Brain v ZCAM, LLC
2020 NY Slip Op 31265(U)
May 6, 2020
Supreme Court, Kings County
Docket Number: 510631/2016
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 6th day of May, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

STEVEN BRAIN,

Plaintiff,

- against -

ZCAM, LLC AND VICTORIAN MANAGEMENT REAL ESTATE INC.,

Defendants.

- X

DECISION/ORDER

Index No. 510631/2016

Motion Sequence Nos. 4 and 5

The following e-filed papers read herein:	NYSCEF Doc. Nos.	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	38-49	50-57
Opposing Affidavits (Affirmations)	61-62, 64-65	59
Reply Affidavits (Affirmations)	66	67

Upon the foregoing papers, defendants ZCAM, LLC and Victorian Management Real Estate Inc. (defendants) move, in motion (mot.) sequence (seq.) four, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint of plaintiff Steven Brain (plaintiff). He concurrently moves, in mot. seq. five, for an order, pursuant to CPLR 3212, granting him partial summary judgment against defendants on the issue of their liability under Labor Law § 240 (1) and § 241 (6).

Background

Plaintiff commenced the instant action on June 23, 2016 by electronically filing a summons and verified complaint in this court against defendants. Plaintiff claims therein that each defendant had an ownership interest in and/or was responsible for managing the premises at 279 Church Street in Manhattan.[1] Also, the complaint asserts that defendants hired Inner City Elevator, plaintiff's employer, to perform elevator repairs at this property.

The pleadings allege that on August 14, 2015, while plaintiff was performing elevator repairs at the subject premises, he had an accident and sustained consequential injuries. More specifically, plaintiff claims that on the date of the accident, he was required to use an unsecured ladder to reach the elevator housing, and, when he used the subject ladder, it became unstable, causing him to fall and sustain injuries. Plaintiff contends that defendants had a duty to provide safe equipment to protect workers against elevation-related hazards; however, plaintiff claims, the equipment provided by the property owner (including the ladder) was either defective, poorly maintained and/or inadequate for his tasks. Plaintiff further contends that defendants had a duty to ensure that all ladders used by workers at their property complied with the applicable provisions of the Industrial Code (12 NYCRR ch. 1, subch. A). Lastly, plaintiff maintains that defendants breached their common-law duty to keep the premises safe for workers.

[1] The property has a storefront business, with offices on the three floors above the street level, and one loft apartment on the fifth floor.

The verified complaint asserts causes of action alleging that defendants are vicariously or directly responsible for violating Labor Law §§ 240 (1), 241 (6) and 200. The complaint also alleges negligence. The pleadings further state that defendants are, respectively, the owner of the subject premises and a management company that is tantamount to an agent of the owner, as those terms are defined in the Labor Law and interpreted by courts of this State. Plaintiff also claims that, at all relevant times, he was engaged in work within the scope of the Labor Law.[2] Plaintiff claims that, therefore, defendants are subject to vicarious liability, without regard to fault, pursuant to the Labor Law. Plaintiff also contends that defendants breached their common-law duty to maintain a safe workplace and that these Labor Law violations and breaches of the common-law duty of care proximately caused his accident and the injuries for which he now seeks damages.

Defendants interposed an answer, which generally denies plaintiff's allegations, and discovery and motion practice ensued. On February 25, 2019, plaintiff filed a note of issue with a trial by jury demand, certifying that discovery is complete and that this matter is ready for trial. The instant summary judgment and partial summary judgment motions followed.

Defendants' Arguments Supporting Their Summary Judgment Motion

Defendants, in support of their motion, first argue that Labor Law § 240 (1) does not apply herein because the subject ladder was being used as a passageway and not for work performed on the elevator. Specifically, defendants claim that a mere fall from a ladder does

[2] Work within the scope of the Labor Law's vicarious liability provisions is commonly referenced as "protected" activities, tasks or work. Workers covered by the statute are commonly referenced as "protected" workers.

not automatically establish liability pursuant to Labor Law § 240 (1). Instead, defendants aver, appellate authority interpreting Labor Law § 240 (1) suggests that the statute is inapplicable when a ladder is used as a means of access from one area of a work site to another. Defendants argue that the subject ladder was being used by plaintiff as a shortcut from one part of the building to another, and, thus, Labor Law § 240 (1) does not apply here.

