Castro v 254 Irving, LLC
2019 NY Slip Op 30290(U)
January 24, 2019
Supreme Court, Kings County
Docket Number: 503406/16
Judge: Edgar G. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of January, 2019.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

----------X

ANGEL CASTRO,

Plaintiff,

- against -

Index No. 503406/16

254 IRVING, LLC, CHARLES VERDE, RIDGEWOOD BUSHWICK SENIOR CITIZENS COUNCIL, INC. VERDE OVEN, INC. AND BUSHWICK PIZZA PARTY,

Defendants.

----------X

The following papers numbered 1 to 5 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant I Said Washington D.C. d/b/a Bushwick Pizza i/s/h/a Bushwick Pizza Party (defendant or I Said) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Angel Castro (plaintiff) as well as any and all cross claims asserted against it.

Facts and Procedural History

The instant action arises out of a February 13, 2015 accident when plaintiff fell from a ladder and sustained injuries in front of a building/pizza place owned by defendant 254 Irving, LLC, located at 254 Irving Avenue in Brooklyn.

Plaintiff testified at his deposition that he worked full-time for "Verde Construction" as a laborer for a year and a half before the accident occurred. During that time period, Verde Construction worked for the City and on houses owned by Charles Verde. Plaintiff worked wherever Mr. Verde told him to work, and Mr. Verde paid him in cash. A man named Jorge and a man named Lupe also worked for Verde Construction. During this time period, only Mr. Verde, Lupe or Jorge told plaintiff what to do. In the year and a half before plaintiff's accident, Mr. Verde owned a business on the ground floor of 254 Irving Avenue selling beer, alcohol and pizza. The business had an exterior sign that said "Verde" on it, with a word preceding "Verde" which plaintiff did not remember. Mr. Verde owned 254 Irving Avenue and the building next to it.

Two months before the accident, plaintiff sanded and painted a ceiling at a "business" located across the street from 254 Irving Avenue, owned by a woman named "Miss Kristin." Plaintiff was sanding the ceiling in order to turn the "business" into a bar. Lupe told plaintiff to perform the work for Miss Kristin. At that time, plaintiff saw Miss Kristin speaking with Lupe but did not understand what they were saying because he does not speak English.

However, according to plaintiff, Lupe told him to "go and sand the ceiling so you paint after that . . . That's what the lady [meaning Miss Kristin] said." While plaintiff was performing the work, Miss Kristin "was checking, she was telling us [plaintiff and Lupe] how she liked it or not." It was understood that the "work was also [sic] for Miss Kristin . . . because she was checking if it was looking good or not," which Mr. Verde did not do. No one else, besides Lupe and Miss Kristin, came to the area where plaintiff was performing this task. Lupe provided the materials for the job, which plaintiff finished that day. Plaintiff saw Miss Kristin before in 2014 when she was coming in and out of this location or 254 Irving Avenue.

About one month before the accident, Mr. Verde closed his pizza business. Lupe told plaintiff that Miss Kristin was going to rent 254 Irving Avenue to run a business selling pizza and alcohol. At that time, Mr. Verde was removing items from his business at 254 Irving Avenue to leave the location for Miss Kristin, who was moving in. The day before the accident, Mr. Verde "removed everything he needed from 254 Irving [Avenue] to make room for Miss Kristin."

On the day of the accident, at approximately 8:00 a.m., Mr. Verde told plaintiff to remove sheet rock from the ceiling of the building located next to 254 Irving Avenue so that Lupe could repair some pipes.[1] Mr. Verde told plaintiff how he wanted him to remove the sheet rock, what to use, and what to replace it with. Plaintiff used a hammer, a crowbar, and

[1]Plaintiff also testified that a worker for Verde Construction told him to perform this task.

a helmet to perform this task, all owned by Mr. Verde, which plaintiff retrieved from Mr. Verde's enclosed warehouse/parking lot located near 254 Irving Avenue. Lupe came in and out to check on plaintiff's progress because he needed to repair the pipes under the sheet rock. Miss Kristin was "coming in and out [of 254 Irving Avenue] with her things," and was cooking and making bread in the basement of 254 Irving Avenue for her bar across the street, which was open for business. Many people were coming into the premises that day.

