Nadborski v 636 Leonard LLC
2019 NY Slip Op 32711(U)
September 10, 2019
Supreme Court, Kings County
Docket Number: 509050/2014
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of September, 2019.

PRESENT:

HON. DEBRA SILBER,
Justice.

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WALDEMAR NADBORSKI,

Plaintiff,

- against -

636 LEONARD LLC, 636 LEONARD GROUP, LLC, BELVEDERE BRIDGE ENTERPRISES, INC., BELVEDERE XXII CONDOMINIUM, JERZY PLAZA and MARTA PLAZA,

Defendants.

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DECISION/ORDER

Index No. 509050/2014

Motion Sequence Nos. 9, 12

The following papers number 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5, 6
Reply Affidavits (Affirmations)	7

Upon the foregoing papers, defendant Belvedere XXII Condominium (Condominium) moves, in motion (mot.) sequence (seq.) 9, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint of plaintiff Waldemar Nadborski as asserted against it. Plaintiff cross-moves, in mot. seq. 12, for an order, pursuant to CPLR 3212,

granting him partial summary judgment on the issue of liability against Condominium[1] pursuant to the Labor Law. Condominium is the only defendant remaining in this action, other than those in default, as the other defendants have been dismissed.

Background

Plaintiff commenced the instant action by electronically filing a summons and verified complaint with the Kings County Clerk's Office on October 2, 2014. The record indicates that Condominium is the owners' association of the improved premises, an eight-unit residential condominium, located at 636 Leonard Street in Brooklyn. Condominium had hired nonparty Summit Development (Summit) to perform waterproofing and related facade work on the subject building.

The record further indicates that on June 12, 2013, plaintiff was a Summit "project manager" or "project supervisor." At that time, Summit workers were performing resurfacing and waterproofing work on the balconies on the rear of the building. This work required Summit workers to access the two yards behind the building; one yard was part of Unit 1A and the other, part of Unit 1B. There was no public access to these yards; access to them was limited to the two unit owners.[2]

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[1] Plaintiff's cross motion also seeks summary judgment against Jerzy Plaza and Marta Plaza (the Plaza defendants); however, by order dated May 30, 2019, this court awarded the Plaza defendants (as well as Belvedere Bridge Enterprises, Inc.) summary judgment dismissing all claims asserted against them (Mot. Seq. # 10 and 11). In an order dated October 15, 2015, a default judgment on liability was issued against defendants 636 Leonard LLC and 636 Leonard Group LLC (Mot. Seq. # 2).

[2] The condominium documents explicitly disclaim any "limited" common elements or areas and, as such, any area of 636 Leonard is either part of a unit or a wholly common area.

Condominium, Summit and plaintiff arranged another way to access the rear yards. They approached the Plaza defendants, the owners of the adjoining premises, located at 638 Leonard Street, who provided Summit workers access through a locked alley on their premises. From this alley, workers could access 636 Leonard—specifically, the fence on the top of a retaining wall around the Unit 1A yard. The yard was on different levels and the part of the yard farthest from the apartment was approximately eight feet below the street level, with a retaining wall around it. From the testimony of Mr. Plaza, it seems these arrangements were made with the (then) President of the Condominium, Justin Karr, who was (then) the owner of Unit 1A.

The top of the retaining wall had a wooden fence on it.[3] To access the Unit 1A yard, plaintiff would remove a part of the fence, walk along the narrow ledge on top of the retaining wall above the sunken portion of the yard, for a distance of ten to twenty feet, holding onto the fence for balance, in order to reach a place where the rear yard was no longer sunken. There, he would enter the yard, retrieve a ladder and descend the stairs to the sunken patio, where he would place the ladder at the spot where part of the fence had been removed, in order to provide access for Summit's workers throughout the day. At the end of the work day, the process was reversed and the fencing restored. However, on the subject date, while plaintiff was walking along the retaining wall, part of the wooden fence he was holding onto splintered and crumbled, causing him to lose his balance and fall approximately eight feet down into the Unit 1A yard and to sustain injuries.