Alternatively, defendants claim that Labor Law § 240 (1) does not apply because the accident did not occur while plaintiff was performing a protected activity. Defendants submit that applicable appellate authority informs that the statute does not apply to so-called routine maintenance performed outside the construction or renovation context. Here, defendants note, plaintiff's task was to replace, in the elevator room, burnt-out directional coils, described as being "about the size of a bottle," which wear out as part of the normal wear and tear arising from the operation of the elevator. Defendants characterize such replacement as routine maintenance not covered by Labor Law § 240 (1). Moreover, defendants add, there was no larger construction or renovation project involving the premises taking place when the plaintiff's accident occurred. Plaintiff was, defendants claim, simply replacing elevator parts. Hence, defendants state that they view the work as routine maintenance outside of the construction or renovation context, and, for this additional reason, defendants urge the court to conclude that Labor Law § 240 (1) does not apply to the facts of this case.

A third reason Labor Law § 240 (1) does not apply here, defendants continue, is that plaintiff was a "recalcitrant worker," as defined by New York decisional law. Specifically,

defendants argue that, despite the occurrence of an elevation-related accident, Labor Law § 240 (1) is not violated when an injured worker had adequate safety devices available but chose not to use them. Here, defendants claim, the accident only occurred because plaintiff chose to climb onto the higher roof level to then descend to the lower roof level (where the elevator room was located and where plaintiff needed to perform his work). Instead, defendants claim, plaintiff had a safer option: he could have accessed the fifth-floor patio (the level of the lower roof and the elevator room) by using the fifth-floor apartment (interim multiple dwelling under the NYC Loft Law) as a thoroughfare. This method of accessing the elevator room, defendants posit, would have eliminated any elevation-related risk. Instead, defendants argue, plaintiff chose the riskier means of access to the lower roof, and claim the record establishes plaintiff's misuse of the ladder as solely and proximately causing the accident. For these reasons, defendants conclude that plaintiff's Labor Law § 240 (1) claim must be dismissed.

Defendants next argue that plaintiff's Labor Law § 241 (6) claims must also be dismissed. They assert that such claims are viable only for workplace accidents occurring in the context of construction, excavation or demolition work, but here, they assert, the building was not under construction or renovation, and no demolition or excavation work was performed. This factual situation, they advocate, requires the court to dismiss these claims.

Defendants also highlight that a sustainable Labor Law § 241 (6) claim requires the plaintiff to plead (and eventually prove) violations of one or more applicable Industrial Code

provisions, which must contain a positive, specific command. Defendants acknowledge that plaintiff's pleadings cite several Industrial Code provisions that purportedly support his Labor Law § 241 (6) claims, but they argue that all of the cited Industrial Code provisions either do not apply to the facts herein, were not violated or merely contain a nonactionable, general safety standard. Making this analysis, defendants maintain, demonstrate that plaintiff's Labor Law § 241 (6) cause of action lacks merit and should be dismissed.

Lastly, defendants assert that the plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed. Defendants contend that the only parties subject to liability under Labor Law § 200 and common-law negligence are those who either controlled the plaintiff's work or created or had actual or constructive notice of a dangerous premises condition. Defendants point out that plaintiff is not claiming that his accident was caused by a hazardous premises condition, but that he fell from a ladder. Also, defendants reiterate that their agents did not direct or control plaintiff's work; in fact, defendants aver, plaintiff received his instructions solely from Inner City Elevator employees. Defendants maintain that as neither prerequisite exists here for a viable Labor Law § 200 or common-law negligence claim against it, plaintiff's Labor Law § 200 and common-law negligence claims should therefore be dismissed.

Plaintiff's Arguments Supporting His Partial Summary Judgment Motion

Plaintiff, in support of his motion, first notes that the appellate court has instructed courts to interpret Labor Law § 240 (1) as liberally as possible to protect construction workers against elevation-related risks. Plaintiff also stresses that the responsibility to

protect workers against such risks is nondelegable; property owners, contractors and their agents are liable for violations irrespective of fault, supervision or control. Plaintiff argues that so long as an injured worker demonstrates both a statutory violation and that the worker's injuries were proximately caused by the violation, the worker is entitled to judgment as a matter of law against the property owners, contractors and their agents on the issue of Labor Law § 240 (1) liability.

