Renzi v CVS Albany, LLC

2020 NY Slip Op 32038(U)

June 1, 2020

Supreme Court, Suffolk County

Docket Number: 15-8471

Judge: William G. Ford

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This opinion is uncorrected and not selected for official publication.

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SHORT FORM ORDER

INDEX No. 15-8471
CAL. No. 19-01503OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 9-5-19 (001)
MOTION DATE 12-12-19 (002)
MOTION DATE 12-19-19 (003)
ADJ. DATE 2-6-20
Mot. Seq. # 001 - MD
 # 002 - MotD
 # 003 - MotD

---X

STEPHEN E. RENZI,

Plaintiff,

- against -

CVS ALBANY, LLC and 390 BROADWAY ASSOCIATES,

Defendants.

---X

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Upon the following papers read on the motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by plaintiff, filed August 15, 2019, by CVS Albany, LLC, filed December 3, 2019, and by 390 Broadway Associates, filed November 25, 2019; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff, filed January 21, 2020, by CVS Albany, LLC, filed January 17, 2020 and February 6, 2020, and by 390 Broadway Associates, filed November 25, 2019; Replying Affidavits and supporting papers by plaintiff, filed January 21, 2020, by 390 Broadway Associates, filed February 6, 2020, and by CVS Albany, LLC, filed February 6, 2020; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by plaintiff, the motion (002) by defendant 390 Broadway Associates, and the motion (003) by defendant CVS Albany, LLC, are consolidated for purposes of this determination; and it is further

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ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that the motion by defendant CVS Albany, LLC, for summary judgment dismissing the complaint and cross-claims against it is granted to the extent of dismissing plaintiff's claims under Labor Law §§ 200 and 241, and the cross claims by 390 Broadway Associates, and is otherwise denied; and it is further

ORDERED that the motion, incorrectly denominated a cross motion, by defendant 390 Broadway Associates for summary judgment dismissing the complaint and cross claims against it is granted to the extent of dismissing plaintiff's claims under Labor Law §§ 200 and 241, and the cross claims by CVS Albany, LLC, and is otherwise denied.

In this Labor Law action, plaintiff, Stephen Renzi, claims that he fell from the roof of a building in Rockville Centre, New York, that was occupied by defendant CVS Albany, LLC (CVS), and, according to plaintiff, owned by defendant 390 Broadway Associates (Broadway). Plaintiff, an HVAC technician who worked for nonparty Michael James Industry (MJI), was on the building's roof to fix the building's air conditioning system. Plaintiff claims that he fixed one air conditioning unit and was diagnosing a second air conditioning unit so that he could fix it. While looking forward at the air conditioning unit, plaintiff walked backward, tripped over the ledge of the roof, and fell off of the roof. Plaintiff asserted claims against defendants under Labor Law §§ 200, 240, and 241 (6). CVS and Broadway interposed cross claims against each other for common-law indemnification, contractual indemnification, and contribution.[1]

Plaintiff now moves for partial summary judgment on the issue of liability. In support of his motion, plaintiff submits, among other things, the pleadings, a bill of particulars, a transcript of the deposition of plaintiff, a transcript of the deposition of Craig Longo on behalf of CVS, a transcript of the deposition of Andrea Greenberg on behalf of Broadway, and a note of issue. CVS moves for summary judgment dismissing the complaint and cross claims against it. In support of its motion, CVS submits, among other things, the pleadings, a bill of particulars, a transcript of the deposition of plaintiff, a transcript of the deposition of Longo, a transcript of the deposition of Greenberg, and an affidavit from Carlos Santiago. Broadway also moves for summary judgment dismissing the complaint and cross claims against it, and for summary judgment in its favor on its cross claim for contractual indemnification. In support of its motion, Broadway incorporates the exhibits submitted with plaintiff's motion, and additionally submits photographs, various lease and sublease documents, and an affidavit from William Marletta.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of***

[1] Although Broadway, in paragraph 58 of its motion, contends that CVS was required to "name the lessor as additional insureds on all of the lessee's applicable primary and excess policies," neither defendant has asserted a cross claim for failure to procure insurance.

