Merino v Continental Towers Condominium
2016 NY Slip Op 32148(U)
October 19, 2016
Supreme Court, New York County
Docket Number: 158411/12
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

PEDRO MERINO and MARCISSA ARTIAGA,

Plaintiffs,

-against-

CONTINENTAL TOWERS CONDOMINIUM and ROSE ASSOCIATES, INC.,

Defendants.

Index No.: 158411/12
DECISION/ORDER
Motion Sequence No. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for summary judgment and plaintiffs' cross-motion for partial summary judgment.

Papers	**Numbered**
Defendants' Notice of Motion	1
Plaintiffs' Notice of Cross-Motion	2
Defendants' Affirmation in Opposition to Cross-Motion	3
Plaintiffs' Reply Affirmation	4
Defendants' Affirmation in Reply	5

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for plaintiffs.
Kaufman Borgeest & Ryan LLP, Valhalla (Eileen R. Fullerton of counsel), for defendants.

Gerald Lebovits, J.

This is an action to recover damages for personal injuries sustained by a worker, Pedro Merino, when he fell from a ladder while working at a construction site located at 301 East 79th Street in New York County (the premises) on June 4, 2012. Merino filed this lawsuit against defendants for common-law negligence and Labor Law §§ 200, 240 (1), 240 (2), 240 (3), and 241 (6). Plaintiff Marcissa Artiaga, Merino's wife, seeks damages against defendants for loss of services and society.

Defendants, Continental Towers Condominium (Continental) and Rose Associates, Inc. (Rose), move under CPLR 3212 for summary judgment to dismiss plaintiff's common-law negligence and Labor Law claims against it. Plaintiffs cross-move under CPLR 3212 for partial summary judgment on the Labor Law § 240 (1) claim.

Defendants argue that the common-law negligence and Labor Law § 200 claims must be dismissed because neither Continental nor Rose supervised or controlled the means and method of Merino's work. According to defendants' safety expert, Daniel M. Paine, CSE, Merino's employer was responsible for providing workers with safety equipment at the site.

Defendants argue that the Labor Law §§ 240 (1), 240 (2), and 240 (3) claims must be dismissed because Merino's negligence was the sole proximate cause of his accident. Defendants also argue that because Merino was not working on a scaffold or staging, Labor Law §§ 240 (2) and 240 (3) are inapplicable.

Defendants further argue that the Labor Law § 241 (6) claims must be dismissed because plaintiffs fail to make out their prima facie case. According to defendants, plaintiffs fail to allege an applicable New York Industrial Code violation.

In their cross-motion, plaintiffs argue that defendants' violation of Labor Law § 240 (1) was a proximate cause of Merino's accident. Plaintiffs argue that Merino fell from an unsecured ladder that suddenly moved and shifted, that defendants failed to provide Merino with safety equipment or fall protection, that Merino's actions were not the sole proximate cause of his accident, and that their § 241 (6) claims have merit.

In opposition to plaintiffs' cross-motion, defendants argue that plaintiffs' cross-motion is untimely. Defendants argue that plaintiffs have no good cause for filing their late cross-motion. Defendants also argue that plaintiffs are not seeking the same relief as defendants and thus that this court should reject the late motion.

In support of their argument that Merino's negligence was the sole proximate cause of his accident, defendants submit a report from a biomechanical and engineering expert, Jacob L. Fisher, Ph.D. P.E., who concludes that plaintiff lost his balance. According to Fisher, Merino could not have fallen in the manner he says he fell. This conclusion, according to defendants, is consistent with Miguel Gomez's examination under oath (EBT) testimony: Merino told his co-worker, Gomez, that he slipped off the ladder. Defendants contend that Fisher's conclusion is also consistent with Paine's conclusion — that an A-frame ladder will not move or shift, as Merino alleges, absent a worker's misuse.

In reply, plaintiffs argue that the court should consider their cross-motion because plaintiffs seek the same relief as defendants. Plaintiffs argue that Fisher's and Paine's affidavits are "worthless as a matter of law" and the court should not consider them.

In their affirmation in reply, defendants submit a supplemental affidavit from Paine. Paine contradicts Merino's version of the accident, as Merino explains in his affidavit in support of his cross-motion. Paine concludes that no evidence suggests that the ladder moved or shifted. Paine concludes that Merino slipped off the ladder.