At approximately 12:15 a.m., Jorge came to the basement and told plaintiff to help him take down the Verde sign because Miss Kristin wanted to put up a new one.[2] Plaintiff came out from the basement and went up to the street, where he observed two ladders in front of the building. When facing the store, one of the ladders was to the left of the store near the entranceway and the other ladder was to the right of the store near the basement stairs. The ladders were old one-piece aluminum extension ladders which had been separated. The Verde sign was still in place above the front of the building/store.[3] Only Jorge told plaintiff how they were going to remove the sign, including how they were going to use the two ladders. Miss Kristin was outside of the building on one side looking up to where the sign was going to be removed. She was also talking to Jorge, but plaintiff did not understand what she was saying because she was speaking English.

---

[2]Plaintiff also testified that Jorge told him "to bring down a sign to put a new one for the restaurant" at 254 Irving Avenue, and that Jorge told him "Hey, Angel, come and help me because we are going to remove that sign and put [sic] a new one[]."

[3]Plaintiff identified the Verde sign above the storefront at 254 Irving Avenue as depicted in a photograph marked as defendant's exhibit A. The photograph also depicts a blue awning which was rolled up at the time plaintiff and Jorge were removing the sign.

Plaintiff and Jorge did not need any other tools or equipment to remove the Verde sign because they only had to detach the sign from three hooks affixed to the exterior wall of the building. The inside of the sign also had the three hooks, which matched the hooks affixed to the wall. According to plaintiff, "[w]e just had to move [the sign] up and take it out and then take it down," because "the wall had a hook that matched the hook on the sign."

Plaintiff went up his ladder first while Jorge stood at the foot of the ladder to make sure it was not going to slip. Plaintiff's ladder had more than twenty rungs. The right side or "leg" of plaintiff's ladder had a black rubber "shoe" but the left side or leg did not, and both sides of the ladder were resting on the sidewalk. Jorge went up the other ladder. As plaintiff was climbing to the highest level he got on the ladder, the ladder was moving "in and out" like a hammock and was shaking, but the feet of the ladder did not slide or move on the sidewalk before he attempted to remove the sign. It was drizzling that day and the entire sidewalk was wet. Plaintiff felt the ladder was unstable as he was climbing but remained on the ladder because he wanted to remove the sign and go to lunch. Plaintiff climbed up over ten rungs from the bottom of the ladder. At his highest point on the ladder, his stomach was near the top of the sign. At this point, Jorge was on his ladder at about the same height.

Both men started to remove the sign. Plaintiff lifted up the bottom right corner of the sign with both hands and Jorge was doing the same thing on his side of the sign. Plaintiff then lifted the sign up and out of the hook affixed to the building wall that was closest to his

side of the sign. However, Jorge was not able to do the same on his side of the sign. Jorge told plaintiff to hold plaintiff's end of the sign while he tried to unhook his side of the sign from the wall. Plaintiff was holding his end of the sign off of the hook for about two minutes while Jorge continued to try to remove the other end of the sign from the hook.

As plaintiff was holding the right corner of the sign, the feet of his ladder slipped on the sidewalk. The ladder then moved away from the building toward the street, the top of the ladder fell down, and plaintiff fell down with the top of the ladder onto the sidewalk. Miss Kristin was still there with a man who worked for her, who called an ambulance, although plaintiff also testified that Miss Kristin arrived after he fell. Lupe was also present. Two days after the accident, there was no sign at the building. A week after the accident, plaintiff saw a new sign on the building that said "Pizza Party." Plaintiff testified that on the day of the accident, he "was working for Verde [Construction], but at the moment of the accident with [sic] . . . Miss Kristin."

Kristin North testified at her deposition that she owns two businesses - a bar called Boobie Trap, LLC, located on the ground floor of 308 Bleeker Street in Brooklyn, for the past three years, and a pizza place called Pizza Party (I Said Washington, D.C., LLC) located at 254 Irving Avenue in Brooklyn, for the past two and a half years. Charles Verde is the landlord/owner of the property located at 308 Bleeker Street. Mr. Verde owns a lot of property in that area, as well as a construction company.

The ceiling of the bar and the walls of the bathroom were painted approximately six months before the bar opened in August 2014. None of Mr. Verde's employees helped with those renovations. Plaintiff did not perform any sanding or painting work at the bar. At the time, Ms. North knew two men who worked for Mr. Verde named Jorge and Lupe, who performed maintenance for all of Mr. Verde's buildings, including the apartments above 308 Bleeker Street, but not at her bar. Jorge also baked bread for Mr. Verde's pizza restaurant, Verde Coal Oven, in a special old coal oven in the basement of Verde Coal Oven at 254 Irving Avenue, which Mr. Verde also owned.

