SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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PAUL WOITOVICH,

Plaintiff,

-against-

ORDER AND DECISION
Index No. 154599/13
Seq. Nos. 001 and 005

THE CITY OF NEW YORK, INTERNATIONAL HOUSE OF PANCAKES, LLC, TRIHOP 14th STREET LLC, 235 EAST 14th STREET REALTY SERVICES INC. and RESTAURANT TECHNOLOGIES, INC.,

Defendant.

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HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

MOT. SEQ. NO. 001

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVIT ANNEXED	1-2 (Exs. A-P)
AFFIRMATION IN OPPOSITION	3 (Ex. A)
REPLY AFFIRMATION	4

MOT. SEQ. NO. 005

NOTICE OF MOTION AND AFFIDAVIT ANNEXED	1-2 (Exs. A-J)
AFFIRMATION IN OPPOSITION	3 (Ex. A)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This order resolves motion sequence numbers 001 and 005.

In this personal injury action, plaintiff Paul Woitovich moves (motion sequence 001), pursuant to CPLR 3212, for partial summary judgment as to liability on his claims against defendant the City of New York ("the City") pursuant to Labor Law §§ 240(1) and 241(6). The City moves

(motion sequence 005), pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against it, as well as for summary judgment on liability as to its cross claims against its co-defendants. After oral argument, and after a review of the papers submitted and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from personal injuries allegedly sustained by plaintiff, a foreman who performed ventilation and drain work for the New York City Transit Authority ("NYCTA"), as he performed work below sidewalk level in front of 235 East 14th Street, New York, New York while on a ladder inside a subway ventilation shaft. Ex. G, at 11-12, 157; Ex. P, at par. 7. Plaintiff's work was conducted as part of a project which entailed the rehabilitation of subway vents along 14th Street. Ex. G, at p. 28. The vent where the incident occurred was owned by the City and leased to the NYCTA. Ex. J, at 12; Ex. O.[1] Defendant 235 East 14th Street Realty LLC ("14th Street") owned the building at that address.[2] Defendant Trihop leased the ground floor of 235 East 14th Street, where it operated an International House of Pancakes ("IHOP") restaurant. Ex. L at 10, 127-128.

On the day of the incident, plaintiff was at the site to remove forms with a hammer and crowbar and to cut rebar with a sawzall in a subway ventilation ("vent") bay. Ex. G at p. 30, 38, 152. He was also to inspect the vent bays to ensure that there was no exposed rebar, that the concrete installed was smooth, and that there were no remaining wood forms. Ex. G at 133. If any of the

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[1]Unless otherwise noted, all references are to the exhibits to plaintiff's motion for summary judgment (motion sequence 001).

[2]By order dated April 7, 2016 (motion sequence 004), this Court, inter alia, dismissed the claims and cross claims against 14th Street.

aforementioned items were present, he was to prepare a punch list because such items could present safety issues Ex. G at 133-134.[3] Safety equipment consisted of boots, vest, helmet, track lamp, goggles and gloves. Ex. G, at 34, 42, 46. He was not provided with a harness, lifeline, safety belt, or safety net. Ex. P, at par. 5, 13.

Plaintiff entered a first vent bay to perform work near the intersection of 14th Street and Third Avenue. Ex. G at 50-52, 58. The work was performed without incident on a ladder affixed to the wall of the first vent bay. Id. Based on information provided by plaintiff, plaintiff's partner, Michael Donofrio, prepared a punch list reflecting that no work needed to be done in that bay. Ex. G at 33, 53-55. By means of a sectional aluminum ladder, plaintiff then descended into a second vent bay further east on 14th Street, where he removed some wooden forms with a hammer. Ex. G at 59-63. Plaintiff then entered a third vent bay, where the alleged incident occurred, on 14th Street between Second and Third Avenues. Ex. G at 67.