Background

Merino's EBT Testimony

Merino testified at his examination before trial (EBT) that he worked for Disalvo Contracting Co. (DiSalvo) since 2006.[1] (Defendants' Notice of Motion, Exhibit E, at 14.) Merino's work consisted of plastering and painting. (*Id.* at 15.) Merino received instructions

[1] The name also appears in the parties' papers as "V. Disalvo Contracting Co."

from his supervisor, Carmine, or the foreman, Lester — both DiSalvo employees. (*Id.* at 16-17, 24.) DiSalvo gave plaintiff ladders to do his work. (*Id.* at 28.) At the premises, plaintiff had to scrape the old ceilings, put plaster on the ceilings, and paint. (*Id.* at 36.) One worker would spray the ceiling with water while another worker would scrape the ceiling. (*Id.* at 37-42.)

On the day of the accident, Merino was working somewhere between the 19th and 29th floors of the premises. (*Id.* at 44.) Merino was with his co-worker, Gomez, on the same floor. (*Id.* at 44.) Merino was assigned to scrape the ceilings; Gomez was assigned to spraying the ceilings. (*Id.* at 45.) Merino covered the floors with fabric and then put plastic on top. (*Id.* at 50.) The distance from the floor to the ceiling was about 12 feet. (*Id.* at 46.)

Merino used a six-foot, metal A-frame ladder, which belonged to DiSalvo, to reach the ceiling. (*Id.* at 46-47.) Merino ensured that he fully opened the ladder, that he locked the latches in place, and that he put the ladder on an even-level surface. (*Id.* at 62-63.) Merino did not ask Gomez to hold the ladder. (*Id.*) The ladder had plastic feet. (*Id.* at 65.) The ladder's rungs had ridges on them. (*Id.*) He held onto the top of the ladder with his left hand as he scraped the ceiling with his right hand. (*Id.* at 63, 71.) He wore sneakers. (*Id.* at 67.) Merino testified that he is "1 meter, 70 tall."[2] (*Id.* at 64.) Gomez was about four to five feet in front of him at all times. (*Id.* at 73.) At the time of the accident, Merino was approximately on the ladder's third rung. (*Id.* at 64.)

Merino testified at his EBT that the "ladder moved and [he] fell." (*Id.* at 75.) The ladder moved to "a side . . . to the left." (*Id.*) The ladder moved "[s]ufficient for [him] to fall, to lose the stability." (*Id.*) Merino testified that "[i]t moved. I don't know. It was all too quick. I felt it move, I lost balance, and I went down." (*Id.* at 76.) When asked whether he lost his footing or whether the ladder lost its balance, Merino answered that the ladder lost balance. (*Id.*) Merino does not know what caused the ladder to move. (*Id.* at 75.) The ladder did not fall over. (*Id.* at 75.) He testified that he "fell straight down while standing." (*Id.* at 76.) He landed on his feet with his weight on his left heel. (*Id.* at 76-77.) Gomez came over to Merino to ask him what happened. (*Id.* at 78-79.)

Merino inspected the ladder and the floor after his fall; everything was "fine." (*Id.* at 79.) He resumed working even though he hurt. (*Id.* at 80.) He used the same ladder to continue his work. (*Id.* at 82.) On the day of his accident, he reported this accident to no one. (*Id.* at 82.)

Three to four days later, Merino told Lester about the accident; Merino was in pain. (*Id.* at 81-82.) Merino continued to work for 15 days after the accident. (*Id.* at 85.) Merino testified about his medical treatment and his surgery. (*Id.* at 91-149.)

[2] According to the court's calculations, that is approximately 5' 6'' - 5'7" feet tall.

Merino's Affidavit

Merino's affidavit in support of plaintiffs' cross-motion is consistent with his EBT testimony. Merino states the following:

> "As I was performing work while standing on the ladder at a height of approximately three feet above the floor, the ladder suddenly moved and shifted. This caused me to fall off the ladder and fall to the floor below." (Plaintiff's Cross-Motion, Exhibit 1, at ¶ 7.)

Construction Contract

In May 2012, DiSalvo contracted with "Continental Towers Condominium, Rose Associates Inc." to install new ceiling panels and plaster the new ceilings at the premises. (Plaintiff's Cross-Motion, Exhibit 2.) DiSalvo agreed to provide the labor, materials, and supplies and to supervise the work. (*Id.*)

Paul Bolggiani's EBT Testimony

Bolggiani testified that he is the premises' resident manager. (Defendants' Notice of Motion, Exhibit F, at 8.) He explained that the premises is a 37-floor condominium building. (*Id.*) He testified that Continental owns the common shares of the building and that Rose is the managing agent. (*Id.* at 9.) He testified that Rose did not hire DiSalvo; the building's board hired DiSalvo. (*Id.* at 13-14.) He testified that the building did not provide safety equipment to the workers. (*Id.* at 27.) He also testified that his job was to check on the progress of the construction work and to ensure that the workers protected the building's floors. (*Id.* at 35.) He testified that he did not know about Merino's accident. (*Id.* at 31.)