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[3] The subject fence was part of Unit 1A, and the unit owner has sole responsibility for maintaining the fence.

The complaint (insofar as relevant to the instant motion) asserts causes of action alleging that violations of sections 240 (1), 241 (6) and 200 of the Labor Law led to the accident. Plaintiff claims that Condominium,[4] as the owner of the subject premises or agent of the unit owners, is vicariously liable for such negligence and Labor Law violations. Plaintiff also claims that at all relevant times, he was engaged in work within the scope of the Labor Law.[5] Plaintiff further contends that defendants breached their common-law duty to maintain a safe workplace. Moreover, plaintiff asserts that Condominium is subject to vicarious liability, without regard to fault, pursuant to the Labor Law. Plaintiff asserts that these violations of the Labor Law and breaches of the common-law duty of care proximately caused his injuries, and plaintiff therefore seeks damages.

The various defendants interposed answers, and discovery and motion practice ensued. On August 14, 2018, plaintiff filed a note of issue with a trial by jury demand,

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[4] The court notes that plaintiff has brought suit against an unincorporated condominium association and has failed to name Condominium's president or treasurer in his or her representative capacity, as a party to this action, as is required by General Associations Law § 13. That section, entitled "Action or proceeding against unincorporated association," provides that: "An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally." However, the court further notes that this error, by itself, is not jurisdictional in nature and, thus, can be corrected by an amendment to the caption (*see Montalvo v Bakery & Confectionary Workers International Union Local No. 3,* 137 AD2d 506, 508 [1988]; *Miller v Student Assn., SUNY at Albany*, 75 AD2d 843 [1980]). *Matter of Motor Haulage Co. [International Bhd. of Teamsters]*, 298 NY 208 [1948]).

[5] Work within the scope of the vicarious liability provisions of Labor Law § 240 (1) is commonly referenced as "protected" activities, tasks or work. Workers covered by the statute are commonly referenced as "protected" workers.

certifying that discovery is complete and that this matter is ready for trial. The instant motions followed.

Arguments Supporting Condominium's Motion (Mot. Seq. 9)

In support of its motion for summary judgment dismissing the complaint, Condominium first addresses plaintiff's Labor Law § 240 (1) claim. Condominium points out that plaintiff was Summit's project supervisor. Condominium notes that Summit provided him with ladders, hard hats, harnesses, lanyards, and other safety equipment. Nevertheless, Condominium argues, the record indicates that plaintiff chose to walk along the ledge of the retaining wall instead of utilizing a ladder to safely descend to the yard from the wall. Also, Condominium adds, plaintiff could have prevented the accident by wearing his safety harness and life line, but chose not to use them. Condominium emphasizes that this accident occurred not because plaintiff was not provided with safety equipment—the record establishes that he was—but because plaintiff chose not to use the equipment in ascending and descending over the retaining wall. Therefore, Condominium avers, plaintiff's own foolish conduct and decisions—not any Labor Law violation, proximately caused his injuries. Condominium cites appellate authority suggesting that all of plaintiff's Labor Law claims—not just those based on Labor Law § 240 (1)—should thus be dismissed.

Next, Condominium argues that plaintiff's Labor Law § 241 (6) claim should be dismissed. Condominium points out that Labor Law § 241 (6) requires an injured worker to demonstrate the existence of a violation of an applicable Industrial Code provision (12 NYCRR ch. 1, subch. A). Condominium asserts that the plaintiff's claims lack merit because the Industrial Code provisions plaintiff alleges were violated are inapplicable to the facts of

this matter. Also, Condominium avers, a sustainable Labor Law § 241 (6) claim requires that plaintiff pleads (and eventually proves) a violation of one or more applicable Industrial Code provisions containing a positive, specific command. Condominium claims that appellate courts have determined that some Industrial Code provisions plaintiff cites lack the required specificity to support a Labor Law § 241 (6) claim. Finally, Condominium reiterates its position that plaintiff's failure to use available ladders, safety harnesses and life lines proximately caused the accident and thus justifies dismissing plaintiff's Labor Law § 241 (6) claim.