In December, 2014, Mr. Verde told Ms. North he was ready to sell his pizza restaurant to her. At that time, Verde Coal Oven was still in business. Ms. North formed I Said Washington, D.C., LLC on December 15, 2014 in order to buy Mr. Verde's restaurant. In January, 2015, Mr. Verde sold his pizza restaurant to Ms. North pursuant to a written sales contract. By lease agreement dated January 12, 2015, Mr. Verde rented 254 Irving Avenue to Ms. North so that she could open a new bar and pizza restaurant. Ms. North planned to renovate the leased space for this purpose. Mr. Verde agreed to remove all of his belongings before turning it over to Ms. North.

Only Ms. North and Paul King, Ms. North's business partner, performed and supervised the renovations for this leased space between January 12, 2015 to March 6, 2015.[4]

---

[4]Ms. North also testified that she did not remember when she and her partner started renovations, how long it was after she signed the lease that they started renovations, or for how long a period they performed renovations.

The bar/restaurant opened on March 6, 2015. None of Mr. Verde's employees, including Lupe and Jorge, performed any renovations at the premises. After Pizza Party opened, Ms. North hired Jorge to bake bread because she had previously tasted the bread Jorge made while working for Verde Coal Oven and thought it was very good. Jorge worked for two to three hours per day, two to three days per week, for one to two months after Pizza Party opened, baking bread and doing janitorial work for Ms. North, and was paid off the books. At the time, Jorge also worked for Mr. Verde doing maintenance. Ms. North did not discuss hiring Jorge with Mr. Verde. Lupe never worked for Pizza Party or I Said Washington, D.C., LLC. Jorge quit working for Pizza Party after one or two months.

When Ms. North first met with Mr. Verde about renting the premises, she asked him to take the Verde sign down.[5] Ms. North understood that it was Mr. Verde's responsibility to take the Verde sign down because it belonged to him, but did not know if there was anything in writing or in the lease which said it was Mr. Verde's responsibility to remove the sign, and did not recall any specific conversation she had with anyone about the responsibility of Mr. Verde to take down the Verde sign. She wanted the sign taken down before she moved into the premises because she did not want the responsibility of taking it down; it said "Verde Coal Oven" and the name of her new restaurant would be "Pizza Party;" and she wanted Mr. Verde to remove all his belongings from the premises that she did not

[5]Ms. North later testified that she did not remember when she made this request, whether it was she or Mr. King who made it, or if the request was made during the time renovations were being performed for their new pizza restaurant.

want, such as chandeliers and a cappuccino machine, along with the Verde sign, not because she wanted to repaint it and put it back up. It was her "understanding that the sign would come down" when she and Mr. King were "going to take over the store and take over the lease," although she did not know how that would be done. At that time, Ms. North and Mr. King did not have a plan to put up a new sign; Ms. North had never had a plan to put up a new sign where the Verde sign had been; and Ms. North never told Mr. Verde that she wanted to take the sign, paint it and make it a Pizza Party sign.

According to Ms. North, someone told her that the sign was in the trash, but she did not remember who told her. Once the old sign was placed in the trash, Ms. North "took it upon herself" to remove it and paint it. It was at this time when her plan came about to paint the sign. Either Ms. North or Mr. King asked Mr. Verde to store the sign for them in Mr. Verde's warehouse across the street from Pizza Party until they wanted to paint it, and Mr. Verde agreed. At some point, possibly before or after Pizza Party opened, Ms. North "took [the sign] and painted [it] over and made it the Pizza Party sign." The sign was made of wood, but Ms. North did not know how heavy it was, did not recall if she could carry it herself, and did not know if the sign was only one piece. Mr. King and Ms. North's Boobie Trap employee Miguel put up the new sign up. Ms. North did not remember how much time elapsed between the time she asked Mr. Verde to remove the sign and the time she painted the sign. She did not know how the sign was put up or how it was attached to the exterior

wall of the building. Ms. North believed she had the authority to put up a new sign pursuant to the paragraph 49 of the lease.

On the day of the accident, while at the Boobie Trap, but before Pizza Party opened, Miguel told Ms. North that one of Mr. Verde's workers fell while trying to remove the Verde sign. Neither she nor Miguel witnessed the accident, and Ms. North did not see plaintiff on the day of the accident, nor would she be able to recognize him if she saw him. Ms. North did not take any action because the person who fell was one of Mr. Verde's employees. She did not know if she heard about the accident before she took possession of the premises or while she and Mr. King were doing renovations, did not know who removed the sign, and did not observe it being removed.

