Obas v 64 Onderdonk Ave. LLC
2019 NY Slip Op 32779(U)
September 19, 2019
Supreme Court, Kings County
Docket Number: 504406/16
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 Civic Center, Brooklyn, New York, on the 19th day of September, 2019.

P R E S E N T:

HON. DEBRA SILBER

Justice.

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ENNOLD OBAS,

Plaintiff,

- against -

64 ONDERDONK AVE. LLC , PEARL REALTY MANAGEMENT, LLC, NEW YORK SIGHTSEEING INC. AND SCOTT TRANSFER PROPERTIES, LLC,

Defendants.

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64 ONDERDONK AVE, LLC AND SCOTT TRANSFER PROPERTIES, LLC,

Third-Party Plaintiffs,

- against -

GO NEW YORK TOURS, INC.,

Third-Party Defendant.

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DECISION / ORDER

Index No. 504406/16
Mot. Seq. # 6, 7 & 8

The following papers numbered 1 to 17 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-6, 7-8
Opposing Affidavits (Affirmations)	9-10, 11, 12-13
Reply Affidavits (Affirmations)	14-15, 16, 17

Upon the foregoing papers, plaintiff Ennold Obas moves (Mot. Seq. # 7) for an order, pursuant to CPLR 3212, granting him partial summary judgment as to liability on his Labor Law § 240 (1) cause of action. Defendants/third-party plaintiffs 64 Onderdonk Ave., LLC, Scott Transfer Properties, LLC, and defendant Pearl Realty Management, LLC move (Mot.

Seq. # 8) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's Labor Law claims and common-law negligence claim. Third-party defendant Go New York Tours, Inc. moves (Mot. Seq. # 6) for an order, pursuant to CPLR 3212 and/or 3211(a)(7), dismissing plaintiff's complaint, as well as all third-party claims against it.[1]

Factual Background

This personal injury action stems from an incident which occurred on July 5, 2015 when the plaintiff Ennold Obas (plaintiff) was performing work at the premises located at 74 Onderdonk Avenue, Queens, New York. Defendant/third-party plaintiff 64 Onderdonk Ave. LLC (Onderdonk) is the owner of the premises.[2] Defendant Pearl Realty Management LLC (Pearl) was the property manager for the premises at the time of the incident. Third-party defendant Go New York Tours, Inc. (Go New York), a company that operates a sightseeing tour bus service, entered into a lease agreement dated November 29, 2012 with defendant/third-party plaintiff Scott Transfer Properties, LLC (Scott) for its use of the premises as a garage/warehouse for the storage and maintenance of Go New York's tour buses. Go New York has a fleet of approximately 25 tour buses. At the time of the accident, plaintiff was employed by Go New York as an electrical mechanic.

During his first deposition, which commenced on October 12, 2017, plaintiff testified that he started working for Go New York about a year before his accident occurred. He was hired as an electrical mechanic to work on the tour buses. He testified that he primarily worked on repairs and maintenance of the electrical systems of Go New York's tour buses.

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[1] Although Go New York moves under both CPLR 3211 and 3212, it solely discusses the motion as one for summary judgment, thereby charting the course of the motion.

[2] The court notes that while counsel for defendants (Onderdonk, Scott Transfer and Pearl) state that the property in question is owned by both Onderdonk and Scott Transfer (affirmation of defendants' counsel at 9), the last recorded deed, dated April 30, 2012, lists Onderdonk as the sole owner of the subject premises.

He described the premises as a big open yard with a garage structure, which had bays with high ceilings, which were approximately 20 feet high. The buses would pull into the bays in order to undergo repairs. Plaintiff explained that he typically used either a six-foot or a ten-foot A-frame ladder to work on the buses. Some of his work involved repairing the headlights and taillights on the buses and working on the windshields. A man named Pedro was plaintiff's Go New York supervisor, and gave him his daily assignments.

Plaintiff testified that three days before the accident, Pedro told him that he had to fix the wiring for the garage. Plaintiff explained that (Plaintiff's First Deposition tr. at 79) the wires supplied power to various tools/machines used to repair the buses, such as the jacks, welders and air compressors (*id.* at 79-80). The wires were located approximately 20 feet up, in the ceiling, and extended down to the floor, to connect to the various machines (*id.* at 80). Plaintiff explained that the wires started in an electrical panel box, located in the back of the garage, which was about five feet high, and ran up to the ceiling (*id.* at 84-85). Plaintiff further stated that this task, to fix the wiring, required him to tape some wires which were hanging down from the ceiling, in addition to cutting and splicing some of the wires to shorten them, so the buses would not hit them and shut off the power when they passed under them (*id.* at 88, 93). There was only one extension ladder on the premises, which was about 20 to 25 feet long and was made of aluminum (*id.* at 68-69). Plaintiff testified that the extension ladder did not have any footings and lacked a hook at the top, which was usually used to secure the ladder up against something when in use (*id.* at 74-75, 77). Plaintiff testified that he had complained to Pedro about the condition of the extension ladder on several occasions (*id.* at 75).