Plaintiff next argues that it is undisputed that ZCAM owns the subject premises and that Victorian is the property management company. He additionally suggests that Victorian is an agent of the owner and claims that both defendants are thus subject to the absolute vicarious liability that Labor Law § 240 (1) imposes. Plaintiff acknowledges that Labor Law § 240 (1) applies only to accidents where the injured worker was performing the type of work enumerated in the statute (*see* n 1). Plaintiff alleges that, as he was tasked with performing repair work on a nonfunctioning elevator in this case, he was engaged in a "repair"—a protected activity—for Labor Law § 240 (1) purposes. He further points out that he fell and sustained injuries when, while repairing the subject elevator, he was atop an unsecured ladder that buckled and slid out from under him. Plaintiff characterizes the fall from an unsecured ladder as a prima facie Labor Law § 240 (1) violation and cites the record as establishing that the violation proximately caused the accident and resultant injuries. Therefore, plaintiff concludes, his partial summary judgment motion on this issue should be granted.

Lastly, plaintiff also asserts that he is entitled to partial summary judgment against defendants regarding Labor Law § 241 (6). Plaintiff observes that § 241 (6), like § 240 (1),

imposes absolute vicarious liability, without regard to fault, against owners, contractors and their agents for any Industrial Code violations that proximately cause injuries to workers. Here, plaintiff continues, the defendants supplied the subject ladder, not his employer, and the applicable Industrial Code provisions required that the subject ladder meet certain strength requirements, and, plaintiff avers, the accident occurred when the subject ladder buckled under the combined weight of plaintiff and his tools. Other applicable Industrial Code provisions, he argues, require that ladders be both secured and placed on a non-slippery surface. Plaintiff claims that defendants' failure to ensure compliance with these provisions violated the Industrial Code, proximately caused his injuries and establish a prima face Labor Law § 241 (6) claim. He contends that no applicable defenses to such a claim exist and therefore plaintiff concludes that his cross motion under Labor Law § 241 (6) should be granted insofar as it seeks partial summary judgment on liability against defendants.

Plaintiff's Opposition Arguments

In opposition to defendants' arguments, plaintiff first contends that Labor Law § 240 (1) certainly applies to these facts, because plaintiff was injured while using an unsecured ladder. "Ladder," plaintiff points out, is a specifically-named safety device in the text of Labor Law § 240 (1), and it was not being used as a "passageway" as defendants claim. Plaintiff disagrees that defendants' cited appellate authority suggests that an unsecured ladder may be considered a passageway under Labor Law § 240 (1); instead, he continues, the cases defendants cite suggest that items/locations/platforms/objects *other* than ladders have been considered to be passageways by appellate courts, which, as a result, found Labor Law § 240

(1) to be inapplicable. Plaintiff concludes that, as he actually fell from an unsecured safety device that Labor Law § 240 (1) *explicitly mentions*, the statute clearly applies.

Next, plaintiff disputes defendants' contention that the accident occurred in the context of "routine maintenance" instead of "repair," an explicitly protected activity in the text of Labor Law § 240 (1). Plaintiff emphasizes that the subject elevator was inoperable and would have remained that way had the coils not been replaced. Plaintiff contends that the appellate authority defendants cite suggests that minor changes to elevator cars (e.g., replacing light bulbs) may be nonactionable "routine maintenance," but such activities are not analogous to replacing nonfunctioning parts in an inoperable elevator. Indeed, plaintiff continues, the appellate authority he cites makes it clear that the mechanical alteration of a nonfunctioning elevator in the course of returning it to service counts as a "repair," triggering Labor Law § 240 (1). Plaintiff submits that the nature of his work activities at the property thus constituted a "repair" for the purpose of the statute.