Pursuant to the lease, Ms. North was responsible for cleaning and maintaining the sidewalk from snow, ice, debris and rubbish. Ms. North did not recall seeing any of Mr. Verde's employees doing any kind of work at 254 Irving Avenue before March 6, 2015, when Pizza Party opened. Ms. North did not know anyone named Angel Castro. When Ms. North signed the lease in January, 2015, Mr. Verde had not yet removed his belongings from the premises.

On or about March 8, 2016, plaintiff commenced the instant action alleging common-law negligence and violations of Labor Law §§ 240 (1), 241 (6), and 200 against defendants 254 Irving, LLC, Charles Verde, Ridgewood Bushwick Senior Citizens Council, Inc. (Ridgewood), Verde Oven, Inc., and Bushwick Pizza Party. Defendant 254 Irving, LLC did

not interpose an answer or otherwise appear in the action. Subsequently, plaintiff moved for a default judgment against it, which was granted by order dated September 23, 2016 (Walker, J.). Defendant Ridgewood interposed its answer on or about April 19, 2016. On or about July 26, 2016, defendant Ridgewood moved for summary judgment dismissing the complaint and all cross claims against it. The motion was granted by order of this court dated January 6, 2017 (Walker, J.). Defendant I Said interposed its answer on or about May 31, 2016, generally denying the allegations of the complaint, and asserting various affirmative defenses. Subsequently, plaintiff served his verified bill of particulars, dated May 17, 2017. After plaintiff and Ms. North were deposed, plaintiff filed his note of issue on November 28, 2017. Defendant I Said (hereinafter defendant) made the instant motion for summary judgment to dismiss the complaint and all any and all cross claims asserted against it on or about January 29, 2018, which is presently before the court for disposition.

Discussion

"Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their 'agents'" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011]). In this regard, "[a] party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the 'ability to control the activity which brought about the injury'" (*id.*, quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). "Lessees who hire a contractor and have the right to control the work being done are considered 'owners' within the meaning of the statutes" (*id.*). "Moreover, a lessee of property may be liable as an

'owner' when it 'has the right or authority to control the work site, even if the lessee did not hire the general contractor'" (*Seferovic v Atl. Real Estate Holdings, LLC*, 127 AD3d 1058, 1060 [2d Dept 2015], quoting *Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [1st Dept 2005]). "The key question is whether the defendant had the right to insist that proper safety practices were followed" (*Seferovic*, 127 AD3d at 1060).

Here, defendant has made a prima facie showing that although it was a lessee, it neither contracted for nor supervised or controlled the removal of the sign (*Garcia v Mkt. Assoc.*, 123 AD3d 661, 665 [2d Dept 2014]). First, as defendant argues, under paragraph 39 (a) of the lease, defendant had "no right to use . . . [t]he exterior faces of all perimeter walls, except for any signage permitted under Article 49," which required prior written consent of the landlord. Because the exterior walls of the building were not part of the demised premises, defendant did not have authority to direct or control removal of the sign from the exterior of the building. Second, the sign was removed by plaintiff and Jorge, the employees of Mr. Verde, the landlord, without any direction or control from defendant via Ms. North. As noted above, despite plaintiff's testimony that on the day of the accident, he "was working for Verde [Construction], but at the moment of the accident with [sic] . . . Miss Kristin," he testified that he worked full time for Verde Construction as a laborer for a year and a half before the accident occurred. Moreover, plaintiff testified that Jorge was also employed by Mr. Verde; that only Mr. Verde, Jorge and Lupe (also employed by Mr. Verde), directed his work; that Jorge came down to the basement to tell plaintiff to help him remove the sign; and

that only Jorge supervised his work with respect to removing the sign, including using the ladders and telling plaintiff to hold the sign while Jorge tried to unhook his side of the sign from the hooks on the wall.

In addition, as defendant points out, Ms. North testified that she asked Mr. Verde to remove the sign when she first met with him to discuss renting the premises; that she understood that it was his responsibility to remove the sign because it belonged to him; that she also wanted him to remove all his belongings from the premises, including the sign; that it was her understanding that the sign would "come down" when she and her partner "took over" the store and the lease; and that she did not know how the sign would be removed. Ms. North also testified that she did not know who removed the sign, that neither she nor her employee Miguel were present when it was being removed, and that she did not observe it being removed. Although plaintiff first testified that Ms. North was present while he and Jorge were removing the sign, he later testified that he did not know if Ms. North witnessed the accident, saying "she came after."