On the morning of the plaintiff's accident, the plaintiff first went to the panel box to check to see where each of the wires "were running." One wire serviced the air compressor and one wire serviced another machine called a DPF device. Plaintiff used the extension

ladder, bringing pliers and electrical tape along (*id.* at 151). The plaintiff leaned the ladder up against the wall at an angle before he started his work (*id.* at 76). Plaintiff testified that he repositioned the ladder at least three or four times in order to climb up to the ceiling to tape the wires that were hanging down a little, to secure them back in their place in the track (*id.* at 102). Plaintiff then began cutting and splicing wires that were hanging lower down, to shorten them, and was taping them up in the metal track on the ceiling (*id.* at 101-102). At some point, the plaintiff began working on two wires that were intertwined with the grounding wire, which came out of the panel box (which plaintiff also referred to as the "safety switch" in the box). These wires supplied power to the air compressor machine. Plaintiff explained that he then repositioned the ladder and climbed up, in order to tape these wires with the electrical tape (*id.* at 103). When he attempted to apply the electrical tape to another wire in the same location in the track, he felt an electric shock in his right hand, which caused both him and the ladder to fall to the ground (*id.* at 110-111). Plaintiff recalled that the ladder moved to the side when he felt the electric shock (*id.* at 112). He claimed that his work involved cutting, splicing, as well as taping the wires that serviced the tools/machines in the garage, and putting them into the metal track on the ceiling (*id.* at 148-150). Plaintiff also used the electrical tape to cover up any portions of the wires that were exposed (*id.* at 150). If the accident had not occurred, plaintiff claimed that he would have continued "fixing" all of the wires (*id.*).

A second deposition of the plaintiff was conducted on January 29, 2018, approximately three months after his first deposition. He was represented by a different attorney at this deposition. As related to the happening of his accident, the plaintiff testified that Pedro, his Go New York supervisor, had asked him to upgrade and fix the electrical system for the building (Plaintiff's Second Deposition tr. at 189, 198). He stated that the electrical system in the garage was unreliable, in that the power and circuit breakers were

constantly cutting off, with sparking, and that the buses regularly hit the low-hanging wires when they came into their bays (*id.* at 190). In order to fix these conditions, plaintiff testified that he was planning to "level" all of the breakers, as well as replace certain breakers that kept cutting off, replace the old wires with new ones, and to better connect the air compressor, which entailed cutting, splicing and taping the wires (*id.* at 192-193). Plaintiff further claimed that he had started this electrical upgrade work three days before his accident occurred, and if the accident had not occurred, he estimated that it would have taken a total of eight days to complete the work (*id.* at 194).

Asin Kostadinov, the president of Go New York was deposed, and testified that his company leased the space to use as a storage and repair facility for Go New York's tour buses. During the first six months that Go New York was in possession of the subject leased space, which was before plaintiff started working there, Kostadinov recalled that the landlord had agreed to, and did, provide more amperage/power to the warehouse in order to operate certain tools/machinery they used to repair the buses (Kostadinov tr. at 33). Kostadinov testified that the amperage power to the premises had to be increased in order to facilitate the repair work on the buses (*id.* at 28-29). When Pedro told him about the need to fix or upgrade the electrical system, Kostadinov authorized Pedro "to find a way to upgrade" the electrical system (*id.* at 35). Kostadinov testified that the plaintiff's sole duties as a Go New York employee was to maintain the buses, which included repairs to the electrical systems on the buses (*id.* at 58). He further testified that Go New York would have hired a contractor to do electrical work on the premises if it was necessary, and that neither the plaintiff, nor any other Go New York employees, were permitted to do such work (*id.* at 83). According to Kostadinov, Go New York did not hire any contractors, or have any work done to the electrical system, and the landlord had taken care of his request to increase the amperage/power (*id.*). Kostadinov testified that he visited the premises about once a week,

and that Go New York did not own the extension ladder that plaintiff used on the day of his accident (*id.* at 124).

Plaintiff subsequently commenced this personal injury action against Onderdonk, Pearl and defendant New York Sightseeing, Inc.[3] alleging violations of Labor Law §§ 200, 240 (1), 241 (6), as well as common-law negligence. Issue was joined by Onderdonk and Pearl on or about May 5, 2016. Plaintiff subsequently filed an Amended Summons and Complaint to include Scott as a direct defendant. Onderdonk, Pearl and Scott (collectively, defendants) interposed a Verified Answer to the Amended Complaint with a cross-claim on or about June 8, 2016. Onderdonk and Scott then commenced a third-party action against Go New York, asserting claims for common-law indemnification, contractual indemnification, contribution and breach of contract for failure to procure insurance. Issue was joined by Go New York with the service of its Third-Party Answer with counterclaims. The parties thereafter engaged in discovery, and at a Final Pre-Note conference, this court issued an order, dated June 5, 2018, extending the time for filing dispositive motions to September 28, 2018. The following motions ensued.

Discussion

Plaintiff's Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment as to liability on his Labor Law § 240 (1) cause of action. Onderdonk, Scott and Pearl (collectively, defendants) oppose plaintiff's motion and, in turn, move for summary judgment dismissing this claim (and the entire complaint).

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

[3] To date, defendant New York Sightseeing, Inc. has not appeared or answered the amended complaint, nor has plaintiff taken a default against it, thereby abandoning the action as against this defendant.

evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." (*Lakeside Constr. v Depew & Schetter Agency*, 154 AD2d 513, 515-515 [1989]).