Gomez's EBT Testimony

Gomez testified that on the day of Merino's accident, he had to use a spray gun with water to soften the ceilings before Merino scraped the ceilings. (Defendants' Notice of Motion, Exhibit G, at 18-19.) He testified that DiSalvo gave him and Merino only ladders and hardhats. (*Id.* at 23, 25.) He explained that he was about six to seven feet away from Merino at the time of the accident. (*Id.* at 20.) He did not see the accident, but he heard it. (*Id.*) He testified that immediately before the accident, he was not using water on the ceiling. (*Id.* at 22.) Immediately after the accident, he saw Merino standing on the floor and holding the ladder. (*Id.* at 21, 39.) He testified that Merino's ladder did not fall. (*Id.* at 36.) Gomez testified that Merino told him "that he just slipped from the ladder and that's it." (*Id.* at 40.) He continued working with Merino the rest of the day. (*Id.* at 41.)

Paine's Affidavit

Paine explains that he has 40 years' experience in the field of construction-site safety. (Defendants' Notice of Motion, Exhibit I, at ¶ 1.) Paine opines within a reasonable degree of construction safety certainty that the six-foot metal A-frame step ladder was a proper safety device, in working condition; the ladder did not fail or malfunction. (*Id.* at ¶ 37-39.) According to Paine, defendants did not violate any Labor Laws or Industrial Codes. (*Id.* at ¶ 40.) In formulating his opinion, defendants' construction-site safety expert inspected the premises on June 20, 2014, and reviewed the EBT transcripts and other disclosure materials. (*Id.* at ¶¶ 1-3.)

Fisher's Affidavit

Fisher explains that he is a Senior Managing Engineer in the Biomechanics practice of Exponent, Inc., a scientific and engineering consulting firm. (Defendants' Affirmation in Opposition, Exhibit C, at ¶ 1.) Fisher explains that he has over 10 years' experience in biomechanical reconstruction and injury analysis of motor vehicle, occupational, and recreational accidents. He has "researched accidents and injury potential using volunteer studies, anthropomorphic test devices ('crash test dummies'), computational models of the human body, and statistical analyses." (*Id.*) He has a Bachelor of Science in Engineering Science and Mechanics from Pennsylvania State University; he has a Doctorate in Bioengineering from the University of Pennsylvania. (*Id.*)

In formulating his opinion, he inspected the premises on June 20, 2014, and reviewed the EBT transcripts and other disclosure materials. (*Id.* at 3.)

Fisher explains that according to Merino's testimony, Merino was working on a 6-foot stepladder that was fully secured in its open and locked position. (*Id.* at 4.) The hallway of the premises was 7 feet 11 inches to 8 feet in height.[3] (*Id.* at 5.) Fisher explains that based on Merino's height and the stepladder's dimensions, Merino was likely standing on the ladder's second step, approximately 22.5 inches above the floor. (*Id.* at 6.) Given that Merino is 67-inches tall,[4] Fisher explains that Merino could not have been standing on the ladder's third step before the accident. (*Id.* at ¶ 7.) Merino would have hit his head on the ceiling had he been standing on the third step. (*Id.*) Fisher explains Merino placed the ladder on level ground and that neither "Merino's weight nor the reaction force of the level floor would cause the ladder to move laterally as plaintiff suggests." (*Id.* at ¶ 9.) No physical force existed to cause the ladder to slip or tip. (*Id.* at ¶ 10.) Fisher states that unless Merino "was working on the stepladder in a location or manner other than what he testified to at his Examination Before Trial and affidavit, there was no physical force to cause the ladder itself to slip or tip." (*Id.*)

Fisher opines that consistent with a physics-based description of the incident, Merino lost his balance:

> "It was Mr. Merino's testimony that he lost his balance and fell straight down while standing, landing on his left heel. Therefore, given the forces upon the ladder, specifically the lack of forces that would cause the ladder to slip or tip in the scenario described by Mr. Merino, and his description of the accident and how he landed, he most consistent physics-based description of the incident is a loss of balance in which Mr. Merino successfully stepped back off the ladder onto the ground, and go his left foot under him so that he remained standing. Mr. Merino's testimony that he landed on his feet demonstrates that upon losing his balance he was able to step back with one foot, or alternatively hop backward with both

[3] Merino, however, testified that it measured 12 feet high.
[4] Approximately 5'7" feet tall.