Further, as defendants state, Ms. North testified that she and her partner performed all the renovations for the subject premises, that none of Mr. Verde's employees performed any of those renovations, and that she only hired Jorge to bake bread and perform janitorial work *after* Pizza Party opened in March, 2015, *after* the accident occurred.

In addition, as defendant asserts, consistent with her deposition testimony, Ms. North states in her affidavit that defendant did not hire or pay plaintiff, his employer or co-workers

(Jorge/Lupe) to remove the sign; did not provide any tools, equipment, materials or ladders to anyone in order to remove the sign; and did not provide the ladder used by plaintiff. Ms. North also states that neither she nor defendant directed, controlled or supervised plaintiff when taking down the sign or with respect to any of plaintiff's work.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether defendant may be considered an owner under the Labor Law. First, plaintiff argues that there is a question of fact as to whether defendant had the "authority and right to exercise supervision and control" over removal of the sign since the lease does not contain a provision "as to who is responsible for removing the [s]ign . . .". (plaintiff's affirmation in opposition at ¶37). Plaintiff also asserts that since defendant had the right to install a sign, "[t]he right of installation, by definition, includes all preparatory and ancillary work, which includes the removal of the [s]ign" (*id.* at ¶46). In addition, plaintiff maintains that whether defendant may be considered an owner under the Labor Law should be decided by a jury because Ms. North could not recall "so many details regarding the circumstances of the [s]ign and the relationship with Jorge and with [Mr.] Verde" (*id.* at ¶38).

However, as defendant argues, and plaintiff effectively concedes, while paragraph 49 of the lease granted defendant the right to install and maintain a sign, the lease prohibited defendant from using the exterior faces of all perimeter walls. Thus, in effect, the lease contained a provision regarding removal of the sign, and is not silent on this issue, as plaintiff contends. In any event, as Ms. North testified, the sign belonged to Mr. Verde, and

defendant has made a prima facie showing that it was Mr. Verde, not defendant, who assumed full responsibility for removing the sign by directing his employees (plaintiff and Jorge) to take it down, which plaintiff has failed to rebut. Finally, contrary to plaintiff's claim, despite some inability to recall certain details, Ms. North provided sufficient information about the circumstances of the accident and the employment of Jorge as it related to Mr. Verde.

Plaintiff next argues that a question of fact exists as to whether Ms. North supervised removal of the sign on the grounds that Ms. North hired Jorge after Pizza Party opened, after the accident occurred; Jorge was "the maintenance man in and around" Ms. North's bar since August, 2014 and Ms. North "knew Jorge as the bread baker at Verde's restaurant" months before she purchased Mr. Verde's pizza business, evidencing "a long[-]standing business relationship" between them (*id.* at ¶39); Ms. North was speaking with Jorge when plaintiff was taking down the sign; Ms. North was watching plaintiff take down the sign and "acting in a manner of supervising, directing and controlling" its removal (*id.* at ¶41); "Jorge himself stated" that Ms. North wanted the sign removed so she could put up a new one (*id.*); Ms. North hired Jorge after March, 2015 so it is "just as likely" that she hired Jorge or Mr. Verde to remove the sign, who enlisted plaintiff to help (*id.*); plaintiff painted the ceiling and bathroom of Ms. North's bar during its renovation; and defendant benefitted from removal of the sign.

However, as noted above, plaintiff testified that during the year and a half before the accident, he worked for Verde Construction and only Mr. Verde, Jorge, and Lupe told him what to do, and that only Jorge told him how he and Jorge were going to remove the sign. Further, plaintiff's own testimony as to whether Ms. North was present when he removed the sign is conflicting. In this regard, plaintiff testified that Ms. North was present at the time, that she was "still" there with her employee when he (plaintiff) fell, but that she arrived after he fell and that her employee witnessed the accident from across the street. In any event, plaintiff only testified that when he was on the sidewalk, having come up from the basement, Ms. North was speaking with Jorge, and looking toward the sign--not, as plaintiff now claims--that Ms. North was "acting in a manner of supervising, directing and controlling" the removal of the sign. Moreover, plaintiff testified that he did not understand what Ms. North was saying because he does not speak English, and thus his claim that Ms. North was supervising his work is unsupported by any admissible evidence. Further, "[e]vidence of general supervisory control or mere presence at the work site is not adequate to establish control over the work activity that caused the injury" (*cf. Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1264 [3d Dept 2010]), whether or not Ms. North benefitted from plaintiff's work. In addition, although plaintiff repeatedly testified at his deposition that Jorge told him that Ms. North wanted the sign removed so she could put up a new one, when plaintiff was asked if Jorge told him what he (plaintiff) was going to do with the sign when he (plaintiff) took it down, plaintiff testified "No . . . He told me just help me." Moreover, this testimony