In support of his motion, plaintiff contends that the work he was performing at the time of his accident involved the repair of wiring, which was part of a larger project to upgrade the building's electrical system and, therefore, was an activity protected under Labor Law § 240 (1). Plaintiff further contends that, while performing this work at an elevated level, he was injured when he received an electrical shock and fell from a defective and unsecured ladder. Thus, plaintiff argues that he is entitled to summary judgment as a matter of law under Labor Law § 240 (1). Plaintiff refers to testimony from both his first and second depositions. Plaintiff testified that, at the time of the accident, he was in the process of using a 20-foot metal extension ladder while taping wires and placing them in a metal track located in the ceiling, approximately 20 feet above the ground (Plaintiff's First Deposition tr. at 41-42, 68). During his second deposition, plaintiff explained that he was tasked with fixing the building's (garage) electrical system because it was unreliable (Plaintiff's Second Deposition tr. at 189). He further explained that his work in repairing the electrical system involved "leveling" all of the breakers rebuilding the breaker panel,

replacing the breakers that kept shutting off, and replacing the old wires with new ones. Plaintiff claimed that taping of the hanging wires to prevent them from coming into contact with the buses was part of the electrical upgrade work, which he estimated would have taken him eight days to complete (*id.* at191-194). Plaintiff additionally testified that the ladder on which he was standing, which lacked footings and a hook at the top, fell along with him when he received an electric shock from a wire he was taping.

In addition, the plaintiff has submitted an affidavit in which he avers that his work in upgrading the electrical system included, among other things, using pliers to cut and remove the defective portions of the wires and to splice in new wires, as well as using a multi-meter to make sure there was power in the wires. He further avers that Go New York provided him with 500 feet of brand-new wire, as part of his work to replace the old and/or defective wiring inside the garage. Plaintiff also states that his work required him to use a drill to install anchors in the walls (Aff of plaintiff at ¶ 5-6).

Plaintiff has also submitted the affidavit of Fred DeFilippis, a professional engineer, who upon review of the record documents, opines that the defendants should have had a licensed electrician perform the work that the plaintiff was performing, which needed to thereafter be inspected by the New York City Buildings Department (DeFilippis Aff at pgs 2-3). Additionally, DeFilippis opines that, in light of the type of work plaintiff was performing, which required ascending to a height of approximately 20 feet above the floor to reach the electrical wiring, the plaintiff should have been provided with protective safety equipment, such as a safety harness and lanyard, or netting, as well as a ladder which had proper rubber footing, to guard against elevation-related hazards (*id.* at pg 3).

Plaintiff also refers to the deposition testimony of Asen Kostadinov, the president of Go New York. Kostadinov testified that during the first six months that Go New York took possession of the subject leased space, he recalled that the landlord had to provide more

amperage/power to the garage in order for Go New York to operate certain tools/machinery used to repair the buses (Kostadinov tr. at 33).

Based upon the forgoing, plaintiff maintains there is evidence in the record that the activity in which he was engaged at the time of the accident was a "repair" to the building's electrical system within the meaning of Labor Law § 240 (1), rather than merely routine maintenance. As such, plaintiff contends he is entitled to partial summary judgment as to liability on this claim.

In opposition, and in support of their own motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, the defendants argue that plaintiff has failed to make a prima facie showing entitling him to summary judgment on his section 240 (1) claim. Defendants argue that the plaintiff is not a person who is entitled to the protection of Labor Law § 240 (1) because, at the time of the accident, he was not performing "repairs" within the meaning of the statute, but rather was engaged in routine maintenance in a non-construction, non-renovation setting. In this regard, defendants contend that plaintiff's work, which they claim only consisted of taping wires, was part of plaintiff's regular maintenance duties for the tools/machinery used on the buses. Defendants note that plaintiff initially testified during his first deposition that, at the time of the accident, he was only taping wires that were hanging down and placing them up in the metal tracking located in the ceiling (Plaintiff's First Deposition tr. at 150). Defendants point out that, three months after plaintiff's first deposition, when he appeared for a continuation of that deposition (on January 28, 2018), he stated, for the first time, that his work involved fixing the building's electrical system (Plaintiff's Second Deposition tr. at 189-190). Defendants contend that plaintiff's later testimony -- that his taping of wires was only part of an electrical upgrade -- contradicts his prior testimony, as well as the C-3 incident report, which indicates that his taping of wires was routine maintenance. Defendants argue that the plaintiff's testimony of an ongoing

larger electrical project is an obvious attempt to make this action fall within the ambit of Labor Law § 240 (1), which defendants maintain it does not.

In addition, defendants point out that, during his first deposition, the plaintiff stated that his taping of the wires was "routine maintenance" and that if the accident had not happened, he would have returned to performing electrical work on the buses (Plaintiff's First Deposition tr. at 150). By changing his testimony from describing taping a few wires to describing upgrading the building's electrical system, defendants contend that the plaintiff is improperly attempting to create a material issue of fact where none previously existed. Defendants argue that the plaintiff's testimony at his second deposition, regarding the type of work he was performing, should be disregarded and not considered in these summary judgment motions. Defendants also argue that the plaintiff's affidavit submitted in support of his motion contradicts his first deposition testimony and, therefore, should also be disregarded.