> feet, from the second step of the ladder, over the first step so that his feet remained under his body and he remained standing when he contacted the ground." (*Id.* at ¶ 11.)

According to Fisher, Merino's "entire weight landed on his left foot . . . [and] his left foot reached the floor first, which would therefore be more consistent with him stepping down and over the bottom step rather than hopping down with both feet." (*Id.* at 12.)

Paine's Supplemental Affidavit

In defendants' Affirmation in Reply, defendants submit Paine's Supplemental Affidavit. Paine opines that defendants did not cause Merino's accident. (Defendants' Affirmation in Reply, Exhibit A, at ¶ 1.) Merino's accident was a result of Merino's misuse of the ladder, according to Paine. (*Id.*) Paine concludes within a reasonable degree of construction-safety certainty that Merino slipped off the ladder — which he says is consistent with Gomez's testimony and Fisher's conclusion. (*Id.* at ¶ 8.)

Discussion

I. Timeliness of Plaintiffs' Cross-Motion

This court will first consider the merits of plaintiffs' cross-motion. A court may consider a cross-motion for summary judgment filed after the statutory120-day period under CPLR 3212 (a), "even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion." (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [finding plaintiff's summary-judgment motion untimely and noting that "defendants' motion was addressed to the causes of action under Labor Law §§ 200 and 241 (6), while plaintiff's cross motion concerned a different cause of action . . . Labor Law § 240."], citing *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005] [finding plaintiff's cross- motion for summary judgment timely on Labor Law § 240 (1) claim, even though plaintiff filed the motion after court's deadline for making summary-judgment motions, because the cross-motion was made in response to defendants' timely motion for summary judgment dismissing Labor Law § 240 (1) cause of action].)

According to the preliminary conference order dated July 3, 2013, Hon. Paul Wooten ordered the parties to file any dispositive motions 60 days from the filing of the note of issue. (Defendants' Affirmation in Opposition, Exhibit A.) Plaintiffs filed their note of issue on December 24, 2014. Plaintiffs had until February 22, 2015,[5] to file their summary-judgment motion. But plaintiffs filed their cross-motion late, on May 4, 2015.

Defendants' summary-judgment motion is timely, and defendants are seeking relief nearly identical to the relief in plaintiffs' cross-motion, namely, the Labor Law § 240 (1) claim. (*See Filannino*, 34 AD3d at 281; *Osario*, 23 AD3d at 203].) Because defendants address

[5] Because February 22, 2015, fell on a Sunday, plaintiffs had until Monday, February 23, 2015, to file their motion.

plaintiffs' Labor Law § 240 (1) claim in their motion, this court will consider the merits of plaintiff's cross-motion.

II. Common-Law Negligence and Labor Law § 200

In their cross-motion, plaintiffs assert that they are discontinuing their common-law negligence and Labor Law § 200 claims. This court need not address these claims.

III. Labor Law § 240 (1)

Defendants' motion is granted in part and denied in part. Plaintiff's cross-motion is denied. Issues of fact require a trial.

To obtain summary judgment, a moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *accord DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].) If any doubt about whether triable facts exist, a court must deny summary judgment. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides as follows:

> "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."

Section 240 (1) "'was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].) Section 240 (1) provides extraordinary protections, but

> "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and

> the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *accord Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007].)

To prevail on a Labor Law § 240 (1) claim, a plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries. (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004].)

A. Whether Rose and Continental are Proper Labor Law Defendants

This court must determine whether defendant Rose, as Continental's managing agent, is liable under the Labor Law as an agent of the owner:

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *accord Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Rose is not liable under Labor Law § 240 (1) as a statutory agent. Rose did not supervise or control the work that brought about Merino's injury. As such, that aspect of defendants' motion — to dismiss plaintiffs' claims against Rose under Labor Law § 240 (1) — is granted.

Because it is undisputed that Continental is the owner of the premises, Continental may be liable for Merino's injuries under Labor Law § 240 (1). The court must decide whether Continental is liable, discussed below.

