SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY
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BRUCE EXLEY,

Plaintiff,

- against –

CASSELL VACATIONS HOMES, INC.,

Defendant.

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To commence the statutory time period 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.

Index No. EF001829-2018

**DECISION AND ORDER**

Motion Date: March 11, 2020

The following papers numbered 1 to 11 were read and considered on (1) a motion by the Plaintiff, pursuant to CPLR §3212, for summary judgment on the issue of liability and (2) a cross motion by the Defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Notice of Motion- Foulke Affirmation- Exhibits A- E- Memorandum of Law-
Exley Affidavit ..... 1-5
Notice of Cross Motion- Schule Affirmation- Exhibits A- E- Memorandum of Law ..... 6-9
Reply- Foulke Affirmation- Memorandum of Law ..... 10-11

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted, and the cross motion is denied.

## Introduction

The Plaintiff Bruce Exley commenced this action to recover damages for personal injuries. He alleges that he was injured when he fell from a defective ladder while working on property owned by the Defendant Cassell Vacation Homes, Inc. (hereinafter "Cassell").

The Plaintiff moves for summary judgment on the issue of liability.

Cassell cross-moves to dismiss the complaint.

**Factual and Procedural Background**

As factual background, the Plaintiff provides sworn testimony as follows.

On October 29, 2017, he fell approximately eight feet (8') to the ground as he was ascending a 16-foot long extension ladder to make repairs to a leaky roof at property owned by Cassell at 111 Weld Road, Fair Oaks, New York. The property consists of five separate buildings housing nine tenant apartments.

The Plaintiff had a verbal agreement with Cassell to maintain and take care of the property in exchange for free room and utilities in one of the apartments. He did not have a written lease with Cassell.

His duties included maintaining the lawn, shoveling sidewalks and attending to tenants' complaints, including small repairs.

He was not paid any money for his work at the property, and he did not receive a paycheck or a W-2 from Cassell.

Cassell did not provide worker's compensation insurance, or manage or supervise his work.

Barbara Metz was the "trustee" for Cassell.

When the work involved plumbing, electrical, or major expenses above $300 or $400, he would contact Metz to get authorization before hiring contractors or making repairs.

Otherwise, the Plaintiff made his living as a self-employed carpenter performing jobs such as roofing, sheetrocking, door hanging, painting for clients.

The accident at issue occurred while he was attempting to inspect and make repairs using an 16 foot extension ladder that was missing one of its leveling feet. To repair the roof, the Plaintiff needed to climb twelve feet (12') above the ground.

Cassell provided the ladder. Cassell did not have any other ladders on site capable of reaching the 12-foot high roof that he needed to reach. Cassell also owned two A-frame ladders, but those ladders only extended approximately six feet (6') and would have been inadequate.

The Plaintiff personally owned three (3) thirty-two foot (32') long extension ladders, but they were not located at the subject property, and were too long to use to reach a 12-foot height.

The extension ladder at issue was stored in a barn on the property, where it had been since he had moved in to his apartment around 2010.

He thinks he noticed that the ladder was missing the leveling foot approximately five years before the accident, and he had used it approximately three times since that time without incident.

On the day of the accident, he had gathered aluminum flashing and a hammer needed to repair the roof, and retrieved the 16-foot extension ladder from the barn where it was stored.

He set up the ladder on the side of the house with the roof leak. He put the base of the ladder on concrete pavers and did his best to level it. After he had climbed up approximately 8 feet, the right side of the extension ladder, which was missing the leveling foot, kicked backwards and he fell.

The Plaintiff moves for summary judgment on the issue of liability.

The Plaintiff argues that Cassell may be held liable for his injuries under Labor Law §240(1).

Cassell cross moves for summary judgment seeking dismissal of the complaint on the ground that the Plaintiff was an employee of Cassell and, therefore, his exclusive remedy was Workers' Compensation benefits.

In support of its motion, Cassell submits an affirmation from counsel, Nelson Schule.

Schule asserts that the following additional relevant testimony was provided at examinations before trial.

The Plaintiff testified: "[Cassell] hired me knowing that I would straighten everything out and which I did. The rents weren't getting there on time. I got everything straightened out for them."

The Plaintiff's understanding was that he "was going to manage the property, collect the rents . . . [do] the hiring, the firing, the leasing, the newspaper, all of it."