Further, defendants maintain that the plaintiff's testimony about an electrical system upgrade is contradicted by the testimony of other parties. In this regard, Kostadinov, the owner of Go New York, testified that the plaintiff was not authorized to work on the building's electrical system, and was hired to work on the buses' electrical systems. Kostadinov was only aware of an increase in the amperage (power) which took place during the first six months of Go New York leasing the space in 2013, and was not aware of any other upgrade to the electrical system. Kostadinov further testified that there was no construction, renovation or excavation work taking place at the premises in July of 2015, and that the only work taking place at the time of the accident was the maintenance of the buses owned and operated by Go New York Tours. He testified that he was never told that the plaintiff was working on the building's electrical system.

Defendants also refer to the deposition testimony of Jack Guttman, who testified that he is the owner of Pearl, Onderdonk and Scott[4]. According to Guttman, when the premises were leased to Go New York, no electrical work had been done at the premises in connection with the lease negotiations. After Go New York took possession and started operating the repair shop, Guttman visited the site occasionally and observed people working and using machinery. Based on his observations, Guttman assumed someone had done some rewiring and/or an upgrade of the electricity, but he did not know who performed the work. Guttman testified that the lease required the tenant to notify the landlord if there was going to be any modifications to the property, including electrical work. He further testified that Go New York never notified him that there was going to be any electrical work performed on the premises.

Ephraim Herskovits, the owner of Zev Electric, a company owned by the Guttman family, testified that Zev Electric performed the initial electric work on the premises in 2012-2013, prior to Go New York's tenancy. He also testified that Zev Electric increased the amperage (power) after Go New York took possession of the premises. His testimony clearly contradicts that of Jack Guttman.

Defendants point to a copy of the C-3 Report of Injury, which was marked as Defendant's Exhibit A during plaintiff's first deposition. The report indicates that at the time of the accident, the plaintiff was "fixing/connecting an air compressor" and that his injury occurred when he "caught an electric shock, and fell off the ladder" (Affirmation of Defendants' Counsel, exhibit H). Defendants note that plaintiff testified that the report was accurate.

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[4]These defendants are all represented by the same law firm and do not argue that any of them are not proper Labor Law defendants.

Lastly, defendants argue that Labor Law § 240 (1) is not applicable because the electrical shock the plaintiff received, not a defective ladder, was the proximate cause of his injuries.

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1, 7 [2011][internal quotation marks omitted]). Labor Law § 240 (1) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . 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."

This section is designed to protect workers from elevation-related hazards while they are involved in certain enumerated work activities (*see Panek v County of Albany*, 99 NY2d 452 [2003]). "While the reach of [Labor Law] section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Quituizaca v Tucchiarone,* 115 AD3d 924, 926 [2014], quoting *Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *see also Esposito v New York City Indus. Dev. Agency,* 1 NY3d 526, 528 [2003]; *Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 [2017]; *Moreira v Ponzo*, 131 AD3d 1025 [2015]; *Enos v Werlatone, Inc.*, 68 AD3d 713 [2009]; *Holler v City of New York*, 38 AD3d 606 [2007]), as well as acts " 'ancillary' " to those activities (*Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d

744, 746 [2016], quoting *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). The issue of whether any particular task "falls within section 240 (1) must be determined on a case-by-case basis, *depending on the context of the work*" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 883 [2003] [emphasis supplied]; *see Fox v H & M Hennes & Mauritz, L.P.*, 83 AD3d 889, 890 [2011]). Indeed, " '[t]o myopically focus on a job title or the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of the statute which requires a liberal construction in order to accomplish its purpose of protecting workers' " (*Goodwin,* 144 AD3d at 746–47 quoting *Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2004]).

In determining whether a particular activity constitutes "repairing," courts are careful to distinguish between repairs and routine maintenance, the latter of which falls outside the scope of section 240 (1) of the Labor Law (*see Esposito,* 1 NY3d at 528; *Joblon v Solow*, 91 NY2d 457 [1998]; *Smith v Shell Oil Co.*, 85 NY2d 1000, 1002 [1995]; *Fox,* 83 AD3d at 890). "Generally, courts have held that work constitutes routine maintenance where the work involves 'replacing components that require replacement in the course of normal wear and tear' " (*Ferrigno,* 152 AD3d at 653, quoting *Esposito,* 1 NY3d at 528; *see Dahlia v S & K Distribution*, LLC, 171 AD3d 1127, 1128 [2019]; *Mammone v T.G. Nickel & Assoc., LLC*, 144 AD3d 761, 761–762 [2016]). In determining whether work constitutes "repair" that falls within the ambit of § 240(1), or "routine maintenance" that falls outside of § 240(1) protections, courts will consider such factors as whether the work in question was occasioned by an isolated event as opposed to a recurring condition, whether the object being replaced was a worn-out component in something that was otherwise operable, and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement." (*Soriano v St. Mary's Indian Orthodox Church*

of Rockland, Inc., 118 AD3d 524, 526-27[2014] [internal citations omitted].) "Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering" (*Prats,* 100 NY2d at 882).