Additionally, plaintiff claims that defendants' arguments about his alleged "recalcitrance" and sole proximate cause defense lack merit. Plaintiff recounts that Labor Law § 240 (1) requires owners, contractors and their agents to furnish, place and operate safety devices in a manner that gives workers proper protection against gravity-related risks. Plaintiff reiterates that defendants failed to provide him this proper protection. Plaintiff argues that a recalcitrant worker defense requires that the record establish that he refused to use an available safety device, but here, he submits, the record contains no such evidence. Moreover, plaintiff notes that a sole proximate cause defense requires proof that he misused

or failed to use an available safety device. Here, plaintiff says, he used the ladder the owner had provided, his only available safety device and he secured it by the only available means, but the ladder was still not stable or strong enough, which caused him to fall. Therefore, plaintiff concludes, a Labor Law § 240 (1) violation proximately caused his accident and resultant injuries, and, accordingly, he could not have been the sole proximate cause of the accident.

Also, plaintiff asserts in opposition to defendants' motion, that his Labor Law § 241 (6) claims should not be dismissed. He cites at least three Industrial Code provisions addressed to ladder safety that he alleges are applicable and which contain sustainable and specific safety standards which were not complied with. He thus reasons that his Labor Law § 241 (6) claims have merit.

Lastly, plaintiff asserts, in opposition to defendants' motion, that his Labor Law § 200 claims are sustainable. He notes that owners, contractors and their agents are subject to common-law negligence or Labor Law § 200 liability if they directed or controlled an injured plaintiff's work. Here, he argues, issues of fact exist as to whether defendants directed or controlled his work. Specifically, plaintiff claims that defendants' agents instructed his supervisor that he should use the subject ladder if he could not obtain access through the fifth floor apartment. Moreover, plaintiff characterizes the subject ladder as defective. Additionally, plaintiff observes that defendants offer no evidence as to when the relevant area was last inspected. Plaintiff claims that defendants have also failed to prima facie establish that they lacked notice of the hazards (i.e., either the subject ladder or the relevant area).

Hence, plaintiff concludes that defendants are not entitled to summary judgment dismissing his Labor Law § 200 and common-law negligence claims.

Defendants' Opposition Arguments

Defendants, in opposition to plaintiff's motion, first argue that Labor Law § 240 (1) does not apply to the instant facts because the subject ladder was being used as a passageway from one part of the work area to another. Defendants contrast this use with instances where an injured worker is required to use a ladder to perform his work. Here, instead, defendants continue, the subject ladder was simply (and unnecessarily, in their view) used as a way to get from a higher roof to a lower roof, where the elevator room was located. Defendants reiterate that since the ladder, in essence, was used as a passageway, Labor Law § 240 (1) does not apply to the instant facts.

Alternatively, defendants claim that plaintiff, despite his insistence that he was "repairing" the elevator, actually was not engaged in a protected activity when the accident occurred. Defendants assert that the coils plaintiff needed to replace had worn out due to normal wear and tear, and that appellate authority interpreting Labor Law § 240 (1) holds that replacing such parts constitutes routine maintenance, explicitly not a protected activity. Defendants note that plaintiff was able to replace the coils by himself with only a few tools. Moreover, defendants argue that, contrary to plaintiff's position, it is insufficient for him to demonstrate merely that the subject elevator was nonfunctioning, as any work replacing parts that have worn out is routine maintenance, regardless whether such work had to be completed before the elevator could again operate. Defendants essentially argue that

plaintiff's work was similar to the task of replacing a filter in an air conditioner. Defendants conclude that therefore, as plaintiff's assigned task was an unprotected activity. Labor Law § 240 (1) fails to apply here.

Again, arguing in the alternative, defendants state that plaintiff cannot recover damages pursuant to Labor Law § 240 (1) because his recalcitrance precipitated the accident. Defendants reiterate that the elevator room where the coil was housed could have been reached simply by walking through the fifth-floor apartment, vitiating the need for a ladder. Defendants assert that plaintiff was expected to use the apartment as a thoroughfare to the elevator room and claim he could have simply waited until the tenants were home to gain access to it. Defendants reason that plaintiff thus failed to follow instructions, to wait until he could reach the tenants to obtain access, which would have avoided any elevation-related risks. Accordingly, they view plaintiff as recalcitrant, which prohibits him from recovering damages pursuant to Labor Law § 240 (1).