At the third location, a NYCTA "maintainer" placed the ladder into the vent bay. Ex. G at 68-69. The ladder was approximately twenty feet long, consisting of two ten-foot sections. Ex. P, at par. 2. It had rubber feet which were on hinges to allow it to sit firmly on the ground. Ex. G at 68. Nothing was attached to the ladder to secure it. Ex. G at 73; Ex. P, at par. 14. The ladder protruded approximately 2 feet above the vent opening, which was level with the ground. Ex. G at 69. The maintainer held the top of the ladder as plaintiff descended the same. Ex. G at 69, 148. Nobody held the bottom of the ladder. Ex. P, at par. 18. When plaintiff's feet were on the second rung below street level, the ladder "slid out on the bottom." Ex. G at 69-70, 102, 105-106, 147. The

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[3]The purpose of the punch list was to advise the NYCTA that further work was needed in a particular location. The NYCTA could have asked plaintiff or another trade to perform such work. Ex. G at 160-161.

ladder "started to go down the wall of the vent bay" and landed on the ground of the bay, causing plaintiff to fall on his feet. Ex. G at 69-71. He estimated that the height of the vent where he fell was approximately 15 feet. Ex. G at 170-171.[4]

Although plaintiff did not see any substance on the floor of the vent bay before the incident, there was a coating of grease, as well as pieces of what appeared to be pancakes, at the bottom of the vent bay, which smelled like cooking oil. Ex. G at 73, 86-88, 164-165; Ex. P., at par. 16. The incident occurred in front of an IHOP restaurant. Ex. G at 139.

Plaintiff worked solely at the direction and instruction of the NYCTA. Ex. G at 150. He was not aware of anyone else other than the NYCTA working on the job that day. Ex. G 40.

This action was commenced by the filing of a summons and complaint on May 18, 2013. Ex. C. A supplemental summons and amended verified complaint were filed on June 10, 2013. Ex. D. The City thereafter joined issue by service of its unverified answer to the amended verified complaint. Ex. E.

On or about September 18, 2013, plaintiff served a bill of particulars alleging that he was injured as a result of defendants' negligence and as a result of their violations of Labor Law §§ 200, 240(1) and 241(6). Ex. F. Plaintiff also alleged violations of, inter alia, Industrial Code §§ 23-1.7(b) and 23-1.21(a-f). Ex. F.

The case scheduling order issued at the preliminary conference held in this matter on December 5, 2013 directed that summary judgment motions "[s]hall be filed no later than 60 days

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[4]Although plaintiff was questioned about numerous photographs, which were purportedly annexed to his motion as Exhibit Q, such photographs were neither efiled nor contained in a working file of the motion provided to the court and are thus not considered on this motion. 22 NYCRR 202.5(b)(d)(1), (4).

after filing of the [n]ote of [i]ssue unless otherwise directed by the court." NYSCEF Doc. No. 22. The note of issue was filed on August 25, 2015. NYSCEF Doc. No. 95. Plaintiff moved for summary judgment on July 1, 2015. The City filed its motion for summary judgment on December 2, 2015.

POSITIONS OF THE PARTIES:

Motion Sequence 001

Plaintiff argues that he is entitled to summary judgment pursuant to Labor Law § 240(1) because the ladder he was working on was not properly secured and he was not provided with any of the safety devices enumerated in the statute. He further maintains that the sole proximate cause defense is not applicable to the facts of this case. Additionally, plaintiff asserts that the City is liable pursuant to Labor Law § 241(6) based on its violations of Industrial Code §§ 23-1.21 and 23-1.7.

In opposition, the City argues that plaintiff's work as an inspector preparing a punch list after the completion of work at the site constitutes routine maintenance and not "erection" or "altering" and therefore does not fall within the scope of Labor Law § 240(1). The City further maintains that, since the ladder slipped on an unidentified substance not observed prior to or at the time of the incident, there can be no liability on its part. It also claims that there is an issue of fact regarding plaintiff's failure to observe that the slippery substance at the bottom of the vent shaft constituted the sole proximate cause of the incident. Additionally, the City urges that, since the Industrial Code sections cited in plaintiff's motion are inapplicable herein, there is no liability pursuant to Labor Law § 241(6). Finally, the City asserts that it is not liable pursuant to Labor Law § 200 since it did

not direct, supervise, or control plaintiff's work.