Here, the court finds that the proof submitted by both the plaintiff and the defendants, including the two depositions of the plaintiff, as well as his affidavit, reveal the existence of a triable issue of fact as to the nature of the task the plaintiff was performing at the time of the accident, and whether under the circumstances, the task constituted a protected activity (*see Dorville v Royal Farms, Inc.*, 169 AD3d 863, 864 [2019]). Although plaintiff initially testified that his task, at the time of the accident, involved fixing/taping electrical wires, based upon a review of the record evidence, it is unclear whether the plaintiff's work, viewed in its totality constituted a "repair" within the meaning of section 240 (1) of the Labor Law (*see e.g., Caban v Maria Estela Houses I Assocs., L.P.*, 63 AD3d 639, 640 [2009] [plaintiff electrician's work in repairing malfunctioning exterior floodlights, viewed in its totality, was deemed repair work within meaning of the Labor Law]; *Rios v WVF–Paramount 545 Prop., LLP*, 36 AD3d 511 [2007] [plaintiff building engineer's work repairing and replacing electrical wiring in the ceiling in order to restore lighting to the entire floor was engaged in more than simply changing a lightbulb, and constituted "repair[s]" within the meaning of Labor Law § 240 (1)]; *Piccione v 1165 Park Ave.,* 258 AD2d 357 [1999] [work which consisted of replacing the ballast and sockets, disconnecting the wires, stripping them and reconnecting them constituted "repairs"]). Indeed, there is admissible evidence that plaintiff's work may have been part of a bigger project to upgrade the building's electrical system, which required more than merely taping wires, but also "leveling" the rebuilding the breaker panel, replacing certain circuit breakers that kept shutting off, replacing the old and frayed wires with new ones, all of which arguably would fall within the scope of "repairing" and, concomitantly, within the ambit of Labor Law § 240 (1) (*see Wass v Cty. of Nassau*, 173

AD3d 933, 935 [2019]; *Ferrigno,* 152 AD3d at 650; *Eisenstein v Board of Mgrs. of Oaks at La Tourette Condominium Sections I-IV*, 43 AD3d 987 [2007]).

Contrary to defendants' argument, the court does not elect to disregard any portion of the plaintiff's testimony taken during his second deposition. While there are arguably some inconsistencies between plaintiff's first and second deposition regarding the context and nature of the type of electrical work he was performing at the time of the accident, the court does not find that the two depositions are completely contradictory on this issue and cannot make a determination as to the plaintiff's credibility (*see Williams v Dover Home Improvement, Inc.*, 276 AD2d 626, 627 [2000]; *Xirakis v 1115 Fifth Ave. Corp.*, 226 AD2d 452 [1996]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Flaccavento v John's Farms*, 173 AD3d 1141, 1142 [2019], quoting *Kolivas v Kirchoff*, 14 AD3d 493, 493 [2005] [summary judgment motion was denied where there was conflicting deposition testimony regarding the facts surrounding the accident which raised a triable issue of fact]).

Moreover, the court notes that the plaintiff's subsequent deposition testimony is not necessarily in direct conflict with his earlier testimony in that he arguably provided more detail when questioned as to the totality of the work he was tasked to perform, and he was not previously asked about the work he performed three days before his accident, which is when he claimed Pedro directed him to fix the wires. In any event, to the extent that plaintiff's testimony is found to be inconsistent, it is for the trier of fact to consider what weight, if any, to attribute to this testimonial evidence. In determining the motions for summary judgment, disregarding or failing to consider portions of plaintiff's subsequent deposition testimony would constitute an impermissible assessment of his credibility by the court (*see e.g., Hayes v New York City Dept. of Corrections*, 84 F.3d 614, 619 [2d Cir.1996]

[holding district judge had erred in discrediting portions of appellant's second deposition because the first and second depositions were only "arguably contradictory."]). As such, the court finds that, under the circumstances of this case, triable issues of fact preclude a determination as to whether the plaintiff's work at the time of the accident constituted an activity covered by the provisions of Labor Law § 240 (1) (*see Dorville v Royal Farms, Inc.*, 169 AD3d 863 [2019]; *Wass*, 173 AD3d at 935; *Kircher v City of New York*, 122 AD3d 486 [2014] [triable issues of fact as to whether the work in which plaintiff was engaged when his accident occurred constituted routine maintenance or a repair precluded summary judgment on Labor Law § 240 (1) claim]; *Montalvo v New York and Presbyterian Hosp.*, 82 AD3d 580 [2011] [based upon record, court could not determine as a matter of law whether plaintiff was engaged in routine maintenance or a repair covered under Labor Law § 240 (1) when he was injured]; *Weisman v Duane Reade, Inc.*, 64 AD3d 643, 644-45 [2009] [existence of a triable issue of fact existed as to whether the plaintiff's work at issue constituted "routine maintenance" or a "repair" under the Labor Law § 240 (1)]).