B. Ladders

Whether a device provides proper protection is a question of fact. No issues of fact exist when "the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials." (*Nelson v Ciba–Geigy*, 268 AD2d 570, 572 [2d Dept 2000].)

A presumption in plaintiff's favor "arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason.'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], quoting *Blake*, 1 NY3d at 289; *accord LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 971 [2d Dept 2009] ["LaGiudice made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240 (1) cause of action through his deposition testimony, which demonstrated that the ladder on which he was working moved for no apparent reason, causing him to slip. In opposition, the defendant failed to raise a triable issue of fact."] [internal citation omitted].) In *LaGiudice*, the court noted that plaintiff was

> "injured when he fell while descending a six-foot tall A-frame ladder after installing an electrical exit sign at the defendant's store. At his deposition, LaGiudice testified that, as he stepped down from the third rung to the second rung, the ladder shifted. LaGiudice further testified that he fell from the ladder and, while on the floor, saw that the entrance rug on which he had positioned the ladder was 'up.' (67 AD3d at 971.)

Courts will grant summary judgment to plaintiffs on the issue of liability on their § 240 (1) claims if the ladders provided to plaintiffs are inadequate to prevent falls. (*Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013] ["Plaintiff's testimony that the ladder he was using was both unsteady as he was ascending it and too short to enable him to reach the window he was cleaning establishes prima facie that defendants failed to provide him with an adequate safety device under Labor Law § 240 (1) and that their failure proximately caused his injuries."]; *DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 515 [1st Dept 2013] ["[T]he ladder wobbled and moved, causing him to lose his balance, and fall to the ground. . . . the ladder provided to plaintiff was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was a proximate cause of his injury."]; *accord Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006] [holding that the moving ladder did not prevent plaintiff from falling — "'the core objective of Labor Law § 240 (1).'"] [internal citation omitted]; *Peralta v Am. Telephone & Telegraph Co.*, 29 AD3d 493, 494 [1st Dept 2006] ["Unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranting a finding that the owners were absolutely liable under Labor Law § 240 (1), notwithstanding claims of comparative negligence or unsupported claims that plaintiff's conduct was the sole proximate case of her injuries."] [internal citations omitted]; *Chlap v 43rd St.—Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005] ["The plaintiffs established their prima facie entitlement to judgment as a matter of law on the cause of action pursuant to Labor Law § 240 (1), by submitting evidence that . . . plaintiff . . . was injured when he fell after the unsecured ladder on which he was standing slipped out from underneath him as he attempted to step onto a ledge."].)

On a summary-judgment motion, plaintiff need not show that a ladder is defective or that the floor was slippery. [*Bonanno v Port of Auth. of N.Y. & N.J.*, 298 AD2d 269, 269 [1st Dept 2002] ["Plaintiff was under no obligation to show that the ladder was defective in some manner or to prove that the floor was slippery to make out a Labor Law § 240 (1) violation. It was sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling."] [internal citations omitted].)

But if a plaintiff is injured after falling from a ladder and the ladder does not break, a court will question whether the ladder in fact was "'so constructed, placed and operated as to give proper protection.'" (*Antunes v 950 Park Ave Corp.*, 149 AD2d 332, 333 [1st Dept 1989] [internal citations omitted].) In *Antunes*, the court held that issues of fact existed about whether the ladder's defect, if any, caused the accident:

> "However, unlike cases involving broken ladders or collapsing scaffoldings, where the break or collapse by itself is sufficient to establish a prima facie case of violation of section 240, since it is unlikely that the scaffolding would collapse or the ladder break if properly constructed, there is nothing in the present record to indicate that the ladder was not 'so constructed, placed and operated as to give proper protection.' Nor does the record indicate whether such defect, if any, caused the accident. Both such showings are required to recover under section 240." (*Id.* [internal citations omitted].)

The *Antunes* Court determined that because plaintiff was the only person who witnessed the accident, issues of fact existed: "Since plaintiff was the only person to have witnessed the accident, whether he fell from the ladder, within the scope of Labor Law § 240, is a triable issue of fact. . . .'[S]ummary judgment should not be granted if the facts upon which the motion is predicated are exclusively within the knowledge of the moving party or clearly not within the knowledge of the opponent.'" (*Id.* [internal citations omitted]; *accord Grant v Steve Mark, Inc.*, 96 AD3d 614, 614 [1st Dept 2012] ["However, plaintiff is not entitled to summary judgment on the issue of liability. The manner of the happening of the accident is within the exclusive knowledge of plaintiff, and the only evidence submitted in support of defendants' liability is plaintiff's account. Defendants should have the opportunity to subject plaintiff's testimony to cross-examination to explore whether she misused the ladder and was the sole proximate cause of the accident, and to have her credibility determined by a trier of fact."].)

