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| <b>Milton v New 56th &amp; Park (NY) Owner, LLC</b>  |
| 2016 NY Slip Op 31524(U)   |
| August 11, 2016  |
| Supreme Court, New York County   |
| Docket Number: 161264/14   |
| Judge: Barbara Jaffe   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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JAMEL MILTON,

Plaintiff,

-against-

Index No. 161264/14

Motion seq. no. 002

**DECISION AND ORDER**

NEW 56<sup>TH</sup> AND PARK (NY) OWNER, LLC and LEND LEASE,  
(US) CONSTRUCTION LMB, INC.,

Defendants.

-----X

BARBARA JAFFE, JSC:

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By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order summarily granting him judgment on the issue of liability on his causes of action alleging violations of Labor Law §§ 240(1) and 241(6). Defendants oppose and cross-move for the summary dismissal of the complaint.

I. PERTINENT FACTS

In his amended complaint, plaintiff, an employee of a nonparty subcontractor, alleges that on November 7, 2014, while at work on the 43<sup>rd</sup> floor of a building under construction at 432 Park Avenue in Manhattan, he fell from a ladder that had slipped out from under him. Defendant 56<sup>th</sup> and Park (NY) Owner, LLC owns the building, and defendant Lend Lease (US) Construction LMB, Inc. was the general contractor and/or construction manager for the project. Plaintiff advances causes of action for violations of Labor Law §§ 200, 240, and 241(6), and various rules

and regulations. (NYSCEF 13).

Plaintiff testified at his deposition, held on June 3, 2015, that a foreman of his employer instructed him to proceed to the 47<sup>th</sup> floor to tape joints between columns and ceilings. He first proceeded to the 47<sup>th</sup> floor, where he borrowed an eight-foot extension ladder from a carpenter on which he spent approximately a half-hour taping and applying compound. When he completed his work on that floor, he proceeded to the 46<sup>th</sup> floor to perform the same work. There, he used a 12-foot A-frame ladder. On the 45<sup>th</sup> floor, plaintiff used another 12-foot A-frame ladder. At approximately 9 a.m., plaintiff went to the 43<sup>rd</sup> floor, where he looked for a ladder and found only an orange eight-foot extension ladder. No other workers were present. (NYSCEF 52).

After leaning the ladder against the wall at a 75-degree angle, plaintiff worked for approximately 15 minutes, descended the ladder, climbed back up, descended again and climbed up again without difficulty. He then moved the ladder to the last section of the 43<sup>rd</sup> floor, and after ascending four or five feet up the ladder, and while he spread compound on the ceiling four feet above him with his feet on the same rung and holding a pan in one hand and a knife in the other, the ladder gave way. (*Id.*).

By affidavit dated March 10, 2016, plaintiff recounts his deposition testimony and adds that the 43<sup>rd</sup> floor ceiling was approximately 12 to 15 feet high, the floor below was concrete, and that upon his arrival on the 43<sup>rd</sup> floor, he looked for a ladder to perform his work, but the ladder “provided” was the eight-to-ten foot-long top half of an extension ladder that had no rubber feet. He also attests that he was some six feet up the ladder and in the process of spreading compound along a ceiling joint when the ladder suddenly slipped away from the wall, causing him to fall with the ladder onto the concrete floor, resulting in his serious injury. No safety devices were

provided to him that would have prevented the ladder from slipping and no one stabilized the ladder for him. (NYSCEF 51).

At a deposition held on February 8, 2016, Lend Lease's senior environmental health and safety manager testified that Lend Lease supervised the various trades at work on the project, which included ensuring that the work was properly, correctly, and safely performed in accordance with specifications. He responded to the scene of plaintiff's accident soon after it occurred, took photographs and measurements, and prepared an incident report. He acknowledged that nothing would have prevented the ladder from slipping, that the ladder was inappropriate for plaintiff's work, and that plaintiff had violated no work rules in connection with his accident. (NYSCEF 53).

## II. SUMMARY JUDGMENT STANDARD

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

## III. PLAINTIFF'S MOTION

### A. Contentions

Plaintiff argues that he has demonstrated, *prima facie*, that defendants violated Labor Law § 240(1) by failing to provide him with adequate protection from elevation-related risks when he

fell from an unstable ladder, and Labor Law § 241(6) by violating Industrial Code sections, 12 NYCRR 23-1.21(b)(3)(i), pertaining to the maintenance and replacement of ladders, and (b)(4)(11), pertaining to the installation and use of ladders. He thus seeks summary judgment as to liability and a trial on the sole issue of damages. (NYSCEF 44).

Defendants argue that because plaintiff independently decided to use “what he knew to be an incomplete ladder,” he was the sole proximate cause of his injuries, and thus, they cannot be held liable therefor. (NYSCEF 62).