Additionally, defendants' argument that the plaintiff's Labor Law § 240 (1) claim should be dismissed because the plaintiff's fall was caused by an electric shock, not a defective ladder, is without merit. Courts have held that in instances where an electrical shock preceded a plaintiff's fall from a ladder, defendants may still be held liable under section 240 (1) if it is established that the ladder and/or safety device failed to provide the plaintiff with adequate protection (*see Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016] [issues of fact existed as to Labor Law § 240 (1) claim whether ladder provided adequate protection where plaintiff fell from ladder after receiving electrical shock]; *Cutaia v Bd. of Managers of 160/170 Varick St. Condo.*, 172 AD3d 424, 426, [2019] [plaintiff laborer granted summary judgment under Labor Law § 240 (1) claim where court found that the unsecured ladder provided, which was not fully open and locked, failed to protect plaintiff

from falling after receiving electrical shock]; *Vukovich v 1345 Fee, LLC,* 61 AD3d 533 [2009] [plaintiff entitled to summary judgment under Labor Law § 240 (1) where he fell off unsecured A-frame ladder after receiving electrical shock]; *see also Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1283 [2015] [triable issue of fact existed as to whether plaintiff fell because the ladder did not afford him proper protection]).

Here, there is evidence that the subject ladder on which the plaintiff was standing at the time he received an electrical shock fell along with him. Therefore, in the event there is a finding that plaintiff's work falls within the type of activity covered under section 240 (1), defendants may be found liable if there is a finding that the ladder failed to provide plaintiff with adequate protection in that it failed to protect him from falling after he received the electrical shock (*see Cutaia,* 172 AD3d at 426). Accordingly, based upon the foregoing, plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim is denied, and that branch of defendants' motion seeking to dismiss this claim is also denied.

Plaintiff's Labor Law § 241 (6) Claim

Defendants also seek to dismiss plaintiff's Labor Law § 241 (6) cause of action because plaintiff was not engaged in construction excavation or demolition work. "Labor Law § 241 (6) imposes a non-delegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in . . . construction, excavation or demolition work" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2014]). " '[T]he courts have generally held that the scope of Labor Law § 241 (6) is governed by 12 NYCRR 23-1.4 (b) (13), which defines construction work expansively. Under 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' " (*Wass,* 173 AD3d at 935–36 [emphasis

supplied] [internal quotation marks and citations omitted]; *see De Jesus v Metro-North Commuter R.R.*, 159 AD3d 951, 953 [2018]).

Here, since an issue of fact exists as to whether the plaintiff was engaged in the "repair" of the subject wires/electrical system at the premises, the defendants have failed to establish, prima facie, that Labor Law § 241 (6) is inapplicable to the plaintiff's activities (*see Wass,* 173 AD3d at 935-36). Thus, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is also denied.

Plaintiff's Labor Law § 200/Common-Law Negligence Claims

Defendants also move to dismiss plaintiff's Labor Law § 200 and common-law negligence causes of action. Defendants contend that they did not direct or control plaintiff's work, and that they lacked actual or constructive notice of the alleged condition that caused the plaintiff's accident. In support of this contention, defendants point out that the plaintiff testified that he received all instructions from his Go New York supervisor, Pedro. Defendants further point out that the plaintiff testified that he made numerous complaints to Pedro about the top of the ladder not having footings or a hook, but did not make such complaints to anyone else (Plaintiff First Deposition tr. at 70-73, 75, 77).

In addition, defendants contend they were not aware of plaintiff performing any work on the wires, and never received any complaints regarding the electrical system, other than the request to increase the amperage (power), which occurred within the first six months of Go New York's tenancy. Jack Guttman, the owner of Onderdonk, Pearl and Scott, testified that he would typically handle all interactions between the tenant (Go New York) for the premises, and that he was not aware of any complaints by Go New York as to any issues related to unreliable and/or faulty electrical service (Guttman tr. at 102). Guttman further testified that he assumed that work had been done on the electrical system because, at the time Go New York's tenancy commenced, there was only basic lighting at the premises.

When Guttman occasionally visited the premises, he observed Go New York's workers operating machines. He testified that he assumed someone must have performed electrical work at the premises, but did not know who, and claimed he received no notification regarding such work (*id.* at 105-106). Based upon the forgoing, defendants argue that they cannot be held liable under Labor Law § 200 and common-law negligence.

In opposition, plaintiff contends that the defendants had actual and constructive notice of the defective electrical condition at the premises. In support of this contention, the plaintiff refers to his own deposition testimony in which he testified that the building's electrical system was unreliable in that the lights kept shutting off, breakers kept going off, and the wires sparked (Plaintiff Second Deposition tr. at 189-190). Plaintiff claimed that he told his supervisor, Pedro, about the electrical issues (*id.* at 190-191). According to plaintiff, about one month after he notified Pedro, two individuals, whom plaintiff claimed were associated with the building owners, came to the premises. At that point, plaintiff claimed he explained that all of the breaker boxes needed to be level, and mentioned the hanging wires, and electricity shutting off (*id.* at 191, 197). He also testified that the building representatives came back to the premises for a second time to look at the electrical system about three months before the plaintiff's accident occurred (*id.* at 197-198).

"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" (*Pacheco v Smith*, 128 AD3d 926 [2015]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where the injured plaintiff's accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 and common-law negligence will be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time (*see Korostynskyy v 416 Kings*

Highway, LLC, 136 AD3d 758, 759 [2016]; *Nicoletti v Iracane,* 122 AD3d 811, 812 [2014]; *Ventimiglia v Thatch, Ripley & Co. LLC,* 96 AD3d 1043, 1046 [2012]; *Eversfield v Brush Hollow Realty, LLC*, 91 AD3d 814, 816 [2012]; *Rojas v Schwartz*, 74 AD3d 1046, 1047 [2010]; *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Rendon v Broadway Plaza Assoc. Ltd. Partnership*, 109 AD3d 975, 977 [2013]).