Finally, Condominium argues that, according to the record, plaintiff has no viable common-law negligence or Labor Law § 200 claims against it. Condominium notes that it hired Summit to perform waterproofing and related services and that the accident occurred during that work. Condominium adds that it neither supervised Summit's work (rather, plaintiff did) nor provided Summit with any tools or equipment. Condominium concludes that the accident resulted from Summit's means and methods, not because of any breach of a duty Condominium owed to plaintiff. Lastly, Condominium reiterates its position that plaintiff's failure to use available ladders, safety harnesses and life lines proximately caused the accident.

Similarly, Condominium points out that plaintiff alleges that the subject fence caused his injuries. Condominium highlights that the unit owner of Unit 1A, not a party to this action, both owned and bore responsibility for maintaining the subject fence. It adds that the relevant condominium documents, such as the offering plan and recorded condominium declaration and by-laws, establishes this point. Condominium argues that a determination

deeming that the fence proximately caused plaintiff's injuries (which Condominium disputes), in turn, means that Condominium cannot be held liable for the injuries under a common-law negligence theory. Condominium urges granting it summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it on these grounds and seeks such an order.

Arguments Supporting Plaintiff's Cross Motion (Mot. Seq. 12)

In support of his cross motion for partial summary judgment on the issue of liability, plaintiff first states that his erstwhile untimely cross motion should nevertheless be decided on its merits because it nearly mirrors Condominium's currently pending summary judgment motion. Plaintiff acknowledges that his cross motion is untimely; however, plaintiff points out that his arguments are made in a legitimate cross motion against moving parties (namely, Condominium at this stage) who timely moved for summary judgment. Plaintiff also notes that his cross motion involves the same issues Condominium already raised. Accordingly, plaintiff argues, his cross motion should be considered even though it is untimely.

Next, plaintiff notes that Labor Law § 240 (1) subjects owners, contractors and their agents to a non-delegable duty, without regard to ultimate responsibility, to provide adequate protection to workers against the risk of elevation-related construction site accidents. Plaintiff points out that if the duty to provide adequate protection is breached, owners, contractors and agents are vicariously liable for injuries that are proximately caused by the breach. Plaintiff suggests that Condominium is the fee owner of the premises, and is thus subject to the vicarious liability provisions of the Labor Law irrespective of whether Condominium was at fault for the breach. Moreover, plaintiff notes that appellate courts

have instructed that Labor Law § 240 (1) be interpreted as liberally as possible to afford workers protection. At a minimum, plaintiff continues, the statute requires owners and contractors to furnish to workers adequate safety devices that provide proper protection against elevation-related risks.

Plaintiff then claims that he has demonstrated in this action that he was subjected to an elevation-related hazard. He also asserts that he was not provided with any safety devices to protect him against the risk of falling from the top of the retaining wall. Consequently, plaintiff concludes, he fell and sustained injuries. Plaintiff argues that, therefore, he has demonstrated both the existence of a Labor Law § 240 (1) violation and that the violation proximately caused his injuries.

Accordingly, plaintiff reasons, Condominium can avoid liability only if the facts establish an applicable affirmative defense. Plaintiff recognizes, but rejects, the defense that he was the sole proximate cause of his injuries. Plaintiff claims that such a defense exists only when a plaintiff misused a safety device or engaged in unwise conduct. Here, plaintiff claims, he did neither. Plaintiff contends that Condominium and the building residents did not permit him to place scaffolds or ladders in a safe manner. Instead, he was directed to climb onto the narrow top of a wall and walk on it, without having any fall arresting devices provided to him.

Plaintiff points out that while walking across the narrow top of the wall, he fell eight feet into a backyard, and was thereby injured. He claims that the record indicates that he did not choose this method to reach the applicable area; instead, he states that he was compelled

to use it. For these reasons, plaintiff concludes that he is entitled to partial summary judgment against Condominium on liability pursuant to Labor Law § 240 (1).