constitutes inadmissable hearsay, and thus fails to buttress plaintiff's argument that a material question of fact exists as to whether Ms. North supervised Jorge and plaintiff while they attempted to remove the sign.

With respect to plaintiff's argument that he was, in effect, Ms. North's special employee while taking down the sign, were this true, plaintiff would be barred from recovering damages for personal injuries against defendant by the Workers' Compensation Law (*Dereveneaux v Hyundai Motor Am.*, 156 AD3d 758, 759 [2d Dept 2017]). In any event, plaintiff testified that for the one and a half years before the accident, he was employed full-time by Verde Construction.

As to plaintiff's argument that he had worked for Ms. North when he painted the ceiling and bathroom of Ms. North's bar during its renovation, as defendant points out, plaintiff testified that Mr. Verde was performing this work for Ms. North because he and Ms. North had "something going on because he is a contractor and she gives him jobs . . ." In addition, plaintiff's testimony that Ms. North was "checking . . . telling us how she liked it or not" fails to demonstrate that she was supervising the job, particularly since it was Lupe who provided the materials. Further, plaintiff's testimony that Ms. North was telling him and Lupe how she liked the work is inadmissible hearsay. Moreover, as noted, plaintiff testified that he could not understand what Ms. North and Lupe were saying.

As to the alleged long-standing business relationship between Ms. North and Jorge, Ms. North only hired Jorge after March, 2015, after the accident occurred, and mere

knowledge by Ms. North that Jorge performed maintenance and baked bread for Mr. Verde fails to make this showing. Further, the suggestion that Ms. North "likely" hired Jorge to remove the sign because she had hired Jorge after the accident is speculative.

In sum, defendant has made a prima facie showing that it cannot be considered an owner within the meaning of the Labor Law, which plaintiff has failed to rebut. Therefore, defendant's motion to dismiss plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims is granted.

In any event, even assuming that defendant was an owner under the Labor Law, plaintiff was not engaged in a covered activity under Labor Law §§ 240 (1) and 241 (6). "Labor Law § 240 (1) provides protection from elevation-related risks for workers engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 686 [2d Dept 2011], *lv dismissed* 19 NY3d 876 [2012], quoting Labor Law § 240 [1]). "'[A]ltering' within the meaning of Labor Law § 240 (1) requires making a significant physical change to the configuration or composition of the building or structure" (*id.* [internal citations and quotation marks omitted]).

"Labor Law § 241 (6) protects only those workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition" (*Moreira v Ponzo*, 131 AD3d 1025, 1027 [2d Dept 2015], citing *Nagel v D & R Realty Corp.*, 99 NY2d 98, 100 [2002]; *Gleason v Gottlieb*, 35 AD3d 355 [2d Dept 2006]). In general, "'the scope of Labor

Law § 241 (6) is governed by 12 NYCRR 23-1.4 (b) (13), which defines construction work expansively'" (*Moreira,* 131 AD3d at 1027, quoting *Vernieri v Empire Realty Co.*, 219 AD2d 593, 595 [1995]). Pursuant to "that regulation, construction work consists of '[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures," regardless of "whether or not such work is performed in proximate relation to a specific building or other structure'" (*id.*, quoting Rules of New York State Department of Labor [12 NYCRR] § 23-1.4 [b] [13]).