Here, in response to defendants' demonstration of their prima facie entitlement to judgment as a matter of law, the court finds that the plaintiff has raised a triable issue of fact as to whether the defendants had actual notice of a hazardous electrical condition, based on plaintiff's testimony that he had spoken with two of the building's representatives on two occasions. An issue of fact has also been raised as to whether defendants had constructive notice due to Guttman's visits to the site and observations, coupled with his knowledge that the electrical system was inadequate at the time Go New York's tenancy of the premises commenced (*see Fuchs,* 62 AD3d 746, 748 [2009]). Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Go New York's Motion

Go New York moves for summary judgment dismissing plaintiff's complaint as well as all third-party claims asserted against it. That branch of Go New York's motion seeking to dismiss plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence claims against defendants is denied for the reasons stated above.

In their third-party complaint, Onderdonk and Scott assert common-law and

contractual indemnification, contribution and breach of contract claims against Go New York.

Common-Law Indemnification and Contribution

Turning to defendants' common-law indemnification and contribution claims, Go New York argues that the plaintiff did not suffer a qualifying "grave injury" within the meaning of Workers' Compensation Law § 11 and, therefore, said claims against it are barred.

Pursuant to Workers' Compensation Law § 11, an employer may not be held liable for contribution to or indemnification of any third person for an employee's injuries "unless such third person proves through competent medical evidence that such employee has sustained a grave injury." The law is settled that an employer may be held liable for contribution or common law indemnification only if the employee has sustained a "grave injury" within the meaning of the Workers' Compensation Law (Workers' Compensation Law § 11; *see Fleming v Graham*, 10 NY3d 296, 299 [2008]).

Section 11 defines "grave injury" as:

> [D]eath, permanent and total loss or use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in a permanent total disability.

In plaintiff's bill of particulars and his supplemental bill of particulars, he alleges that he has sustained total disability, including "significant trauma to head, with deficits and sequelae causing neurological impairment," permanent severe loss of vision in right eye and permanent hearing damage in right ear. Go New York contends that the plaintiff's own deposition testimony confirms that his alleged diminished hearing and vision are not total or permanent. In this regard, Go New York notes that the plaintiff admitted that his vision is

20/20 when he wears his glasses and, thus, cannot establish total and permanent blindness. Additionally, Go New York notes that the plaintiff was able to testify without any assistance during his deposition, and that, although he wore a hearing aid, there was no indication that the plaintiff suffered total or permanent deafness. Go New York additionally notes that the plaintiff clearly testified that he was receiving Workers' Compensation benefits arising from this accident.

With regard to the plaintiff's allegation he sustained significant trauma to the head, Go New York argues that the reports of Dr. William B. Head (Dr. Head), Dr. Michael Hutchinson (Dr. Hutchinson) and Alan Getreu establish that the plaintiff did not sustain a traumatic brain injury rendering him unable to work within the meaning of Workers' Compensation Law § 11. In this regard, after examining the plaintiff and reviewing his medical records, Dr. Head, a board certified neurologist, opines in a report, dated June 26, 2018, that he saw no objective clinical evidence of any permanent neurological condition or disability, and that he believes that the plaintiff should be able to "carry on with his usual and customary duties for work, as an electrician, or in any other capacity for which he is trained, without difficulty, from the neurological and psychiatric perspective" (Prisco Affirmation, exhibit P).

In a report, dated June 29, 2018, Dr. Hutchinson, a board-certified neurologist, also opines, with a reasonable degree of medical certainty, based upon his examination of plaintiff and review of his medical records, that the plaintiff is not completely physically disabled, and that it is unlikely that he sustained permanent severe loss of vision in his right eye (*id.*, exhibit Q).

Additionally, Go New York refers to a report by Alan Getreu, the Director of Rehabilitation Services for First National Rehabilitation Services, who opines that the plaintiff does not meet the criteria to be considered vocationally or industrially disabled and

that he believes he could return to full-time employment with his existing capabilities and skills, but would also benefit from other presently available opportunities to increase his skills (*id.*, exhibit R). Go New York further notes that the plaintiff testified that he had not returned to work because of issues with his back, not because of anything related to any neurological condition or disability. Based upon the forgoing, Go New York argues that there is no evidence that the plaintiff has suffered a grave injury as a result of this accident.

In opposition, defendants contend that this branch of the motion should be denied solely because they maintain that the issue of whether the plaintiff sustained a "grave injury" is for the jury to decide, not the court. The court notes that the defendants fail to set forth any factual details in support of this contention.

In opposition, plaintiff maintains that he did in fact sustain a "grave injury" as defined in section 11 of the Workers' Compensation Law. In support of this contention, the plaintiff has submitted the affirmation of his treating physician, Dr. Alan Steven David, a board-certified neurologist. Dr. David avers that the plaintiff, who has been his patient since August 5, 2015, has sustained a traumatic brain injury as a result of the alleged accident, which has resulted in him being "permanent and total disability" (Ras Aff, exhibit C).

