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| Silva v Noble Constr. Group, LLC |
| 2019 NY Slip Op 34455(U) |
| June 28, 2019 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 51534/2017 |
| Judge: Sam D. Walker |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
CARLOS SILVA,

Plaintiff,

-against-

DECISION & ORDER
Index No. 51534/2017
Seq. 1

NOBLE CONSTRUCTION GROUP, LLC and
DOWNTOWN RE HOLDINGS, LLC,

Defendant(s).
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The following papers were read on the motion for summary judgment brought by defendant C.W. Brown, Inc.:

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| Notice of Motion/Affirmation/Exhibits A-N | 1-16 |
| Affirmation in Opposition/Affidavit/Exhibits A-I | 17-27 |
| Reply Affirmation/Exhibit A | 28-29 |

FACTUAL AND PROCEDURAL BACKGROUND

This action is to recover for personal injuries the plaintiff, Carlos Silva ("Silva") alleged he sustained on December 14, 2016, at the construction site of a 12-story building consisting of commercial and residential space, located at 688 Broadway, New York, and owned by the defendant, Downtown Re Holdings, LLC ("Downtown/owner"). The defendant, Noble Construction Group, LLC was the general contractor on the project and at the time of the accident, Silva was employee of RC Construction, a sub-contractor on the project.

Silva commenced this action by filing a summons and verified complaint on February 2, 2017, alleging negligence and violations of Labor Law §§ 200, 240, and 241. Silva alleges that, at the time of his accident, he was working on a ladder with missing rubber footing, using a hand held power tool known as a grinder, when the ladder moved because it was unstable and he lost control of the grinder, causing the rotating blade to deeply lacerate his arm. Silva further alleges that, in addition to losing control of the grinder, his body twisted on the ladder, causing him to injure his neck, shoulder, lower back and causing his head to hit a pipe behind him.

Silva now files the instant motion for summary judgment on the issue of liability, arguing that Labor Law § 240(1) was violated as a matter of law, by the defendants' failure to provide him with appropriate safety devices for his elevated work and Labor Law § 241(6) was violated due to the violations of specific Industrial Code provisions.

DISCUSSION

"[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," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof in admissible form, establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Section 240(1) of the Labor Law, entitled "Scaffolding and other devices for use of employees", states in pertinent part that:

All contractors and owners and their agents, ..., in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be

furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed (NY Labor Law § 240[1]).

“Labor Law § 240(1) imposes upon owners and general contractors a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (see *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 15 [2d Dept 2015]). “Absolute liability is imposed upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation related hazards, and where such failure is a proximate cause of the accident (*Id.*). “To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation proximately caused his or her injuries (see *Orellana v 7 West 34th Street, LLC*, 2019 NY Slip Op 04711 [2d Dept 2019]). The statute requires a determination of whether the injury sustained is a type of elevation-related hazard to which the statute applies (see *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1,6 [2011]).

Here, the plaintiff demonstrated, prima facie, that the subject ladder was an inadequate safety device for the work in which he was engaged at the time of his alleged accident” (*Id.*). Silva testified that he had performed this type of work previously and the right way to perform it required building a scaffolding and using a safety belt. Additionally, the ladder was supposed to have the rubber footings, but when he complained, he was told to do the work with the equipment that was available. The defendants did not offer any probative evidence in opposition to create an issue of fact. An attorney’s affirmation is

insufficient to create an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Section 241(6) of the Labor Law provides that:

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.

“Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*see Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 983 [2d Dept 2014]). “The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Law” (*Id.*).

In this case, Silva alleges that the defendant violated several industrial code provisions found at 12 NYCRR 23.

Section 23-1.21[b][1] provides that every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.

Section 23-1.21 [b][3][i] provides that all ladders shall be maintained in good condition and a ladder shall not be used if it has a broken member or part.

Section 23-1.21[b][4][iii] provides that all ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Section 23-9.2 provides in pertinent part that all power operated equipment shall be maintained in good repair in proper operating condition at all times.

In this case, Silva testified that the ladder did not have rubber footings as required by the code and was unstable, causing it to shift. Silva also asserted that the grinder was missing the side handle and he had complained to his supervisor. The Court of Appeals ruled in (*Misicki v Caradonna*, 12 NY3d 511, 518-519 [2009]) that 12 NYCRR 23-9.2 applied to a grinder. However, that ruling was specific to that case because the defendant failed to raise the issue. Here, the defendant has challenged such an application creating an issue as to whether that section would apply to a grinder. Nevertheless, the defendants have not created any issues of fact with regard to the violations of the sections of the code regarding the ladder and those sections sets forth an action to be taken and a time frame for taking the action (see *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept 2015]). Therefore, the Court finds that Silva has established a violation of Labor Law § 241(6).

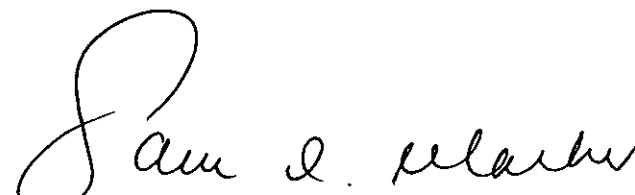
Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted.

The parties are directed to appear before the Settlement Conference Part in courtroom 1600 on August 13, 2019 at 9:15 a.m to schedule a trial on damages.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
June 28, 2019


HON. SAM D. WALKER, J.S.C.