## B. Analysis

### 1. Labor Law § 240(1)

Labor Law § 240(1) provides, in pertinent part, that

[a]ll contractors and owners and their agents, . . . in the erection, demolition, repair, 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, . . . ladders, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

This statute, which is liberally construed for the accomplishment of its purpose (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]), imposes absolute liability on building owners and their agents for workplace injuries (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 n 4 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 519 [1985]). It was “designed to prevent those types of accidents in which the . . . ladder . . . proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis omitted], quoting *Ross*, 81 NY2d at 501; *Verdon v Port Auth. of New York & New Jersey*, 111 AD3d 580, 581 [1<sup>st</sup> Dept 2013]).

While a defendant who violates Labor Law § 240(1) cannot raise as a defense the plaintiff's own negligence, there is no liability where there is no violation of the statute, such as where the plaintiff's own negligence was the sole proximate cause of his accident. (*O'Brien v Port Auth. of New York*, 131 AD3d 823, 826 [1<sup>st</sup> Dept 2015], citing *Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280, 290 [2003]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Thus, for a defendant to prevail against a plaintiff who demonstrates, *prima facie*, the defendant's liability on a Labor Law § 240(1) claim, a showing that the plaintiff was the sole proximate cause of his or her accident must be supported by evidence "that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained." (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402–403 [1<sup>st</sup> Dept 2013]). However, "[t]he general availability of safety equipment at a work site does not relieve the defendants of liability." (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11 [1<sup>st</sup> Dept 2011]).

Plaintiff's testimony and affidavit, the facts of which defendants do not dispute, demonstrate that he was injured when he fell from a portion of an extension ladder that was not appropriately footed and was otherwise unsecured, exposing him to a gravity-related risk. He thus establishes, *prima facie*, that defendants failed to provide him with proper protection for work involving a gravity-related risk, thereby proximately causing his injuries. (*See Stankey v Tishman Constr. Corp. of New York*, 131 AD3d 430, 430 [1<sup>st</sup> Dept 2015] [evidence established, *prima facie*, that defendants did not provide "proper protection" to plaintiff, who saw only

extension ladder in area where he was working; no scaffolding available; plaintiff not wearing safety harness; no appropriate anchor point available)). While plaintiff's testimony that he could find no other ladder on the 43<sup>rd</sup> floor supports an inference that he partly caused his fall, his comparative negligence is immaterial to this cause of action. (*See id.* [plaintiff's knowing use of half of extension ladder without proper rubber footings no defense to section 240(1) claim where defendants failed to provide adequate safety devices]; *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 465 [1<sup>st</sup> Dept 2013] [that plaintiff may have chosen wrong type of ladder immaterial as comparative negligence irrelevant as to section 240(1) claim]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1<sup>st</sup> Dept 2009] [mere presence of ladder somewhere at work site does not establish "proper protection"]).

## 2. Labor Law § 241(6) claim

As plaintiff alleges no damages for his claimed violation of Labor Law § 241(6) that differ from those alleged as resulting from his claimed violation of Labor Law § 240(1), I need not address it. (*See Jerez v Tishman Const. Corp. of New York*, 118 AD3d 617, 617–618 [1<sup>st</sup> Dept 2014] [as plaintiff entitled to summary judgment on section 240(1) claim, Labor Law §§ 200, 241(6) claims not addressed]; *see also Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 456 [1<sup>st</sup> Dept 2015] [motion court properly declined to consider section 200 and common-law negligence claims as academic where plaintiff prevailed on section 240(1) claim]; *Auriemma*, 82 AD3d at 12 [as plaintiff prevailed on section 240(1) claim, discussion of other theories of recovery pursuant to Labor Law for same damages deemed academic]).

#### IV. DEFENDANTS' CROSS MOTION

##### A. Contentions

In support of summary dismissal, defendants maintain that plaintiff's causes of action for common law negligence and Labor Law § 200 cannot serve as grounds for holding them liable absent their supervision, direction, or control of plaintiff's work, or their creation or notice of the condition giving rise to plaintiff's injury. They also observe that plaintiff testified that he was supervised by his employer's foreman only, that he had made no prior complaints to them so as to impart notice of the condition, and that Lend Lease's safety manager did not visit the 43<sup>rd</sup> floor the day of the incident. (NYSCEF 63).

Defendants contend that plaintiff's Labor Law § 241(6) claim relies on multiple Industrial Code violations for which he offers no specific factual assertions, that those Code sections have been abandoned by plaintiff, are too general, or are otherwise inapplicable, and that to the extent that plaintiff establishes violations of 12 NYCRR 23-1.21(b)(3)(i) and 23-1.21(b)(4)(ii), the violations did not proximately cause his accident. (*Id.*).

In reply, plaintiff alleges that Lend Lease's safety inspector testified that he was responsible for the overall safety at the work site and supervision of subcontractors, and defendants thus failed to provide a safe place to work in violation of Labor Law § 200. He also contends that there is a sufficient basis for finding that defendants violated 12 NYCRR 23-1.21(b)(3)(i) and 23-1.21(b)(4)(ii), which in any event, he claims, they implicitly concede. (NYSCEF 71).