Lastly, defendants argue that plaintiff is not entitled to partial summary judgment under Labor Law § 241 (6). They support this assertion by first noting that the statute, by its terms, applies to instances where "construction, demolition or excavation" work is performed. Here, they continue, plaintiff was involved in no such work, which also was not being performed anywhere on the premises at all relevant times. Therefore, since plaintiff was not involved in "construction, demolition or excavation" work, they submit that Labor Law § 241 (6) does not apply. Alternatively, defendants claim that the Industrial Code provisions plaintiff cited either do not apply to the facts, were not violated, or do not contain

a specific, positive command as is required to support this cause of action. Hence, they assert that plaintiff's Labor Law § 241 (6) claim lacks merit.

Discussion

Summary Judgment Standard

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], citing *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *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]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable

inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *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]); *see also 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]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

However, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*,

32 NY2d 285, 290 [1973]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman,* 3 NY2d at 404`[internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).[3]

Labor Law § 241 (6)

> Labor Law § 241 states, in the 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 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."

[3] The court finds that the statements of the purported experts are solely designed to support legal conclusions, and, as such, the court reaches its decision without regard to these statements.

Labor Law § 241 (6) thus 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] [emphasis added], citing *Rizzuto* v *L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501-502 [1993]; *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]). "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]). 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 at 505 and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d at 351).

Here, plaintiff's Labor Law § 241 (6) claims lack merit and must be dismissed. The record establishes that plaintiff was employed to repair an elevator in a building that was otherwise not under construction, being renovated or being demolished. Labor Law § 241 (6) is "inapplicable outside the construction, demolition or excavation contexts" (*Esposito*

v New York City Indus. Dev. Agency, 1 NY3d 526, 528 [2003]). An industrial accident that occurs outside of the context of construction, demolition or excavation simply does not trigger the statute (*Nagel v D&R Realty Corp.*, 99 NY2d at 102-103; *see also Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639, 640 [1st Dept 2009]). "Since plaintiff's work was not performed in any such context," this court must dismiss plaintiff's Labor Law § 241 (6) claims (*id.*).[4]

Labor Law § 200 and Common-Law Negligence

> 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 codifies 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]).

[4] The court reaches its decision on this issue based on the appellate authority cited for the proposition that Labor Law § 241 (6) is inapplicable outside the construction, demolition or excavation contexts; the court expresses no opinion on whether the Industrial Code sections cited by plaintiff were violated.

This duty "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]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999], quoting *Comes,* 82 NY2d at 877 and *Russin,* 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, defendants have not made a *prima facie* case for dismissal, which requires defendants to demonstrate that, as a matter of law, that there are no issues of fact regarding plaintiff's claims under Labor Law § 200 or common-law negligence. The court notes that the record indicates that ZCAM or Victorian Management owned[5] (and thus controlled) the

[5] Moreover, if ZCAM owned the subject ladder and it is shown to be defective, Victorian Management may be subject to liability as ZCAM's agent.

subject ladder. Moreover, the record shows that defendants' agents directed plaintiff's foreman (who then directed plaintiff) to use the ladder. Additionally, defendants have not demonstrated that the subject ladder was not defective. Since the record suggests that this accident did not arise out of a subcontractor's methods (*cf. Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008] [no Labor Law § 200 liability if accident arose from methods of plaintiff's employer and defendants exercise no supervisory control over the work]), plaintiff's Labor Law § 200 and common-law negligence claims are viable. Viewing the record in the light most favorable to plaintiff, the opponent of summary judgment (*Pierre-Louis,* 66 AD3d at 862), an issue of fact exists as to whether defendants created or had notice of a dangerous condition (the subject ladder) on the premises (*see e.g. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007] ["Where a plaintiff's injuries stem . . . from a dangerous [premises] condition, an owner [or its agent] may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and . . . created the dangerous condition . . . or had actual or constructive notice of the dangerous condition that caused the accident"]).

