violation of Labor Law 200 and Labor Law 241(6) are hereby dismissed. Plaintiff's motion is granted to the extent that defendant is liable to plaintiff for his injuries under Labor Law 240(1).

The foregoing shall constitute the decision, and order of the Court.

Dated: FEB 23 2015

KENNETH L. THOMPSON JR. J.S.C.