The Plaintiff also maintained properties for Cassell at 9 Linden Avenue and Monhagen Avenue. He considered himself "full-time," as he was there "24/7." "If there was something that had to be done, [he] did it, without having to be told."

The Plaintiff has never filed any paperwork with Cassell regarding the work he performed. Rather, everything was done verbally, over the telephone.

The Plaintiff first became aware that the ladder was missing a foot five years prior to his accident, but he did not do anything about it, and he did not tell anyone at Cassell.

The Plaintiff had used the ladder a month prior to his alleged accident during which he did not have any problems.

Metz never inspected his work, and never supervised nor directly managed the method of his work.

Metz was not aware of any equipment, generally, that Cassell had at the property, including any ladders.

In reply, the Plaintiff submits an affirmation from counsel, Evan Foulke.

Initially, Foulke notes, Metz told the Plaintiff that there was no Workers' Compensation coverage for the accident. Further, he asserts, the Plaintiff had not received any such coverage.

In addition, Foulkes notes, on December 27, 2019, he served Cassell with a Notice to Admit concerning worker's compensation coverage at the time of the Plaintiff's accident.

Cassell objected to the demand on relevance grounds and asserted that it could not truthfully admit or deny whether it maintained such coverage.

At the January 29, 2020, court conference, defense counsel stated that he had been unable to reach or speak with his client, and therefore could not "truthfully admit or deny the matters contained" in the Notice to Admit.

The Court afforded defense counsel an opportunity to speak with his client, and directed that he supplement Cassell's response to the Notice to Admit.

However, Foulke avers, Cassell did not supplement its response.

Therefore, he argues, pursuant to CPLR §3123(a), the lack of coverage is deemed admitted.

In any event, he asserts, Metz's explicit admission to the Plaintiff on the day of the accident that he was not covered by any policy of worker's compensation insurance, or any other insurance, coupled with the fact that the Plaintiff never received any worker's compensation benefits, and was not a payroll employee of Cassell, is sufficient to meet the Plaintiff's *prima facie* burden of proof as to a lack of such coverage.

**Discussion/Legal Analysis**

Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280; *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020]. To prevail on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must prove that the defendant violated the statute and that such violation was a proximate cause of his or her injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280; *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020]. Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1). *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280; *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020].

Where an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280; *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020].

Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280; *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020].

Specifically, a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020]. Rather, there must be evidence that the ladder was defective or inadequately secured, and that the

defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries. *Melchor v. Singh*, 90 A.D.3d 866 [2nd Dept 2011].

Once a plaintiff makes a *prima facie* showing the burden then shifts to the defendant, who may defeat the motion only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and/or that the plaintiff's own acts or omissions were the sole cause of the accident. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280; *Von Hegel v. Brixmor Sunshine Square, LLC*, 180 A.D.3d 727 [2nd Dept 2020].

Here, in support of his motion, the Plaintiff demonstrated a *prima facie* entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240(1).

In opposition, Cassell failed to raise a triable issue of fact as to the same.

Further, in opposition to the motion, and in support of its cross motion, Cassell failed to demonstrate, *prima facie*, or to raise a triable issue of fact, that the action is barred by the exclusivity provisions of the Workers' Compensation Law. *See generally, Salinas v. 64 Jefferson Apartments, LLC*, 170 A.D.3d 121 [2nd Dept 2019]; *Wahab v. Agris & Brenner, LLC*, 102 A.D.3d 672 [2nd Dept 2013]; *Chowdhury v 390 Fifth*, 2 A.D.3d 560 [2nd Dept 2003].

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the Plaintiff's motion is granted and the Defendant's cross motion is correspondingly denied; and it is further,

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear for a Status Conference on Tuesday June 16, 2020, at 1:30 p.m., at the Orange County Court House, 285 Main Street, Court room #3, Goshen, New York, to discuss how the issue of damages shall proceed.

The foregoing constitutes the decision and order of the court.

Dated: May 1, 2020
Goshen, New York

**ENTER**

**HON. ROBERT A. ONOFRY, J.S.C.**

TO: Evan M. Foulke, Esq.
Attorney for Plaintiff
Office & P.O. Address
55 Main Street, 2nd Floor
Goshen, New York 10924

KENNEY SHELTON LIPTAK NOWAK LLP
Attorneys for Defendant
Office & P.O. Address
The Calumet Building
233 Franklin Street
Buffalo, New York 14202