New York City Asbestos Litig., 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

Labor Law § 200 codifies "the common-law duty imposed upon an owner or general contractor to provide . . . workers with a safe place to work" (***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168, 169 [1993]; *see e.g.* ***Alexandridis v Van Gogh Contr. Co.***, 180 AD3d 969, 120 NYS3d 347 [2d Dept 2020]). "Thus, liability under this statute is governed by common-law negligence principles" (***Grasso v New York State Thruway Auth.***, 159 AD3d 674, 678, 71 NYS3d 604, 611 [2d Dept 2018]). There are two types of section 200 cases: "those where workers are injured as a result of dangerous or defective premises conditions at a work[ ]site, and those involving the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323, 329 [2d Dept 2008]; *see* ***Robles v Taconic Mgt. Co., LLC***, 173 AD3d 1089, 103 NYS3d 571 [2d Dept 2019]). When liability is based on an allegedly dangerous premises condition, an owner must have either created the condition or had actual or constructive notice thereof (*e.g.* ***DeFelice v Seakco Constr. Co., LLC***, 150 AD3d 677, 54 NYS3d 55 [2d Dept 2017]). An owner need not control the work site to be liable for a dangerous premises condition (***Griffin v New York City Tr. Auth.***, 16 AD3d 202, 791 NYS2d 98 [1st Dept 2005]). A general contractor, on the other hand, must have actual or constructive notice of the dangerous condition and control over the work site to be liable (*e.g.* ***Wynne v B. Anthony Constr. Corp.***, 53 AD3d 654, 862 NYS2d 379 [2d Dept 2009]). When liability is premised on the manner in which the work is performed, "the party to be charged [must have] had the authority to supervise or control the performance of the work" (***Gasques v State of New York***, 59 AD3d 666, 667, 873 NYS2d 717, 720 [2d Dept 2009] [quotation marks and citations omitted], *affd* 15 NY3d 869, 910 NYS2d 415 [2010]; *see e.g.* ***Paul v Village of Quogue***, 178 AD3d 942, 115 NYS3d 450 [2d Dept 2019]). There are also certain "rare hybrid case[s]" where both a dangerous premises condition and the means and methods of the work proximately cause the plaintiff's injury (***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 52, 919 NYS2d 44, 48 [2d Dept 2011] [the plaintiff's injury was caused by both the lack of a shut-off mechanism on a lawnmower and a large hole in the ground]).

Labor Law § 240 (1) states that "[a]ll 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 shall furnish or erect" suitable safety devices to guard against elevation-related hazards (*see generally* ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 727 NYS2d 37 [2001]). Of note, routine maintenance is not an enumerated activity to which the statute applies (*e.g.* ***Esposito v New York City Indus. Dev. Agency***, 1 NY3d 526, 770 NYS2d 682 [2003]). Section 240 is a strict-liability statute, and principles of comparative fault do not apply (*e.g.* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 771 NYS2d 484 [2003]). The statute should "be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 124, 8 NYS3d 229, 233 [2015] [quotation marks and citations omitted]). But there is no liability when a plaintiff's actions are the sole

proximate cause of his or her injuries (*e.g.* ***Barreto v Metropolitan Transp. Auth.***, 25 NY3d 426, 13 NYS3d 305 [2015]). The duty imposed by section 240 "is nondelegable[,] and an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control" (***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 559, 606 NYS2d 127, 129 [1993] [quotation marks and citations omitted]). A lessee may be liable as an owner under section 240 when it contracts for the work or supervises it (*e.g.* ***Rizo v 165 Eileen Way, LLC***, 169 AD3d 943, 94 NYS3d 157 [2d Dept 2019]).

Labor Law § 241 (6) makes owners and contractors (except owners of one and two-family dwellings who do not direct or control the work) liable for violations of the Industrial Code (*see* ***Mugavero v Windows by Hart, Inc.***, 69 AD3d 694, 894 NYS2d 448 [2d Dept 2010]). An owner "cannot escape liability by demonstrating that it delegated the responsibility for its duties under § 241 (6) to its lessee" (***Giacomazzo v Exxon Corp.***, 185 AD2d 145, 146, 586 NYS2d 112, 113 [1st Dept 1992]); similarly, a general contractor may be held liable even if it did not control or supervise the work site (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]). Similar to section 240, section 241 (6) does not apply when workers are engaged in routine maintenance (***Guevera v Simon Prop. Group, Inc.***, 134 AD3d 899, 22 NYS3d 490 [2d Dept 2015]; ***Wein v Amato Props., LLC***, 30 AD3d 506, 816 NYS2d 370 [2d Dept 2006]). Unlike section 240, comparative negligence is a defense to a claim under section 241 (***St. Louis v Town of N. Elba***, 16 NY3d 411, 923 NYS2d 391 [2011]). A lessee may be liable under section 241 when it contracts for the work or supervises it (*e.g.* ***Rizo v 165 Eileen Way, LLC***, *supra*).