In his reply affirmation, plaintiff argues that he was performing construction work which falls within the ambit of Labor Law § 240(1) and he is thus entitled to summary judgment pursuant to that statute. He further asserts that there is no sole proximate cause defense to his claim pursuant to Labor Law § 240(1). In addition, plaintiff maintains that the City is liable pursuant to Labor Law § 241(6) since it violated Industrial Code §§ 23-1.21 (b)(4)(i) and (b)(4)(ii).

Motion Sequence 005

The City argues that it is entitled to summary judgment dismissing all claims and cross claims against it. It essentially reiterates the arguments which it makes in opposition to plaintiff's motion for summary judgment in sequence number 001. Additionally, the City argues that it is entitled to summary judgment awarding it common-law indemnification against IHOP and Trihop since those entities allegedly created the condition which caused the ladder to slip.

In opposition, plaintiff argues that the City's motion must be denied since it is untimely, having been filed more than 60 days after the filing of the note of issue, which violated the mandate of the preliminary conference order. Plaintiff further asserts that, if the City's motion is not denied as untimely, it must be denied on the merits, and substantially reiterates the grounds upon which its summary judgment motion was made under motion sequence 001.

LEGAL CONSIDERATIONS:

Summary Judgment Standard

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson*

v. Waisman, 39 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v. City of New York*, 49 N.Y.3d 557 (1989). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v. New York Telephone*, 220 A.D.2d 728 (2d Dept. 1985).

Labor Law § 240(1)

Labor Law § 240(1) provides that:

> 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.

This statute was intended to protect workers from hazards related to the effects of gravity where protective devices are required due to a difference between the elevation at which the work is to be performed and a lower level, or a difference between a level at which a worker is located and a higher level of materials or a load being hoisted or secured. *See Rocovich v Consolidated Edison*, 78 NY2d 509, 514 (1991). Liability under Labor Law § 240(1) will be invoked where a plaintiff confronts a hazard envisioned by the statute and there is a failure to use or provide, or there is an insufficiency or inadequacy of, a device set forth in that provision. *See Narducci v Manhasset Bay*

Assocs., 96 NY2d 259, 268 (2001).

> "Where a ladder is offered as a work-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)." *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 (1st Dept 1998), *citing Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 (1st Dept 1996). Further, "[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." *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 (1st Dept 2002).

Triantafilkis v New York & Presbyt. Hosp., 2016 NY Slip Op 31674(U); 2016 N.Y. Misc LEXIS 3214 (Sup Ct New York County 2016).

Here, plaintiff has established his prima facie entitlement to summary judgment on his claim pursuant to Labor Law § 240(1) by establishing, through his deposition testimony and affidavit in support of the motion, that he fell from a ladder which was not secured, on premises owned by the City, and that the City failed to provide him with any adequate safety device which prevented him from falling to the bottom of the vent after the ladder slipped. The sole explanation for the occurrence is that the ladder was not properly secured on the oily floor, thereby causing it to slip and causing plaintiff to fall and sustain injury. *See Bonanno v Port Auth. of N.Y. and N.J.*, 298 AD2d 269 (1st Dept 2002) (plaintiff granted summary judgment where ladder placed on oily floor was not secured, chocked, or wedged in place and no safety devices were provided to plaintiff); *Klein v City of New York*, 222 AD2d 351 (1st Dept 1995), *affd* 89 NY2d 833 (1996) (plaintiff granted summary judgment where he established his ladder slipped on a greasy or slippery floor). The very fact that the ladder slipped establishes that the City failed to provide plaintiff with adequate safety devices to protect him from such a fall, thereby violating Labor Law § 240(1).

The City's argument that issues of fact exist regarding sole proximate cause because plaintiff failed to notice the slippery surface where the ladder was set up is without merit. First, the

NYCTA's maintainer, not plaintiff, set the ladder up. Ex. G, at 68-69. Even if plaintiff had set the ladder up himself, however, there is no dispute that the ladder was unsecured and that he was not provided with any other safety devices. *See Vega v Rotner Mgt. Corp.*, 40 AD3d 473 (1st Dept 2007); *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 (1st Dept 2004).