Also, defendants who provide plaintiffs-workers with adequate, non-defective ladders will not be liable if plaintiffs are injured simply because they lose their footing on ladders. (*See Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] ["Defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction."].)

Courts will deny summary-judgment motions if issues of fact exist about whether the accident occurred solely because of the plaintiffs' loss of balance while using the ladder. (*Ellerbe*, 91 AD3d at 442; *accord Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007]; *Chan v Bed Bath & Beyond*, 284 AD2d 290, 290 [2d Dept 2001] [affirming denial of plaintiff's motion for partial summary judgment on liability under Labor Law § 240 [1] where plaintiff allegedly told his supervisor that he "slipped off of the ladder"]; *contra Wasilewski v Museum of Modern Art*, 260 AD2d 271, 272 [1st Dept 1999] [finding that alleged contradictions in the evidence do not raise bona fide credibility issues about plaintiff's testimony to warrant a trial].)

In *Ellerbe*, the plaintiff testified at his EBT that the "ladder from which he fell had only been 'tied off' at the top right side and the ladder had 'reared back' when he attempted to dismount from the top of the ladder by stepping to his left onto the deck floor." (91 AD3d at 441-442.) The site safety manager, however, testified "that plaintiff told him, immediately after the fall and while plaintiff was still on the ground, that he fell because he 'lost his footing.'" (*Id.* at 442.) The site safety manager "also testified that he inspected and climbed the ladder

immediately after plaintiff's fall, finding it to be stable, since its feet were wedged between cells in the corrugated steel floor, and its upper right column was also secured. In an affidavit, [he] averred that, based upon his inspection of the ladder, the accident could not have happened as plaintiff claims." (*Id.*) The First Department determined that Supreme Court correctly denied plaintiff's motion for partial summary judgment on liability under Labor Law § 240 (1) because issues of fact existed:

> "While it is undisputed that plaintiff made out a prima facie case, the aforementioned incident report and testimony of [the site safety manager], which is inconsistent with [plaintiff's] account, raises a triable issue of fact as to whether [plaintiff's] accident in fact resulted from a violation of the statute. Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate." (*Id.*)

In *Buckley*, the First Department determined that triable issues of fact existed because of inconsistencies in the evidence:

> "While it is undisputed on appeal that plaintiffs' moving papers made out a prima facie case for summary judgment as to liability under section 240 (1), the aforementioned incident report—which, contrary to plaintiffs' assertions, is inconsistent with Buckley's testimony and [the foreman's] affidavit—would, if admitted at trial, raise a triable issue of fact as to whether Buckley's accident in fact resulted from a violation of the statute. Specifically, [defendants] would not be subject to statutory liability if, as the incident report indicates, Buckley simply lost his footing while climbing a properly erected, nondefective A-frame ladder that did not malfunction." (38 AD3d at 462.)

The Second Department in *Chan* found that "[w]hen a plaintiff is injured from a fall from a ladder that is not shown to be defective, the issue of whether the ladder provided proper protection under Labor Law § 240 (1) is a question of fact for the jury." (284 AD2d 290.) Plaintiff fell from an unsecured A-frame ladder and sustained injuries. (*Id.*) At his EBT, "plaintiff testified that the ladder tilted, causing him to fall." (*Id.*) Plaintiff's supervisor, however, "testified that on the following day the plaintiff told him during a telephone conversation that he slipped off of the ladder." (*Id.*)

In *Wasilewski*, however, the First Department determined that no issues of fact required a trial. (260 AD2d at 271.) The court held that the defendants-owners violated Labor Law § 240 (1) because they failed properly to secure a ladder and to ensure that it remain steady and erect while plaintiff used it:

> "[D]efendants offered no evidence to controvert plaintiff's assertion that no one was holding the 8 to 10 foot A-frame ladder from which plaintiff fell, that the ladder was not secured to something stable and was not chocked or wedged in place, and that no other safety devices, such as safety belts, were provided. The fact that the ladder may have had a brace in the middle to keep it open is immaterial." (*Id.*)