## B. Analysis

### 1. Labor Law § 200/common-law negligence claim

The common-law duty of an owner or a general contractor “to maintain a safe construction site” is codified in Labor Law § 200. The duty is predicated on the owner’s or general contractor’s “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]; *Stier v One Bryant Park LLC*, 113 AD3d 551, 552 [1<sup>st</sup> Dept 2014]). However, an owner’s or general contractor’s retention of the right to supervise the work site generally, to stop work if a safety violation occurs, or to enforce safety regulations, does not rise to the level of control and/or supervision required to impose liability under section 200 or under the common law. (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48-49 [1<sup>st</sup> Dept 2012]; *Robinson v County of Nassau*, 84 AD3d 919, 920 [2d Dept 2011]). Rather, the party to be charged with the obligation must “supervise[ ] and control[ ] the manner in which [the plaintiff’s] work was performed.” (*Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1<sup>st</sup> Dept 2012]).

Here, the health and safety manager’s testimony establishes, *prima facie*, that defendants had no authority to control or supervise the manner in which plaintiff performed his work. Although plaintiff demonstrates that Lend Lease exercised general supervisory authority over the site, and that the province of the manager was site safety, this evidence does not constitute the nature and level of supervision and/or control that would warrant the imposition of a duty under Labor Law § 200 or the common law, particularly where, as here, plaintiff testified that the foreman of a nonparty subcontractor was responsible for supervising him. (*See Delahaye v St. Anns Sch.*, 40 AD3d 679, 683-684 [2d Dept 2007] [as plaintiff and subcontractor testified that

plaintiff “took his instructions from (subcontractor) and no other party,” he failed to establish that general contractor “had any control or supervisory role over (his) work”]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1<sup>st</sup> Dept 2005] [no liability under section 200 even where construction manager “conducted regular walk-throughs and, if he observed an unsafe condition, had the authority to find whoever was responsible for the condition and have them correct it or, if necessary, stop the work”]). Thus, plaintiff fails to raise a triable issue.

### 2. Labor Law § 240(1) claim

As plaintiff was not the sole proximate cause of his injuries (*supra*, III.B.1.), defendants are not entitled to the dismissal of this cause of action. (*See Janiak v Ewall*, 88 AD3d 849, 850-851 [2d Dept 2011] [denying defendant’s motion to summarily dismiss section 240(1) claim where evidence failed to establish, as matter of law, that plaintiff’s conduct was sole proximate cause of accident]).

### 3. Labor Law § 241(6) claim

Defendants argue solely that its alleged violations of 12 NYCRR § 23-1.21(b)(3)(i) and (b)(4)(ii) did not proximately cause plaintiff’s accident because he was the sole proximate cause of it. Having found to the contrary (III.B.1.), defendants are precluded from summary dismissal as to this claim. (*See Quinn v Whitehall Props., II, LLC*, 69 AD3d 599, 601 [2d Dept 2010] [as defendants failed to establish plaintiff sole proximate cause of accident, summary judgment on section 241(6) claim precluded]). While evidence of comparative negligence is a cognizable defense to a section 241(6) claim (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]), plaintiff’s alleged comparative negligence is no basis for granting summary dismissal (*see Booth v Seven World Trade Co., LP*, 82 AD3d 499, 502 [1<sup>st</sup> Dept 2011] [whether plaintiff was

responsible for snow removal on “floor, platform or other working surface” was issue of comparative negligence and “would not require a grant of summary judgment in defendants’ favor” on section 241(6) claim]).

Plaintiff does not otherwise dispute that the remaining alleged Industrial Code violations are inapplicable to the facts. (*See Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1<sup>st</sup> Dept 2014] [absent dispute that Industrial Code section at issue was inapplicable, dismissal of section 241(6) claim premised thereon warranted]).

#### V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the branch of plaintiff’s motion for an order granting him summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1) is granted, and the motion is otherwise denied as academic; it is further

ORDERED, that the issue of the amount of a judgment to be entered on plaintiff’s claim pursuant to Labor Law § 240(1) shall be determined at a trial herein; and it is further

ORDERED, that defendants’ cross motion for an order summarily dismissing the action is granted to the extent that plaintiff’s causes of action premised on a violation of Labor Law § 200, and premised on a violation of Labor Law § 241(6), which is premised on violations of 12 NYCRR 23-1.5, 23-1.6, 23-1.16, 23-1.21(b)(1), 23-1.21(b)(3)(i), (ii), and (iv), 23-1.21(b)(4)(i), (iii), (iv), and (v), and 23-5.1, are dismissed; the cross motion is denied as to plaintiff’s causes of action premised on a violation of Labor Law § 240(1), and on a violation of Labor Law § 241(6),

which is premised on violations of 12 NYCRR 23-1.21(b)(3)(i) and 23-1.21(b)(4)(ii).

ENTER:

  
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Barbara Jaffe, JSC

DATED: August 11, 2016  
New York, New York