Labor Law § 240 (1)

Lastly, the court considers Labor Law § 240 (1), which, as is relevant states 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,* 81 NY2d at 501). 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 nondelegable. 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"]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall 's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing

Bland v Manocherian, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer,* 65 NY2d at 524). Additionally, this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

Here, plaintiff has demonstrated prima facie entitlement to judgment as a matter of law with respect to defendants' Labor Law § 240 (1) liability. Plaintiff's uncontradicted sworn testimony indicates that, despite his best efforts to secure the ladder, the ladder was not properly "placed and operated" to prevent the risk of gravity-related accidents. Although the fact that a worker fell from a ladder is insufficient to establish "that the 'proper protection' required by Labor Law § 240 (1) was not provided" (*Avendano v Sazerac, Inc.*, 248 AD2d 340, 341 [1998], quoting *Basmas v J.B.J. Energy Corp.*, 232 AD2d 594, 595 [1996]; *see also Tylman v School Constr. Auth.*, 3 AD3d 488, 489 [2004]; *Alava v City of New York*, 246 AD2d 614, 615 [1998]), a fall from a ladder that is inadequately secured and slips out from underneath an injured plaintiff, causing him to fall, establishes prima facie liability under Labor Law § 240 (1) (*see e.g. Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005], citing *Loreto v 376 St. Johns Condominium, Inc.,*15 AD3d 454[, 455][2d Dept 2005]; *Blair v Cristani*, 296 AD2d 471[, 472] [2d Dept 2002]; *Guzman v Gumley-Haft, Inc.*, 274 AD2d 555[, 556] [2d Dept 2000]). Moreover, a fall from an

inadequately secured ladder establishes prima facie Labor Law § 240 (1) liability even if "plaintiff was the sole witness with exclusive knowledge of the facts as to how the accident happened" (*Rauschenbach v Pegasystems, Inc.*, 273 AD2d 90, 91 [2000]; *see also Acosta v 888 7th Ave. Assocs.*, 248 AD2d 284 [1998]).

Here, plaintiff's uncontradicted testimony indicates that the subject ladder was not properly secured (*Gilhooly v Dormitory Auth. of State of N.Y.*, 51 AD3d 719, 720 [2d Dept 2008]; *Ricciardi v Bernard Janowitz Constr. Corp*., 49 AD3d 624, 625 [2d Dept 2008]). Thus, plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of defendants' Labor Law § 240 (1) liability by showing that he fell from a defective and/or unsecured ladder (*cf. Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011] [proper protection issue is factual question except when safety device "collapses, moves, falls, or otherwise fails"]; *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]).

Defendants' arguments to the contrary lack merit. First, "ladder" is an explicitly-named safety device in the text of Labor Law § 240 (1). Thus, the argument that the subject ladder should be considered a "passageway" instead of a ladder is without merit. Defendants rely mainly on *Palacios v 29th St. Apts, LLC* (110 AD3d 698 [2d Dept 2013]) for the proposition that the subject ladder was used as a passageway. However, the Appellate Division in *Palacios* explicitly noted that "it is apparent that the fire escape [used by the injured plaintiff Palacios] 'was not being utilized as a ladder, scaffold, hoist or other safety device for the benefit of the injured plaintiff in his work'" (*id.* at 699, quoting *Donohue v*

CJAM Assoc., LLC, 22 AD3d 710, 712 [2005]). The plaintiff in *Palacios* "chose to use the fire escape as a 'shortcut' to the ground from the roof" (*id.* at 698); in contrast, plaintiff here used a ladder to reach the elevator room, where he needed to go in order to perform his assigned task. Hence, the argument that the inadequately secured subject ladder should be considered a "passageway" instead of a ladder is rejected.