According to plaintiff's testimony, the ladder shook and moved. (*Id.*) The *Wasilewski* Court noted that plaintiff's supervisor's testimony did not create an inconsistency in the evidence: "The testimony of Tadeusz Gawel, plaintiff's supervisor, does not provide an alternative to plaintiff's version of the accident. . . . [the supervisor] said only that plaintiff told him he slipped, which is not inconsistent with plaintiff's version that he slipped after the ladder moved forward." (*Id.* at 272.) The *Wasilewski* Court determined that the Supreme Court erred in denying partial summary judgment to plaintiff:

> "[H]ere there is no view of the evidence that supports a finding that plaintiff's actions were the sole cause of his injuries. . . . defendant fails to set forth a conflicting theory with supporting evidentiary materials, other than mere speculation, as to how the accident occurred, and . . . the alleged contradictions do not raise bona fide credibility issues regarding plaintiff's testimony. . . ." (*Id.*)

C. Whether Continental is Liable Under Labor Law § 240 (1)

Because it is undisputed that Continental is the owner of the premises, Continental may be liable for Merino's injuries under Labor Law § 240 (1). The court must decide whether Continental is liable.

Although plaintiffs made a prima facie showing of entitlement to judgment as a matter of law against Continental on the issue of liability, an issue of fact exists about whether Merino's accident resulted from a violation of the statute. An issue of fact also exists about whether the accident occurred solely because of Merino's loss of balance while using the ladder. (*See Ellerbe*, 91 AD3d at 442; *accord Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007]; *Chan*, 284 AD2d at 290.)

Defendants "set forth a conflicting theory with supporting evidentiary materials" about how the accident occurred. (*Wasilewski*, 260 AD2d at 272 [1st Dept 1999].) The credible evidence reveals different versions of the accident. Under one version, Continental would be liable; under the other version, Continental would not be liable. (*See Ellerbe*, 91 AD3d at 442.) Continental would not be liable if Merino "simply lost his footing while climbing a properly erected, nondefective A-frame ladder that did not malfunction." (*Buckley*, 38 AD3d at 462.)

Gomez's EBT testimony is inconsistent with plaintiff's account of the accident. Although Gomez did not see the accident, Gomez testified that right after the accident Merino told him "that he just slipped from the ladder and that's it." (Defendants' Notice of Motion, Exhibit G, at

40.) Merino, however, testified that the "ladder moved and [he] fell . . . . [that the ladder moved to] a side . . . to the left. . . . [s]ufficient for [him] to fall, to lose the stability." (Defendants' Notice of Motion, Exhibit E, at 75.) Merino testified that "[i]t was all too quick. I felt it move, I lost balance, and I went down." (*Id.* at 76.)

Defendants' expert, Fisher, provides a theory about how Merino's accident occurred different from Merino's version. Fisher opines that unless Merino "was working on the stepladder in a location or manner other than what he testified to at his Examination Before Trial and affidavit, there was no physical force to cause the ladder itself to slip or tip." (Defendants' Affirmation in Opposition, Exhibit C, at ¶ 11.) Fisher opines that consistent with a physics-based description of the incident, Merino lost his balance. (*Id.*) Although Fisher investigated the premises only two years after Merino's accident and never inspected the ladder Merino used on the day of the accident, Fisher sufficiently explains that Merino just slipped from a nondefective, non-malfunctioning A-frame ladder that was properly erected.

These inconsistencies in the evidence between Gomez's and Fisher's testimonies in relation to Merino's testimony raise triable issues of fact.

Plaintiffs' counsel's argument — that Fisher's affidavit is worthless — is insufficient to rebut the expert's affidavit.

Although Merino is not required to prove that the ladder was defective, an issue of fact exists about whether the ladder's defect, if any, caused Merino's accident. (*See Antunes*, 149 AD2d at 333.)

Also, the way the accident happened is within Merino's exclusive knowledge. (*See Grant*, 96 AD3d at 614.) A trier of fact should determine whether Merino is credible. (*See id.*)

Because issues of fact exist, defendants' summary-judgment motion and plaintiffs' cross-motion on the issue of Labor Law § 240 (1) are denied.

IV. Labor Law §§ 240 (2) and 240 (3)

Defendants' summary-judgment motion is granted to the extent that plaintiffs' claims against defendants under Labor Law §§ 240 (2) and 240 (3) are dismissed. Plaintiffs do not oppose that aspect of defendants' motion seeking dismissal of the Labor Law §§ 240 (2) and 240 (3) claims. A court may deem admitted those aspects of a party's summary-judgment motion that are unopposed:

> "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted, and where there are cross motions for summary judgment, in the absence of either party challenging the verity of the alleged facts . . . there is, in effect, a concession that no question of fact exists." (*Kuehne &*

> *Nagel, Inc. v F.W. Baiden.* 36 NY2d 539, 544 [1975] [internal citations omitted].)