Here, defendant has made a prima facie showing that plaintiff did not engage in altering the building as that term is defined under Labor Law § 240 (1). As defendant argues, plaintiff testified that in order to remove the sign, he merely needed to lift the corner of the sign in order to detach the hooks of the sign from the corresponding hooks on the building. Further, other than ladders, the job did not require any tools or equipment, bolts or nails to be removed, or any drilling into the building. Thus, the removal of the sign did not require any alteration of the exterior of the wall or any "significant physical change to the configuration or composition of the building" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *see also Munoz v DJZ Realty, LLC,* 5 NY3d 747, 748 [2005] [applying a new advertisement to the face of a billboard that sat atop a building changed billboard's outward appearance, "but did not change the billboard's structure, and thus [was] more akin to cosmetic maintenance or decorative modification than to 'altering'" under Labor Law § 240 (1)]; *Adika v Beth Gavriel Bukharian Congregation*, 119 AD3d 827, 828 [2d Dept 2014] [painting

decorative images on large wooden panels, and installing one of those panels on the wall of a yeshiva was not protected activity under Labor Law § 240 (1)]; *Anderson v Schwartz*, 24 AD3d 234, 234 [1st Dept 2005], *lv denied* 7 NY3d 707 [2006], quoting *Munoz*, 5 NY3d at 748 [removal of temporary aluminum auction sign attached to exterior of commercial building with four and one-half inch bolts, and unconnected to any power source while perhaps changing "outward appearance of the [building] . . . did not change the [building's] structure, and thus [was] more akin to cosmetic maintenance or decorative modification than to 'altering'" under Labor Law § 240 (1)]; *compare Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 746 [2d Dept 2016] [installation of wood paneling on building walls "changed the dimension, thickness, and composition of the sheetwork walls and steel doors," and therefore "constituted a significant physical change to the configuration or composition of the building"]).

Defendant has also established that Labor Law § 241 (6) is inapplicable because removing a non-permanent sign without the use of any tools cannot be considered construction or excavation work; removing the sign did not require any bolts or nails to be removed, any holes drilled nor any modifications to the exterior wall of the building; and since removal of the sign was not related to any renovations defendant was going to perform and plaintiff's other work that day was not related to defendant's leased premises, plaintiff was not working at a construction site for purposes of the Labor Law.

In opposition, plaintiff argues that under Labor Law § 240 (1) he was engaged in altering the building because he was "removing a sign that was affixed flat to the exterior wall of the defendant's building, and . . . is deemed part of the building" (plaintiff's affirmation in opposition at ¶ 54). He also contends that under Labor Law § 240 (1), Labor Law § 241 (6), and Rules of New York State Department of Labor (12 NYCRR) § 23-1.4 (b) (13), his work was performed in preparation for and ancillary to the protected activity of "painting" defendant's new sign, that painting the sign constitutes a significant change to the configuration and composition of the building because it essentially renamed the building and/or the prime tenant in the building, and that he was involved in both removal and installation of the sign, which is also defined as a significant physical change to the configuration and composition of the building (*id.* at ¶ 58).

As defendant argues, with respect to whether plaintiff's work constituted alteration of the building, the cases upon which plaintiff relies are misplaced because they involve signs actually affixed to the building, unlike here, where the sign was only attached to the hooks which were in turn attached to the exterior of the wall, and was therefore not affixed to the building itself (*compare Izrailev v Ficarra Furniture of Long Is.*, 70 NY2d 813, 815 [1987] [where "sign was only attached with a number of screws,"[6] "extended across the facade of the premises" and "was affixed so as to be held flat against the building wall," the sign "was part of the building for purposes of the statute"]; *Lawyer v Rotterdam Ventures*, 204 AD2d

[6] *Izrailev v Ficarra Furniture of Long Is.*, 121 AD2d 685, 686 [2d Dept 1986], *revd* 70 NY2d 813 [1987].

878, 879 [3rd Dept 1994], *lv dismissed* 84 NY2d 864 [1994] ["standing on a ladder to install a sign on (the front portion of) defendant's building] is the type of work contemplated by Labor Law § 240 (1)"]; *Neville v Deters*, 175 AD2d 597, 597 [4th Dept 1991] ["replacing a sign which was affixed to a building owned by defendants" was an activity entitling injured plaintiff to protection of Labor Law § 240 (1)]).