Also without merit is the City's argument that Labor Law § 240(1) is inapplicable to the facts herein because plaintiff was preparing a punch list and was not engaged in construction or any of the other activities enumerated in the statute. Plaintiff testified that, at the time of the incident, he was in the vent bay to remove forms with a hammer and a crowbar and to cut rebar with a sawzall. Ex. G at p. 30, 38, 152. He was also to inspect the vent bays to ensure that there was no exposed rebar, that the concrete installed was smooth, and that there remained no wood forms. Ex. G at 133. If any of the aforementioned items were present, he was to prepare a punch list because such items could present safety issues. Ex. G at 133-134.[5]

Labor Law § 240(1) may be applicable "despite the fact that the particular job being performed at the moment plaintiff was injured did not in and of itself constitute construction." *Covey v Iroquois Gas Transmission Sys.*, 218 AD2d 197, 199 (3d Dept 1996) affd 89 NY2d 952 (1997). Here, plaintiff's duties were clearly performed within the scope of the NYCTA's vent rehabilitation project. *See O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 (1st Dept 1999) (worker who fell on his way to work site where he stripped forms from recently poured concrete was covered by the statute). Even if plaintiff had not testified that he performed actual labor at the site, including removing forms and cutting rebar, compiling a punch list is work which falls under the "erection"

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[5]Given plaintiff's testimony, it is evident that the City's contention that "at the time of plaintiff's inspections, all construction work - the pouring of concrete and installation of new grates - had already concluded" (City's Aff. In Opp. at par. 14) is false.

category of the statute. *See Greenfield v Macherich Queens Ltd. Partnership*, 3 AD3d 429 (1st Dept 2004).

In asserting that plaintiff performed nothing more than routine maintenance, thereby removing himself from the protection of the statute, the City relies on *Martinez v City of New York*, 93 NY2d 322 (1999). The plaintiff in *Martinez* was an environmental inspector whose job was to identify sections of New York City schools from which asbestos needed to be removed. The Court held that plaintiff was not entitled to the protection of Labor Law § 240(1) because his work was to end before the actual asbestos removal began, and thus did not occur during one of the activities set forth in that section, and that any future work was to be performed not by plaintiff's employer, but by another entity. *Martinez* is thus distinguishable from this case, since plaintiff herein was employed by the NYCTA to engage in alteration, construction or erection work as part of the ongoing vent rehabilitation project.

Labor Law § 241(6) and § 200

Given the granting of plaintiff's motion for summary judgment against the City pursuant to Labor Law § 240(1), which results in absolute liability, this Court need not address his argument regarding his claim pursuant to Labor Law § 241(6). *See Panek v County of Albany*, 99 NY2d 452 (2003). For the same reason, the City's cross motion seeking summary judgment dismissing the claims against it is denied as academic. *See Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 (1st Dept 2013).[6]

[6]To the extent the City seeks summary judgment on its claims against its co-defendants, this request for relief must be denied as well. The case scheduling order directed that summary judgment motions "[s]hall be filed no later than 60 days after filing of the [n]ote of [i]ssue unless

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for an order, pursuant to CPLR 3212, for summary judgment against defendant the City of New York on the issue of liability is granted to the extent of granting plaintiff summary judgment against said defendant pursuant to Labor Law § 240(1); and it is further,

ORDERED that the motion by defendant the City of New York for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims against it, as well as for summary judgment on its cross claims against its co-defendants, is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: October 20, 2016

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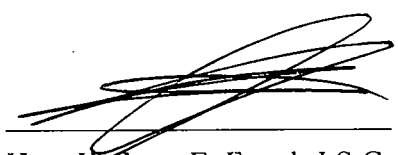

Hon. Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

otherwise directed by the court." NYSCEF Doc. No. 22. Although the note of issue was filed on August 25, 2015 (NYSCEF Doc. No. 95), the City did not move for summary judgment until December 2, 2015. Thus, the City's motion is untimely and this Court need not address the City's claim that it is entitled to summary judgment against its co-defendants.