The Court will first address CVS's motion. As to the Labor Law § 200 claim, CVS satisfied its prima facie burden with evidence that plaintiff simply walked backward while looking forward, tripped over the ledge, and fell off of the roof. Plaintiff denied tripping or slipping on a dangerous condition on the surface of the roof. As part of its prima facie burden, CVS has shown that the ledge of the roof was open, obvious, and not inherently dangerous (*see generally* ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]). In opposition, plaintiff failed to raise a triable issue of fact. Although plaintiff claims that the roof ledge violated OSHA standards, plaintiff failed to identify any specific OSHA standard that was violated. The main thrust of plaintiff's argument is that the ledge was not a uniform height around the roof because the roof was slightly sloped. But that does not make the ledge dangerous, especially when the ledge's height was open and obvious. To the extent that plaintiff claims that the ledge was not six inches high, and that it had to be that height under the applicable building code, photographs of the portion of the ledge over which plaintiff fell show that it was more than six inches in height. In any event, even if it were an inch or two shorter, any such deficiency did not proximately cause plaintiff—who was walking backward while looking forward—to fall off the roof. Accordingly, that branch of CVS's motion seeking summary judgment on plaintiff's Labor Law § 200 claim is granted.

Turning to section 240, it is well-settled that while repairing an air conditioning system is a covered activity under the statute, routine maintenance of air conditioning systems is not (*e.g.* ***Esposito v New York City Indus. Dev. Agency***, *supra*). For example, "replacing components that require replacement in the course of normal wear and tear" is routine maintenance (***Dahlia v S&K Distrib.,***

LLC, 171 AD3d 1127, 1128, 98 NYS3d 338, 340 [2d Dept 2019] [quotation marks and citations omitted]). Here, CVS has failed to meet its prima facie burden to show that plaintiff was engaged in routine maintenance. Plaintiff, who was the only MJI employee at the premises that day, was there to determine why the building was not receiving cool air. He had just reclaimed refrigerant from one air conditioning unit and was attempting to ascertain why a second air conditioning unit had high head pressure when the accident happened. Specifically, plaintiff was ascertaining if a condenser was clogged, which could cause the high pressure. But plaintiff never ascertained why this second air conditioning unit was not working and never repaired it, as the accident happened before plaintiff could do so. Without evidence as to what was wrong with the second air conditioning unit and what work was required to make it operable, the Court cannot determine if plaintiff was engaged in routine maintenance or repair.

The affidavit from Carlos Santiago, a CVS facilities manager, also never explained what work had to be performed on the second air conditioner or why it was not working. Santiago's affidavit mainly expounded on work that had been performed on the air conditioning units in the couple of weeks before plaintiff's accident. Although Santiago also described the work performed on the date of the accident, and submitted an invoice for that work (exhibit 4 to the affidavit), it appears that the work described on that invoice was related only to the first air conditioning unit, not the second air conditioning unit. Indeed, the invoice lists the serial number of the units on which work was performed, and only one serial number is listed. That there is only a single serial number listed shows, apparently, that the work described on the invoice was performed only on the first air conditioning unit. Of note, a proposal from MJI that is exhibit 2 to Santiago's affidavit, and a work order that is exhibit 3 to Santiago's affidavit, both list three different serial numbers for the three different air conditioning units on the roof. Thus, Santiago's affidavit and attached exhibits do not explain what work had to be performed on the second air conditioning unit or why it was not working, and there is no other evidence on that topic.

Simply stated, "there is no evidence in the record establishing the cause of the [second air conditioning unit's] breaking or the work that was involved in [repairing] it. Thus, it cannot be determined as a matter of law whether plaintiff was engaged in routine maintenance or a repair covered under" section 240 (***Montalvo v New York & Presbyt. Hosp.***, 82 AD3d 580, 581, 919 NYS2d 18, 19 [1st Dept 2011]; *see* ***Parente v 277 Park Ave. LLC***, 63 AD3d 613, 883 NYS2d 22 [1st Dept 2009]; *see also* ***Weisman v Duane Reade, Inc.***, 64 AD3d 643, 883 NYS2d 137 [2d Dept 2009]). To the extent that Santiago's affidavit can be interpreted as stating that plaintiff was at the premises to follow up on previously-performed maintenance, such an interpretation conflicts with Craig Longo's testimony on behalf of CVS. Longo, the CVS store manager, testified that he put in a service call because the store was hot, and he did not know of any recent maintenance on the air conditioning units (***Santiago v Fred-Doug 117, L.L.C.***, 68 AD3d 555, 891 NYS2d 59 [1st Dept 2009]). CVS has also failed to show, prima facie, that plaintiff—who was not provided with any safety equipment such as ropes or harnesses that could have prevented him from falling—was the sole proximate cause of his injuries (*see* ***Rast v Wachs Rome Dev., LLC***, 94 AD3d 1471, 943 NYS2d 323 [4th Dept 2012]; *see generally* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 771 NYS2d 484 [2003]). Accordingly, so much of CVS's motion as seeks summary judgment on plaintiff's Labor Law § 240 claim is denied.