Next, defendants' argument that replacing the directional coils constitutes "routine maintenance" also lacks merit. To be sure, "routine maintenance" is not protected by Labor Law § 240 (1) (*see e.g. Vanerstrom v Strasser*, 240 AD2d 563 [2d Dept 1997] ["routine maintenance activities, not related to construction or renovation, are not intended to be protected by Labor Law § 240"]). However, "repairing" a "structure" is a protected activity. Here, as plaintiff correctly points out, he was working to return a nonfunctioning elevator car to full operation. The applicable appellate authority holds that work on nonfunctioning elevators constitutes "repairing" for Labor Law § 240 (1) purposes (*see e.g. Spiteri v Chatwal Hotels*, 247 AD2d 297, 298 [1st Dept 1998] ["the record in this matter indisputably shows that the elevator in question was not working that day . . . (u)nder these circumstances, it is clear that plaintiff was engaged in repair work within the meaning of" Labor Law § 240 (1)] [internal quotes omitted], quoting *Carr v Perl Assocs.*, 201 AD2d 296, 297; *see also Riccio v NHT Owners, LLC*, 51 AD3d 897 [2d Dept 2008] [replacing door track of elevator car

constitutes repair and not routine maintenance for Labor Law § 240 (1) purposes]).[6] Thus, the argument that plaintiff was engaged in "routine maintenance" at the time of the accident is rejected.

Lastly, defendants' arguments that plaintiff was either a recalcitrant worker or the sole proximate cause of his injuries also lacks merit. As noted above, plaintiff has established that the existence of a Labor Law § 240 (1) violation contributed to the accident; therefore, "a violation of Labor Law § 240 (1) is a proximate cause of [the] accident [and] the plaintiff's conduct, of necessity, cannot be deemed the sole proximate cause" (*Melchor,* 90 AD3d at 867 citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Triola v City of New York*, 62 AD3d 984, 986 [2d Dept 2009]). Also, the record contains no sworn testimony or other admissible evidence that the plaintiff "engaged in unforeseeable, reckless activities [or] misused a safety device that was provided to him[,]" and, accordingly, plaintiff was not the sole proximate cause of his injuries (*Beharry v Public Stor., Inc.* , 36 AD3d 574, 575 [2d Dept 2007]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004] [sole proximate cause defense exists when a worker misused device or for no good reason chose not to use an available safety device that would have prevented the accident]); to the contrary, plaintiff attempted to secure the subject ladder by using the materials available to him. Furthermore, the record indicates that plaintiff was

[6] The court further notes that recently-enacted state-wide legislation requires elevator repair persons to obtain a government-issued license, following specified training, further bolstering the notion that elevator repair is a specialized profession that does not involve "routine" work.

following a supervisor's directions; accordingly, the record does not establish that plaintiff was a recalcitrant worker (*see e.g. Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 809 [2d Dept 2010], citing *Walls v Turner Constr. Co.*, 10 AD3d 261, 262 [1st Dept 2004] [worker is recalcitrant only when such worker "disobeyed immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device"], *affd on other grounds* 4 NY3d 861, 862 [2005]; *see generally Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Cahill*, 4 NY3d at 39-40). To the contrary, plaintiff herein was acting in accordance with his supervisor's directions when he used the subject ladder that led to the accident. Therefore, the accident and plaintiff's consequential injuries are at least partially attributable to the failure to provide proper protection as mandated by the statute, and, despite defendants' protestations, plaintiff is entitled to partial summary judgment on the issue of defendants'[7] liability pursuant to Labor Law § 240 (1) (*see e.g. Laquidara v HRH Constr. Corp.*, 283 AD2d 169 [1st Dept 2001]).[8]

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[7] The record suggests that Victorian Management is subject to vicarious Labor Law liability as the agent of ZCAM, the property owner. "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the 'ability to control the activity which brought about the injury'" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011], quoting *Walls*, 4 NY3d 861, 863-864 [2005]). Here, the record indicates that Victorian Management gave directions to plaintiff's supervisor, who then gave directions to plaintiff.

[8] Moreover, assuming arguendo that plaintiff was partially at fault, a worker's comparative negligence is not a defense to a Labor Law § 240 (1) claim (*Stolt v General Foods Corp.*, 81 NY2d 918 [1993]).

Accordingly, it is

ORDERED that defendants' summary judgment motion, mot. seq. four, is granted solely to the extent of dismissing plaintiff's Labor Law § 241 (6) claims, and is otherwise denied; and it is further

ORDERED that the plaintiff's concurrent, partial summary judgment motion, mot. seq. five, is granted solely to the extent of awarding him summary judgment on the issue of liability on his claims against defendants under Labor Law § 240 (1), and is otherwise denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Debra Silber, J.S.C.