Moreover, plaintiff does not rebut defendant's showing that under Labor Law § 240 (1), removal of the sign did not require making any physical change to the building. In addition, as defendant argues, plaintiff fails to provide any evidence that his work was performed in preparation for or related to the painting of the sign. In this regard, Ms. North testified that at the time of plaintiff's accident, she had no intention of installing a new sign. And, as defendant contends, even if Ms. North intended to replace the sign at the time of plaintiff's accident (presumably based on plaintiff's hearsay testimony that Jorge told him that Ms. North wanted to remove the sign so she could put up a new one), there is no evidence that Ms. North intended *to paint* the sign at that time. Specifically, Ms. North testified that it was only when she saw the sign in the trash that she decided to remove and paint it. Further, although plaintiff testified that Jorge told him he wanted his help to remove the sign so Ms. North could put up a new one, when plaintiff was asked at his deposition if Jorge told him what he (plaintiff) was going to do with the sign when he (plaintiff) took it down, plaintiff testified "No . . . He told me just help me." Thus, plaintiff has failed to demonstrate that removal of the sign was in preparation for installing and painting a new one.

As such, plaintiff has failed to raise a triable issue of fact that he was engaged in a covered activity under Labor Law §§ 240 (1) and 241 (6).

Assuming defendant is deemed an owner under the Labor Law, defendant also argues that plaintiff's Labor Law § 200/common-law negligence claim must nevertheless be dismissed. "Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Wadlowski v Cohen*, 150 AD3d 930, 931 [2d Dept 2017] [internal citations and quotation marks omitted]). Thus, "[w]hen a worker at a job site is injured as a result of a dangerous or defective premises condition," a property owner will be held liable under Labor Law § 200 and common-law negligence where it "created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition" (*id.* [internal citations and quotation marks omitted]). "[W]hen a worker at a job site is injured as a result of dangerous or defective equipment used in the performance of work duties," the property owner will be held liable under Labor Law § 200 and for common-law negligence where it "had the authority to supervise or control the means and methods of the work" (*id.* at 931-932 [internal citations and quotations marks omitted]). "Where . . . an accident is alleged to involve defects in both the premises and the equipment used at the work site, the property owner seeking dismissal of "causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (*id.* at 932 [internal citations and quotation marks omitted]).

Defendant has made a prima facie showing that this cause of action should be dismissed on the grounds that it did not supervise or control the means and methods of plaintiff's work and did not have actual or constructive notice of any dangerous condition. In this regard, defendant points to the affidavit of Ms. North, who avers that defendant did not supply the ladders used by Mr. Verde's employees, and that while it maintained the sidewalk adjacent to 254 Irving Avenue after entering into the lease, she and defendant were not aware of any defective conditions with respect to the sidewalk on or before the date of the accident, that defendant always removed any snow or icy condition on the sidewalk on or before the date of the accident, and that defendant was not aware of anyone slipping or falling on any snow or ice on this sidewalk before the date of the accident.

In addition, as defendant asserts, plaintiff testified that Jorge was the only person who directed his work removing the sign, that only Jorge and Lupe directed the work he was performing for Verde Construction immediately before the accident, and that all tools and equipment he used while working in the basement just prior to the accident were provided by Mr. Verde.

In opposition, plaintiff argues that questions of fact exist regarding: 1) the extent of Ms. North's presence "at the scene of the accident at the time that [he] was asked to assist Jorge in removing the sign;" 2) whether Ms. North or any of her employees were responsible for the safety of the ladder, i.e. its condition, its footing on the wet slippery sidewalk, and the absence of someone holding it "all of which could have prevented the accident;" and 3) in

effect, whether defendant failed to keep the wet, slippery sidewalk in a safe condition (plaintiff's affirmation in opposition at ¶ 60).

Plaintiff has failed to provide any evidence that Ms. North was present when Jorge asked him to help remove the sign. Even assuming Ms. North was present when the accident occurred--given plaintiff's conflicting testimony--her mere presence fails to establish that she was supervising plaintiff's work. Further, defendant was not involved in placing the ladder on the sidewalk. Even plaintiff concedes that only Jorge told him how to remove the sign, including using the ladders.

In addition, plaintiff has failed to raise a material issue of fact that defendant was negligent in allowing the sidewalk to be wet. "The mere fact that the sidewalk was wet was not sufficient to establish a dangerous condition" (*Patrick v Cho's Fruit & Vegetables*, 248 AD2d 692, 692 [2d Dept 1998]; *see also Bernal v 521 Park Ave. Condo*, 128 AD3d 750, 750 [2d Dept 2015]).

In summary, the motion of defendant to dismiss the complaint, as well as any cross claim asserted against it, is granted.

This constitutes the decision and order of the court.

ENTER

J.S.C.

HON. EDGAR G. WALKER

KINGS COUNTY CLERK
FILED
2019 FEB -5 AM 9:27