To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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WILTON VALDEZ,

Plaintiff,

-against

CITY OF RYE, RYE FIRE DEPARTMENT and MILTON FIREHOUSE,

Defendants.

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INDEX NO. 66687/2016

DECISION/ORDER

Motion Date: 03/14/18
Motion Seq. 1

ECKER, J.

The following papers numbered 1 through 11 were read on the motion of WILTON VALDEZ ("plaintiff"), made pursuant to CPLR 3212, for an order granting partial summary judgment as to liability, as against CITY OF RYE, RYE FIRE DEPARTMENT and MILTON FIREHOUSE ("defendants"):

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exhibits A-F [1]	1 - 8
Affirmation in Opposition, Exhibit A	9 - 10
Affirmation in Reply, Exhibit A	11

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges that he sustained physical injuries while employed by United Steel Products. He and his co-worker, his father, were sent to the firehouse owned and operated by defendants on March 9, 2016, to repair the spring mechanism that

[1] Court rules require plaintiff to use numbered exhibit tabs and defendant to use lettered exhibit tabs. The same exhibit number (or letter) is not to be repeated within the same motion sequence. The parties are advised that this court requires working copies of all papers.

controlled the garage door of the firehouse. They arrived at the job site by company truck. Affixed to the roof of the company truck were two ladders, one of which was easily accessible, and the other of which was underneath heavy work materials needed for another job. Rather than using one of two company ladders so provided, plaintiff accepted the offer of one of the firefighters to use a fire department extension ladder. While using a power drill to fix the door spring, the ladder buckled, causing plaintiff to fall and to sustain his injuries. It is upon these facts that plaintiff, pursuant to the Labor Law, seeks to impose strict liability upon defendants,

Plaintiff brought this action premised upon Labor Law §§ 240(1), 240(6) and 200. On this motion for summary judgment, plaintiff submitted the transcript of his GML § 50-h hearing and defendants submitted a copy of plaintiff's deposition transcript. Defendants argue, in opposition to the motion, that there are material issues of fact that preclude the granting of summary judgment, because (1) the repair of the garage door is not a covered activity for which strict liability is imposed, and (2) plaintiff was negligent in not inspecting the ladder that he elected to borrow and use.

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure. *Matter of Suffolk Co. Dept. of Social Services v James M.,* 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]. In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *Negri v Stop and Shop, Inc.,* 65 NY2d 625 [1985]; *Nash v Port Washington Union Free School District,* 83 AD3d 136, 146 [2d Dept 2011]; *Pearson v Dix McBride, LLC,* 63 AD3d 895 [2d Dept 2009]. The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center,* 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Id.*; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986].

The court finds that the activity in which plaintiff was engaged, at the time of his fall, is a covered activity within the reach of Labor Law § 240(1). *Lofaso v J.P. Murphy Associates*, 37 AD3d 769, 771 [2d Dept 2007] (since plaintiff "was repairing a nonfunctioning door, he was engaged in the type of repair work which is protected under Labor Law § 240(1)"); *see also Brown v Concord Nurseries*, 37 AD3d 1076 [4th Dept 2007] (the clamping of a broken torsion bar that prevented the proper functioning of the overhead door of a storage building found to be covered by Labor Law § 240(1)). That plaintiff was engaged in the emergency repair of the overhead door is confirmed by the invoice for the work done [Pltf. Ex. A to reply affirmation].

The court finds that notwithstanding defendants' failure to file a cross-motion

addressing the applicability of Labor Law § 241(6), they did raise the issue by arguing that the work being done at the firehouse did not qualify as construction, excavation or demolition. Plaintiff did not address this argument in his reply. CPLR 3212(a) provides "(I)f it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion." Upon its search of the record, the court determines that the cause of action alleging a violation of Labor Law § 241(6) cannot be sustained. *See Vecchio v Lack*, 131 AD2d 465 [2d Dept 1987].

The court next finds that there is an issue of fact as to whether the plaintiff's use of the fire department ladder, in lieu of the ladder supplied by his employer, entitles defendants to raise the "recalcitrant worker" affirmative defense. It is alleged by plaintiff that the ladder he was furnished by the fire department did not have the appropriate non-slip footings. Plaintiff acknowledges that he failed to inspect the ladder before he ascended. Hence, plaintiff's use of the fire department ladder, rather than the one provided by his employer, may constitute negligence on his part that the finder of fact could determine was the sole proximate cause of his injury.

The seminal case relative to when a plaintiff may be found to be a "recalcitrant worker" is *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004], where the Court, in reversing the trial court and Appellate Division's grant of summary judgment to plaintiff, stated:

> "The word 'recalcitrant' fits plaintiff in this case well. He received specific instructions to use a safety line while climbing, and chose to disregard those instructions. He was not the less recalcitrant there was a lapse of weeks between the instructions and his disobedience of them. The controlling question, however, is not whether plaintiff was 'recalcitrant,' but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident."[2]

In a similar case, *Nalvarte v Long Island University*, 153 AD3d 712, 713-714 [2d Dept 2017], the Court affirmed the denial of summary judgment to plaintiff, upon findings that plaintiff sustained his burden of proof showing that Labor Law § 240(1) applied, but that defendant raised a triable issue of fact as to whether the plaintiff's actions were the sole proximate cause of his injuries. "Specifically, the defendant raised a triable issue of fact as to whether pipe scaffolds, which were available to the plaintiff,

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[2] The court is aware of the recent Court of Appeals decision in *Rodriguez v City of New York*, _ NY3d_ 2018 WL 1595658 [April 3, 2018]("*Rodriguez*"). In *Rodriguez,* the Court of Appeals held that, on a motion for partial summary judgment as to liability in a negligence action, a plaintiff is entitled to be awarded partial summary judgment without having to eliminate issues of fact concerning plaintiff's comparative negligence. As this case involves the strict liability principles set forth under the Labor Law, however, the analysis set forth in the *Rodriguez* decision is inapplicable here.

constituted adequate protection for the work that the plaintiff was performing, and if so, whether the plaintiff, based on his training, prior practice, and common sense, knew or should have known to use pipe scaffolds instead of Baker scaffolds" (internal citations omitted)." *Id.*

Plaintiff's GML § 50-h hearing transcript [Pltf. Ex. A] reveals that plaintiff was asked specifically about safety instructions and the use of equipment not supplied by his employer [T. 22-26]. In his deposition [Deft. 1], at page 33, plaintiff was questioned about safety courses he had taken, and an "OSHA 10" card he was issued following ten hours of training. Plaintiff's answers to these inquires provide pillars of support for a sustainable "recalcitrant worker" defense. *See Cahill v Triborough Bridge and Tunnel Authority*, *supra*.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that plaintiff's motion, made pursuant to CPLR 3212, for partial summary judgment, to the extent that he has proven a prima facie case that the work he was doing at the time of his accident was covered by Labor Law § 240(1) granted in part; and it is further

ORDERED that the cause of action alleged by plaintiff to have been a violation of Labor Law § 241(6), is dismissed, in accordance with the court's authority pursuant to CPLR 3212(a); and it is further

ORDERED the parties shall appear at the Compliance Conference Part of the Court, Room 800, on April 27, 2018, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
April 5, 2018

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Stolzenberg Cortelli, LLP
Attorneys for Plaintiff
Via NYSCEF

James K. Baden, Esq.
Attorney for Defendants
Via NYSCEF