As noted above, "[g]rave injuries are those injuries that are listed in the statute and are determined to be permanent" (*Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 832 [2012]). One such enumerated injury is an "acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). A "permanent total disability" requires a showing that the injured employee is no longer employable "in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412 [2004]; *see Grech v HRC Corp.*, 150 AD3d 829, 830 [2017]; *Cueto v Hamilton Plaza Co., Inc.*, 67 AD3d 722, 724 [2009]).

Here, the court finds that Go New York has met its initial burden to establish that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11, by submitting competent admissible evidence, including the reports of neurologists who examined plaintiff and concluded that he did not suffer from any brain injury rendering him "no longer employable in any capacity" (*Rubeis,* 3 NY3d at 413; *see Grech,* 150 AD3d at 830; *Purcell v Visiting Nurses Found. Inc.,* 127 AD3d 572, 574 [2015]; *Fried v Always Green,* LLC, 77 AD3d 788, 790 [2010]). In opposition, neither the defendants nor the plaintiff have raised a triable issue of fact (*see Goodleaf v Tzivos Hashem, Inc.,* 68 AD3d 817, 817 [2009]; *DePaola v Albany Med. Coll.*, 40 AD3d 678 [2007]; *O'Berg v MacManus Group, Inc.*, 33 AD3d 599 [2006]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In this regard, the court notes that Dr. David's affirmation, upon which the plaintiff relies, is conclusory and lacks probative value. Indeed, his affirmation fails to refer to any specific facts or evidence to support his conclusion that the plaintiff sustained a "traumatic brain injury" falling within the "grave injury" standard in Workers' Compensation Law § 11. Thus, plaintiff's evidence is not sufficient to create a triable issue of fact as to whether he is not employable "in any capacity" as a result of his claimed brain injury (*see Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 501 [2015]; *Anton v West Manor Constr. Corp.,* 100 AD3d 523, 524 [2012]; *see also Barrett v Hudson Valley Cardiovascular Assocs., P.C.*, 91 AD3d 691, 692 [2012]). Thus, pursuant to Workers' Compensation Law § 11, Go New York is entitled to dismissal of defendants' third-party claims against it for common-law indemnification and contribution.

Contractual Indemnification

Defendants' contractual indemnity claim is based upon a provision in the lease agreement between Scott (landlord) and Go New York (tenant), which states as follows:

> Tenant [Go New York] agrees to indemnify, defend, repay and save landlord [Scott] harmless from any and all claims,

> expenses, liability or loss which landlord [Scott] may suffer or incur as a result of tenant's [Go New York's] violation of this lease, its use of the premises, violation of any municipal, state or federal law, rule or ordinance, any failure of tenant [Go New York] to act in accordance with this lease, and/or because of any act or omission (or alleged act or omission) on the part of the tenant [Go New York].

(Baxter Aff, exhibit L, Rider 20).

Go New York argues that the above-referenced indemnity provision is unenforceable under General Obligations Law (GOL) § 5-321, which provides as follows:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

"A broad indemnification provision in a lease . . . which is not limited to the lessee's acts or omissions, fails to make exceptions for the lessor's own negligence, and does not limit the lessor's recovery under the lessee's indemnification obligation to insurance proceeds, is unenforceable pursuant to General Obligations Law § 5–321" (*Hadzihasanovic v 155 E. 72nd St. Corp.*, 70 AD3d 637, 638–639 [2010]; *see Nolasco v Soho Plaza Corp.*, 129 AD3d 924, 925 [2015]; *DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656, 659 [2008]; *N.A. (Anonymous) v Hillcrest Owners Ass'n, Inc.*, 165 AD3d 1153, 1155 [2018]).

The court finds the indemnity provision to be unenforceable and violative of GOL 5-321. As Go New York correctly points out, the above-referenced indemnification clause, which makes no reference to Onderdonk, is broad enough to be read to exempt Scott from liability for damages resulting from its own negligence, or that of its agents or servants. Indeed, the indemnity provision is not limited to Go New York's acts or omissions, and fails to make an exception for Scott's own negligence and, further, it does not limit Scott's recovery from Go New York to insurance proceeds (*see Po W. Yuen v 267 Canal St. Corp.*,

41 AD3d 812 [2007]; *see also DeSabato,* 55 AD3d at 659). In addition, the court notes that the defendants do not oppose this branch of Go New York's motion. Accordingly, Go New York is entitled to summary judgment dismissing defendants' third-party claim for contractual indemnification as against it.

Breach of Contract for Failure to Procure Insurance

As to defendants' breach of contract claim for failure to procure insurance, the court notes that the defendants also fail to oppose the dismissal of this claim. As such, that branch of Go New York's motion seeking to dismiss this claim is also granted.

Conclusion

For the reasons stated above, plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) cause of action is denied.

Defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence causes of action is denied.

The branch of Go New York's motion for summary judgment dismissing plaintiff's complaint is denied. The branch of Go New York's motion seeking to dismiss defendants' third-party claims against it for common-law indemnity, contractual indemnity, contribution and breach of contract for failure to procure insurance is granted, and the third-party complaint is hereby dismissed.

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