As to plaintiff's Labor Law § 241 (6) claim, CVS observes that plaintiff did not allege a violation of any specific portion of the Industrial Code in his complaint or bill of particulars. Although a plaintiff must assert a violation of a specific provision of the Industrial Code for a valid claim under section 241, a plaintiff may refer to specific provisions of the Industrial Code for the first time in opposition to a motion for summary judgment when the allegations "involve[] no new factual allegations, raise[] no new theories of liability, and cause[] no prejudice" to the defendants (***Klimowicz v Powell Cove Assoc., LLC***, 111 AD3d 605, 607, 975 NYS2d 419, 421 [2d Dept 2013]; *see* ***Simmons v City of New York***, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; ***Kowalik v Lipschutz***, 81 AD3d 782, 917 NYS2d 251 [2d Dept 2011]). In opposition to the motion, plaintiff contends that CVS violated 12 NYCRR 23-1.24 (b) and 23-1.7 (e) (2). Regardless of the issue of prejudice, CVS has shown that, as a matter of law, neither of those provisions is applicable. Section 23-1.24 (b) applies only when "any work is being performed in the construction, repair or maintenance of any roof." The regulation uses the phrase "of any roof," not "on any roof," requiring that the work be to the roof itself. Here, it is undisputed that plaintiff was not performing any construction, repair, or maintenance work on the roof itself. Thus, under the plain terms of the regulation, it does not apply. Section 23-1.7 (e) (2) prohibits "accumulations of dirt and debris and from scattered tools and materials and from sharp projections" in work areas. Here, it is undisputed that plaintiff did not slip or trip on dirt, debris, tools, or any sharp projections; by his own admission, he simply walked backward off of the roof. Plaintiff failed to raise a triable question of fact in opposition. Thus, that branch of CVS's motion seeking summary judgment on plaintiff's Labor Law § 241 (6) claim is granted.

CVS also seeks summary judgment on the cross claims asserted against it by Broadway for common-law indemnification, contractual indemnification, and contribution. In a Labor Law claim, a party may only obtain common-law indemnification if "it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 378, 929 NYS2d 556, 563 [2011]; *see* ***Rizo v 165 Eileen Way, LLC***, 169 AD3d 943, 94 NYS3d 157 [2d Dept 2019]; ***Picchione v Sweet Constr. Corp.***, 60 AD3d 510, 875 NYS2d 42 [1st Dept 2009]; *see generally* ***Santoro v Poughkeepsie Crossings, LLC***, 180 AD3d 12, 115 NYS3d 368 [2d Dept 2019]). "Liability for [common-law] indemnification may only be imposed against those parties . . . who exercise actual supervision," and the mere fact that a party may have had authority to supervise the work is insufficient for that party to be liable in common-law indemnification (***McCarthy v Turner Constr., Inc.***, *supra*; *see* ***Naughton v City of New York***, 94 AD3d 1, 940 NYS2d 21 [1st Dept 2012]). Here, CVS has shown that it did not actually supervise plaintiff; its liability, if any, is purely vicarious, and it cannot be held liable in common-law indemnification (*see* ***Provens v Ben-Fall Dev., LLC***, 163 AD3d 1496, 83 NYS3d 385 [4th Dept 2018]; ***Pita v Roosevelt Union Free Sch. Dist.***, 156 AD3d 833, 68 NYS3d 84 [2d Dept 2017]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; ***Mohammed v Islip Food Corp.***, 24 AD3d 634, 808 NYS2d 389 [2d Dept 2005]). For the same reasons, CVS cannot be held liable in contribution (*see* ***Gonsalves v 35 W. 54 Realty Corp.***, 147 AD3d 815, 47 NYS3d 367 [2d Dept 2017] ***Markey v C.F.M.M. Owners Corp.***, 51 AD3d 734, 858 NYS2d 293 [2d Dept 2008]; ***Einhorn v Fine Times***, 277 AD2d 8, 715 NYS2d 243 [1st Dept 2000]; ***Jehle v Adams Hotel Assoc.***, 264 AD2d 354, 695 NYS2d 22 [1st Dept 1999]). Regarding contractual indemnification, CVS showed, prima facie, that there was no written indemnification agreement between it and Broadway. In opposition, Broadway failed to raise a triable question of fact. Although Broadway relies