Thus, plaintiffs' claims under Labor Law §§ 240 (2) and 240 (3) are dismissed.

V. Labor Law § 241 (6)

Defendants move for summary judgment against plaintiffs on the Labor Law § 241 (6) claim. Plaintiffs cross-move.

Preliminarily, as discussed above, because Rose did not supervise or control the work, it may not be held liable under Labor Law § 241 (6) as the owner's agent. Accordingly, Rose is entitled to dismissal of the Labor Law § 241 (6) claims against it; plaintiffs are not entitled to summary judgment in their favor on these claims.

Labor Law § 241 (6) provides as follows:

> "All contractors and owners and their agents . . . 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers." (*Ross*, 81 NY2d at 501-502).

To prevail on a cause of action under Labor Law § 241 (6), plaintiffs must prove a violation of a provision of the Industrial Code that sets forth a specific safety standard. (*Id.* at 505.) In *Ross*, the Court of Appeals found that

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not." (*Id.*)

Contributory and comparative negligence are valid defenses to claims asserted under Labor Law § 241 (6). (*Id.* at 494, n 4.) Breaching a duty imposed by a regulation "promulgated

under Labor Law § 241 (6) is merely some evidence of negligence," which is different from absolute liability under § 240 (1). (*Id.*)

Plaintiffs must also prove that defendants' violation proximately caused Merino's injuries.

Plaintiffs oppose defendants' motion only with respect to defendants' alleged violations of 22 NYCRR 23-1.21, 23-1.21 (b) (4), and 23-1.16. Because plaintiffs do not oppose defendants' motion with respect to the remaining code violations — asserted in plaintiffs' complaint and bill of particulars — those claims are deemed admitted and dismissed.

Plaintiffs allege a violation of a sufficiently specific Industrial Code provision — 22 NYCRR 23-1.21 (b) (4) — but no proof exists that defendants violated 23-1.21 (b) (4). Section (b) (4) (i) is inapplicable because Merino did not use a portable ladder. Section (b) (4) (ii) is inapplicable. Section (b) (4) (ii) requires that "[a]ll ladder footings . . . be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." But Merino testified that the ladder's footings were firm; the ladder had rubber feet and he placed the ladder on an even surface. Section (b) (4) (iii) is also inapplicable. No testimony exists that Merino worked on rungs between six and ten feet above the ladder footing. Sections (b) (4) (iii) and (v) are inapplicable because no testimony exists that Merino used a leaning ladder.

As for the other sections enumerated under 22 NYCRR 23-1.21, plaintiffs do not explain in their cross-motion how they apply to Merino's accident.

Plaintiffs have not demonstrated that defendants are liable under 22 NYCRR 23-1.16. Section 23-1.16 is inapplicable because no evidence exists that Merino used safety belts, harnesses, tail lines, or lifelines.

In any event, defendants' expert, Paine, explains in his affidavit that defendants did not violate any above-mentioned Industrial Code provision. Although plaintiffs need not provide an expert's affidavit to prove that defendants violated the Industrial Code, plaintiffs do not contradict Paine's affidavit with evidence. Plaintiffs' counsel's argument — that Paine's affidavit is worthless — is insufficient to rebut the expert's affidavit.

Defendants' motion to dismiss plaintiffs' claims against Continental under Labor Law § 241 (6) is granted; plaintiffs' cross-motion is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' claims against defendants Rose Associates, Inc. (Rose), and Continental Towers Condominium (Continental) for common-law negligence and Labor Law § 200 are discontinued as explained in plaintiffs' cross-motion, and it is further

ORDERED that defendants' motion is granted in part and denied in part, in that all claims against defendant Rose are dismissed, plaintiffs' claims against Continental under Labor Law §§

240 (2), 240 (3), 241 (6) are dismissed, and plaintiffs' claims against Continental under Labor Law § 240 (1) are not dismissed and shall continue; and it is further

ORDERED that plaintiffs' cross-motion is denied; and it is further

ORDERED that defendants serve a copy of this decision and order on plaintiffs with notice of entry and serve the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: October 19, 2016

J.S.C.
HON. GERALD LEBOVITS
J.S.C.