Plaintiff further contends that he is entitled to partial summary judgment against Condominium on his Labor Law § 241 (6) claim. He emphasizes that § 241 (6) also imposes a non-delegable duty on Condominium—to comply with the provisions of the Industrial Code (12 NYCRR ch. 1, subch. A) during construction projects. Plaintiff acknowledges that a successful Labor Law § 241 (6) claim requires an injured worker to demonstrate a violation of an applicable Industrial Code provision. Plaintiff further acknowledges that the referenced Industrial Code provision must contain a specific safety command, and not reiterate general, common-law duties to guard against hazards. Plaintiff avers that demonstrating such a violation makes Condominium liable without regard to fault.

Here, plaintiff continues, the facts suggest that several provisions of the Industrial Code were violated. Specifically, plaintiff contends, one such provision requires at least ladder access to any elevated work area. Also, plaintiff argues that he was subjected to tripping and slipping hazards, which also violated the Industrial Code. Moreover, plaintiff asserts that yet another provision required furnishing him with a safety harness and lifelines to protect against falls, but he was not given any such devices. Plaintiff argues that these Industrial Code violations proximately caused his injuries and reiterates that Condominium is vicariously responsible for them. Plaintiff argues that no serious question exists that these Industrial Code provisions were violated, and that such violations were substantial factors leading to the accident. Plaintiff adds that New York appellate courts have considered the cited Industrial Code provisions and deemed them sufficiently specific to support Labor Law

§ 241 (6) claims. Plaintiff concludes that, therefore, he is entitled to partial summary judgment against Condominium on liability pursuant to Labor Law § 241 (6).

Lastly, plaintiff argues that he should be awarded partial summary judgment against Condominium on liability pursuant to Labor Law § 200. Plaintiff asserts that Condominium directed and controlled the manner in which he and his fellow Summit workers would access the relevant parts of the work site. He states that Condominium breached the ordinary, common-law duty to keep the premises safe by denying Summit permission to use ladders and scaffolds while performing their work. Moreover, he claims that Condominium's control of the premises left plaintiff with only one (unsafe) way to access the relevant area.

Plaintiff alleges that he has demonstrated that Condominium violated Labor Law § 200 by showing that it imposed unsafe requirements regarding access to the rear of the building on Summit, and that at least two premises hazards—the subject fence and wall—contributed to the accident. Plaintiff claims that Condominium exercised actual control over the relevant area, and, as such, it is liable, pursuant to Labor Law § 200, for his injuries. Hence, plaintiff advocates granting his motion in its entirety.

Plaintiff's Opposing Arguments

In opposition to Condominium's motion, plaintiff first asserts that the record belies its argument that he was the sole proximate cause of his injuries. Plaintiff claims that the so-called sole proximate cause defense requires a Labor Law defendant to show that plaintiff misused or refused to use an available safety device. Here, however, plaintiff continues, the record indicates that no such devices were made available. Moreover, plaintiff reiterates that he was not given any devices to prevent him from falling off the top of the eight-foot high

wall that he needed to traverse to reach the relevant area. Plaintiff reasons that, absent any device to protect against falls, he cannot have been the sole proximate cause of his injuries.

Plaintiff also argues against Condominium's contentions with regard to Labor Law § 241 (6). He first repeats that Condominium's agents did not permit Summit workers to use either ladders or scaffolds to reach the relevant work area. This lack of access, plaintiff continues, required him to traverse the narrow top of the subject wall to reach the relevant area. Plaintiff characterizes this means of access as a slipping and tripping hazard, which violates a specific Industrial Code provision. Moreover, plaintiff claims that defendant's refusal to allow ladders constitutes a separate Industrial Code violation. Additionally, plaintiff explains that to successfully traverse the subject wall, he had to steady himself by holding the fence. Plaintiff claims that the fence's poor condition led to the accident and thus violated an Industrial Code provision concerning carpentry and lumber quality. Lastly, plaintiff asserts that the Industrial Code was violated because he was not provided with any lifelines, safety belts or harnesses for fall arresting purposes. For these reasons, plaintiff urges rejecting Condominium's arguments concerning Labor Law § 241 (6).

Next, plaintiff argues against Condominium's contentions concerning Labor Law § 200. Plaintiff again asserts that the record shows that Condominium specifically directed and controlled the manner in which Summit employees were permitted to access the relevant work area. Plaintiff points out that Condominium's control extended to denying Summit workers the use of ladders and scaffolds. Coupled with the subject fence's rickety condition, plaintiff continues, this accident implicates Labor Law § 200 in two ways: Condominium imposed dangerous requirements on plaintiff's manner of work, and plaintiff was suffered

to work near a dangerous premises condition that led to the accident. These accident-causing factors, plaintiff submits, require denying the portion of Condominium's motion seeking summary judgment dismissing the Labor Law § 200 claim.

Lastly, plaintiff accuses Condominium of overemphasizing his claims concerning the subject fence. Plaintiff reiterates that Condominium's agents directed him to work in an area that, without ladders or scaffolds, could not be safely accessed. Plaintiff then reasons that Condominium, for Labor Law purposes, is subject to vicarious liability as an owner or as an agent of the unit owners. Any details, plaintiff continues, about ownership or management—such as those contained in the condominium offering plan or who owned certain units—are irrelevant for Labor Law purposes. Plaintiff reiterates that his claims are not limited to just asserting that the fence was worn and rickety. Therefore, plaintiff recommends rejecting any contention that Condominium is entitled to summary judgment because it was not responsible herein.

Condominium's Opposing and Reply Arguments

In opposition to plaintiff's cross motion, and in reply to plaintiff's opposition to its motion, Condominium first asserts that plaintiff misstates the sworn deposition testimony in this action. Condominium references plaintiff's testimony that it was he who chose how to access the relevant work area - including the choice to traverse the narrow top of the retaining wall. Moreover, Condominium continues, plaintiff's present contentions concerning access to ladders and scaffolding are misleading. Condominium observes that even plaintiff testified that scaffolds could not have been installed in the subject area. It adds that plaintiff was not denied the use of ladders, which were present and available in the

subject area. Indeed, Condominium states, plaintiff testified that he could have used a ladder to descend to the yard from the retaining wall, but rejected this option as impractical. Condominium asserts that the only restriction it imposed was the need for plaintiff to remove the ladder from the area at the end of the day and return with it on the next day.

Condominium reiterates that it did not control access to the relevant work area. Condominium contends that it was necessary to arrange passage through the Plaza's alleyway to reach the back of the subject premises; the absence or presence of scaffolds or ladders in the relevant area would not change that fact; and, notwithstanding plaintiff's present contentions, no one directed him how to navigate along the subject wall.

Condominium also notes plaintiff's testimony concerning both his hard hat and safety harness. Specifically, Condominium asserts that plaintiff's testimony indicates that he had both safety items available at relevant times but chose not to use them. Condominium reasons that their availability and plaintiff's choice not to use a ladder establishes that plaintiff was the sole proximate cause of his injuries.

As for Labor Law § 241 (6), Condominium contends that the Industrial Code sections plaintiff cites in his bill of particulars, §§ 23-1.5, 23-1.7, 23-1.16, and 23-1.21 are either inapplicable or were not violated and that the sole proximate cause defense also applies to defeat a Labor Law § 241 (6) claim.

With respect to Labor Law § 200, Condominium explains that it did not control the subject alley, the retaining wall, or any portion of the fence on it. Condominium adds that plaintiff chose the method of accessing the rear area of the subject premises. Specifically, it references plaintiff's testimony that there was nothing dangerous about the top of the

retaining wall and that, instead, the accident occurred because he grasped the wooden fence to keep his balance and two of the wooden boards broke. Condominium concludes that it was in no way responsible for this accident, and, therefore, granting it summary judgment dismissing the complaint is appropriate.

Discussion

Summary Judgment Standards

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d

Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the summary judgment motion must present evidentiary proof sufficient to establish the existence of material factual issues (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a summary judgment motion are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a summary judgment motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Furthermore, "[i]n all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotations omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept

1989]; *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Timeliness of Plaintiff's Cross Motion

This court notes that plaintiff's cross motion is prima facie untimely. The applicable rule (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 [formerly Rule 13]), states that:

> "[i]n cases where the City of New York is a defendant and is represented by the Tort Division of the Corporation Counsel's office, summary judgment motions may be made no later than 120 days after the filing of a Note of Issue. In all other matters, including third party actions, motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue. In both instances the above time limitation may only be extended by the Court upon good cause shown. See CPLR 3212(a)."

In this action, plaintiff filed a note of issue and certificate of readiness on August 14, 2018. Therefore, plaintiff had until October 15, 2018[6] to timely move for partial summary judgment. Nevertheless, plaintiff did not electronically file his partial summary judgment motion until March 27, 2019; plaintiff's motion is thus untimely. Generally, courts should

[6] The sixtieth day is actually October 13, 2018, which was a Saturday (*see* General Construction Law § 25 [1]).

not entertain such an untimely summary judgment motion absent a showing of "good cause" for the delay (CPLR 3212 [a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *First Union Auto Fin., Inc. v Donat*, 16 AD3d 372 [2005]; *Breiding v Giladi*, 15 AD3d 435 [2005]). The requisite "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill*, 2 NY3d at 652).

However, "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007], citing *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept 2005]; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment*, 298 AD2d 540 [2d Dept 2002]; *Miranda v Devlin*, 260 AD2d 451 [2d Dept 1999]). Condominium's motion seeks summary judgment dismissing plaintiff's complaint, and raises arguments concerning Labor Law § 240 (1), § 241 (6) and § 200; plaintiff's cross motion contains arguments concerning the same. Thus, since the same statutes and causes of action are implicated, the grounds for both the pending motion and cross motion are thus nearly identical, and "the nearly identical nature of the grounds may provide the requisite good cause" (*id.* at 592). Accordingly, despite the fact that plaintiff's cross motion is untimely, good cause for the lateness exists, and the court will therefore consider plaintiff's untimely cross motion (*id.*; *see also Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d

887, 890 [2d Dept 2016]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]).

Condominium's Motion

The court denies Condominium's motion. Condominium raises arguments concerning Labor Law § 240 (1), § 241 (6) and § 200. Labor Law § 240 (1) states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required "proper protection" against elevation-related risks is non-delegable; therefore,

owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]).

Here, Condominium has not shown, prima facie, that it complied with its non-delegable duty to provide proper protection against elevated risks. Specifically, the record shows that plaintiff needed regular access to the yard behind Unit 1A to perform the resurfacing and waterproofing work on the rear of the building and the balconies. Contrary to Condominium's present arguments, the record suggests that it was unnecessary to subject plaintiff to the elevation-related risk associated with reaching the yard from the top of the subject wall eight feet above the yard. To the contrary, the record indicates that the subject yard could have been reached through Unit 1A. Condominium argues that such access was impossible, but the relevant condominium documents belie that assertion. Indeed, each unit owner is required to grant the condominium board a right of unit access—including forced access if deemed necessary—for structural work (here, resurfacing and waterproofing). The Condominium's By-Laws, Section 5.9 *Rights of Access* state, at Page 62, in pertinent part, as follows:

> (A) Each Unit Owner shall grant to the Condominium Board, to the Managing Agent or Manager (if any), to the Resident Manager or to any other Person authorized by any of the foregoing a right of access (including the right of forced entry if required in the discretion of the party seeking such entry) to his Unit, for the purposes of:
>
> (i) making inspections of, or removing violations noted or issued by any governmental authority against the Common Elements or any other part of the Property;
>
> (ii) curing defaults hereunder or under the Declaration or violations of the Rules and Regulations committed by such Unit owner or

> correcting any conditions originating in his Unit and threatening another Unit or all or a portion of the Common Elements;
>
> (iii) performing maintenance, installations, alterations, repairs, or replacements to the structural elements, mechanical or electrical services, or other portions of the Common Elements located within his Unit or elsewhere in the Building;
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> * * *
>
> Except in cases of emergency (that is, a condition requiring repairs or replacement immediately necessary for the preservation of safety of the Building or for the safety of the occupants of the Building or other individuals, or required to avoid the suspension of any necessary service in the Building), the foregoing rights of access shall be exercised only upon not less than 1 day's advance notice and only in such a manner as will not unreasonably interfere with the use of the Units for their permitted purposes. In cases of emergency, however, such rights of access may be exercised immediately, without advance notice and whether or not the Unit Owner is present.

Allowing plaintiff (and/or other Summit workers) to use Unit 1A as a means of access to the subject yard would have prevented exposing plaintiff to the elevation-related risk[7] involved in traversing the top of the subject retaining wall. Therefore, Condominium's failure to allow Summit access through Unit 1A presents at least an issue of fact as to whether Condominium violated Labor Law § 240 (1).

Next, Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings

[7] Moreover, there is an inherent contradiction in Condominium's arguments: Condominium maintains that it was impossible to access the subject yard except by means of the subject retaining wall, but also contends that plaintiff chose the manner to reach the wall. If descending from the top of the wall to the yard was the only possible manner to reach the yard, doing so is hardly a choice. In any event, the record suggests at least one other means of accessing the yard, and, as such, awarding Condominium summary judgment would be inappropriate.

> 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross,* 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto,* 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross,* 81 NY2d 494 [1993]) and "mandates

a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d at 351). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross,* 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

To successfully move for summary judgment dismissing Labor Law § 241 (6) claims, defendants must demonstrate "that the Industrial Code provisions cited were inapplicable to the facts, or that the alleged violation of the same was not a proximate cause of the damages alleged" (*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2009], citing *Ross,* 81 NY2d 494 [1993]; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550 [2007]; *Rivera v Santos*, 35 AD3d 700 [2006]). In order to successfully oppose a motion for summary judgment dismissing Labor Law § 241 (6) claims, a plaintiff is required to note an applicable provision of the Industrial Code that contains concrete specifications with which owners and contractors must comply (*Donovan v S & L Concrete Constr. Corp., Inc.*, 234 AD2d 336, 337 [1996]; *see also Ross,* 81 NY2d 494 [1993]). Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, such a violation "does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury . . . whether the equipment, operation or conduct at the work site was reasonable and adequate under the particular circumstances" (*Seaman v*

Bellmore Fire Dist., 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]).

Condominium is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claims because it has not demonstrated "that the Industrial Code provisions cited were inapplicable to the facts, or that the alleged violation of the same was not a proximate cause of the damages alleged" (*Abreo*, 60 AD3d at 881). Specifically, Industrial Code § 23-1.7 (f), requires that stairways, ramps or runners be provided as means of access to work levels above or below ground, and has been held to set forth specific standards of conduct sufficient to support a Labor Law § 241(6) cause of action (*O'Hare v City of New York*, 280 AD2d 458, 458 [2d Dept 2001]). Given the convoluted method plaintiff was using to reach the below ground yard, Industrial Code § 23-1.7 (f) may well have been violated (*see Gonzalez v Pon Lin Realty Corp.*, 34 AD3d 638, 639 [2d Dept 2006] ["The Supreme Court erred in granting that branch of Pon Lin's motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action because Pon Lin failed to establish that 12 NYCRR 23–1.7(f) was inapplicable to the facts of this case"]). Thus, plaintiff 's Labor Law § 241 (6) cause of action is adequately supported (*see e.g. Rivera*, 35 AD3d at 702) and

the Condominium is not entitled to summary judgment with respect to plaintiff's Labor Law § 241 (6) claim.

Lastly, Condominium's motion is denied insofar as it seeks summary judgment dismissing plaintiff's Labor Law § 200 claim. Labor Law § 200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto,* 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi,* 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). Since Condominium is the agent of the unit owners, pursuant to the provisions of

the Condominium Declaration, the By-Laws and the Unit Powers of Attorney its duty to keep its premises in a reasonably safe condition for workers it hires is nondelegable (*Arabian v Benenson*, 284 AD2d 422 [2d Dept 2001]; *Tagle v Jakob*, 97 NY2d 165 [2001]).[8]

Here, the record does not eliminate all questions of fact as to whether the premises were kept in a reasonably safe condition given the requirements of plaintiff's work. As stated above, Condominium arguably should have secured passage through Unit 1A, a safe means of accessing the yard behind it. If Condominium had done so, plaintiff would not have been exposed to the risks associated with having to traverse the top of the subject retaining wall, and would not have fallen. For these reasons, Condominium is not entitled to summary judgment dismissing plaintiff's Labor Law § 200 claims. Accordingly, Condominium's motion is denied in its entirety.

Plaintiff's Motion

However, the court also denies plaintiff's cross motion for partial summary judgment on the issue of liability against Condominium. Plaintiff, like Condominium, raises arguments concerning Labor Law § 240 (1), § 241 (6) and § 200. Assuming that plaintiff has demonstrated that he was engaged in a so-called "protected" task (*cf. Vasquez v Minadis*, 86 AD3d 604, 605 [2011]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), plaintiff has nevertheless not demonstrated the absence of issues of fact with respect to Condominium's liability (*see e.g. Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011] [issue of proper protection under Labor Law § 240 (1) is question of fact except when a

[8]The court offers no opinion on whether Condominium has an indemnification claim against the unit owner.

safety device "collapses, moves, falls, or otherwise fails"]; *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] [liability pursuant to Labor Law § 240 (1) is a question of fact except when the device collapses, moves, falls]; *Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [even if violation of Industrial Code shown, jury must resolve issue whether worksite conduct was reasonable]; *Chahales v Garber*, 195 AD2d 585, 586 [2d Dept 1993] [summary judgment rarely appropriate in common-law negligence]; *St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [whether parties conformed to duty of care is a question of fact necessitating a trial]). Moreover, viewing the record in the light most favorable to Condominium, the opponent of plaintiff's motion (*Pierre-Louis,* 66 AD3d at 862), the record demonstrates an issue of fact as to whether plaintiff was the sole proximate cause of his accident and injuries. The record suggests that it may have been possible for plaintiff to remove a portion of the fence at another location so that he would not have had to traverse the retaining wall to obtain access to the yard. "The statutory protection [of Labor Law § 240 (1)] does not extend to workers who have adequate and safe equipment available to them but refuse to use it" (*Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982], *appeal dismissed* 58 NY2d 824 [1983]; *see also Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010] [triable issues of fact presented on Labor Law § 241 (6) claim as to whether sole proximate cause of injuries was refusal to obey instructions to use actually available safety device]; *Sponholz v Benderson Prop. Dev., Inc.*, 273 AD2d 791, 792 [2d Dept 2000] ["There is a triable issue of fact whether defendants provided a safe stairway for plaintiff to use" as required by 12 NYCRR 23–1.7(f)]). Given that plaintiff has not demonstrated the absence of triable issues of fact as to Condominium's liability pursuant

to Labor Law § 240 (1), § 241 (6) and § 200, plaintiff's cross motion for partial summary judgment is denied. Accordingly, it is

ORDERED that the defendant Belvedere XXII Condominium's summary judgment motion to dismiss plaintiff Waldemar Nadborski's complaint is denied; and it is further

ORDERED that plaintiff Waldemar Nadborski's partial summary judgment motion against defendant Belvedere XXII Condominium on the issue of liability is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court