on an indemnification provision in the ground lease in support of its cross claim for contractual indemnification, CVS was not a party to the ground lease (*see infra* n 5). Accordingly, that branch of CVS's motion that seeks summary judgment on Broadway's cross claims is granted.

Turning to Broadway's motion, the analysis applicable to CVS's motion is largely applicable to Broadway's motion. The Court notes that Broadway also submitted the affidavit of William Marletta, a safety consultant, who opined, among other things, that the building's roof complied with the applicable building codes. Accordingly, for that reason and for the reasons in support of dismissing the section 200 claim against CVS, that branch of Broadway's motion that seeks summary judgment dismissing plaintiff's Labor Law § 200 claim is granted. As discussed above, the two Industrial Code provisions on which plaintiff relies are inapplicable. Thus, that branch of Broadway's motion that seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted.

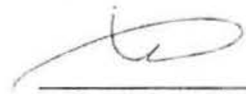
Regarding section 240, Broadway additionally argues that plaintiff, who was ascertaining if a condenser was clogged when he fell, was engaged in an inspection and, therefore, was not performing an enumerated activity. To the extent that ascertaining if a condenser was clogged can be considered an inspection, the Court cannot say, as a matter of law, that it was not covered by section 240. Plaintiff was ascertaining whether the condenser was clogged to see if that was causing the high head pressure so he could "remedy the malfunction" (***Cullen v AT&T, Inc.***, 140 AD3d 1588, 1589, 32 NYS3d 757, 759 [4th Dept 2016]; *see* ***Channer v ABAX, Inc.***, 169 AD3d 758, 93 NYS3d 444 [2d Dept 2019]; ***Doskotch v Pisocki***, 168 AD3d 1174, 90 NYS3d 667 [3d Dept 2019]; ***Dubin v S. DiFazio & Sons Constr., Inc.***, 34 AD3d 626, 826 NYS2d 325 [2d Dept 2006]). Like CVS, Broadway failed to show, as a matter of law, that plaintiff was engaged in general maintenance instead of repair. Marletta's affidavit did not explain what was actually wrong with the second air conditioning unit and what subsequent work had to be done to fix it. Accordingly, and for the reasons described above, Broadway has failed to show, as a matter of law, that the Labor Law § 240 claim should be dismissed.

Regarding the cross claims, Broadway has shown that there is no written indemnification agreement that would require Broadway to indemnify CVS. Accordingly, so much of Broadway's motion as seeks summary judgment on CVS's cross claim against Broadway for contractual indemnification is granted. As explained above, because CVS will not be liable to Broadway in contractual indemnification, the branch of Broadway's motion that seeks summary judgment on its cross claim against CVS for contractual indemnification is denied. Broadway has also shown that its liability, if any, is vicarious, and that it was not actively negligent. Accordingly, for the same reasons that Broadway's cross claims against CVS are being dismissed, that branch of Broadway's motion as seeks summary judgment on CVS's cross claims is granted.

Turning to plaintiff's motion, as explained above, the Labor Law §§ 200 and 241 claims are being dismissed. As to the Labor Law § 240 claim, as explained above, there is a question of fact as to whether plaintiff was engaged in repair or routine maintenance. Additionally, both plaintiff and Longo testified that plaintiff, on the date of the accident, said that he did not fall from the roof. When a plaintiff gives different accounts of the accident, not all of which would result in liability under section 240, a plaintiff may not obtain summary judgment on the issue of liability (***Potter v NYC Partnership Hous.***

Dev. Fund Co., Inc., 13 AD3d 83, 786 NYS2d 438 [1st Dept 2004]), including when a plaintiff denies falling (*see* ***Delmar v TerraStruct Corp.***, 249 AD2d 259, 670 NYS2d 915 [2d Dept 1998]). Accordingly, plaintiff's motion for partial summary judgment on the issue of liability is denied.

Dated: June 1, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION