SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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GUSTAVO ARIEL CUEVAS PEREZ,

Plaintiff,

-against-

FIVE SUNSET PARK HOLDINGS, LLC,

Defendant.
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Index No.: 517787/17
Motion Date: 8-10-20
Mot. Seq. No.: 2

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the plaintiff, GUSTAVO ARIEL CUEVAS PEREZ, moves for an order: (1) pursuant to CPLR 3212 granting him partial summary judgment against the defendant on his causes of action pursuant to Labor Law §§ 240(1) and Labor Law §§ 241(6); (2) granting him leave to serve an Amended Verified Bill of Particulars; and (3) for such other and further relief as to the Court deems just and proper.

Background**:**

This action arises out of a work-related accident that occurred on July 7, 2017, at a residential apartment building located at 475 - 48th Street, Brooklyn, New York ("the premises"). The plaintiff claims that he suffered injuries, including a laceration to his leg, as a result of falling from a ladder. He claim that he was engaged in demolision word the bathroom of apartment 5 of the premises at the time of the accident. The evidentiary materials submitted

by the plaintiff in support of the motion include the examination before trial transcripts of the plaintiff, the defendant and non-party witness, Franklin Hodge.

At his deposition, the plaintiff testified that he was working as a day laborer on the day of the accident and that he had never worked at the premises before. That morning, while standing on the corner of 37th street and Fort Hamilton Parkway in Brooklyn, he was approached by Franklin Hodge, who was driving a van, and asked if he wanted to work that day. He agreed and he and another man, who also asked to work that day, were driven to the premises by Mr. Hodge. He was paid $120 cash for the eight-hour day's work. The plaintiff maintained that he was hired to perform demolition work at the premises which entailed demolishing a bathroom. He claims that Mr. Hodge provided with an A-frame ladder, a hammer and a chisel in order to do the work.

The accident occurred at approximately 2:00 p.m. Plaintiff described the accident as follows:

> I was trying to demolish the [bathroom] wall on a ladder. So I tried to remove the wall. The ladder moved. I fell and a piece of the wall with ceramic fell on top of me.

The other day laborer that Mr. Hodge picked up that morning was the only witness to the accident.

The plaintiff claims that the wall he was demolishing at the time of the accident was by the bathtub. In order to demolish this wall, he had to fit the A-frame ladder partially on the floor outside the tub and partially in the bathtub. The part of the wall that plaintiff was demolishing at the time of the accident was near the ceiling and need the ladder to reach it. At the time of the accident, he testified that he was the second or third step of the ladder and had a hammer in his hand. He was caused to fall when the ladder moved toward the side. As a result of the fall, he suffered a laceration to his leg.

The defendant produced Jack Geula, its managing member, to testify on its behalf. He confirmed that the defendant owned the premises which were managed by a company by the name of Masada. Mr. Geula is also the managing member of Masada.

He testified that Masada hired Franklin Hodge, an independent contractor, to work as the building superintendent for the premises and four other Masada run buildings. Mr. Geula testified that apartment five was being renovated at the time of the accident and that Mr. Hodge was hired to do the renovation, a job that was separate and apart from his duties as the building superintendent The renovation involved repairing walls, removing the old tiles and then re-tiling the bathroom. Mr. Hodge hired his own people to help with the work.

After Mr. Geula learned of the accident, he spoke to Mr. Hodge who told him that he had hired the plaintiff to clean up construction debris. According to Mr. Geula, Mr. Hodge hired and paid the plaintiff for the work. Mr. Geula was not involved with the work and not at the premises at the time of the accident. Mr. Hodge told him that he too was not present at the premises when the accident occurred.

Franklin Hodge was subpoenaed by the defendant and testified as a non-party witness. He acknowledged he was hired to demolish and replace the bathroom in apartment number five and that he hired day laborers to help with the work. He admitted to hiring the plaintiff on the day of the accident but claimed that he was hired only to do clean-up work, not demolition. When he took the plaintiff back to the corner where he picked him up that morning, he noticed that the plaintiff had a scratch on his leg. He claims that the plaintiff did not tell him that he was injured while using a ladder and told him something to the effect that “something fell down on him." He denied providing plaintiff with a ladder but admitted that a ladder was already in the apartment which was used for the demolition work.

Discussion:

The Claim pursuant to Labor Law § 240(1):

Labor Law § 240(1) is applicable to "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82; *see also, Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932). Here, whether the plaintiff fell from a ladder, as he claims, is a critical factual issue in determining whether Labor Law § 240(1) is applicable in this case. The only party to the action who has personal knowledge of the accident is the plaintiff and his account of the accident may be suspect since according to Mr. Hodge, he had no business being on a ladder at the time of the accident and did not mention to Mr. Hodge that he fell from a ladder when Mr. Hodge picked him up following the accident.

Summary judgment should be denied where knowledge of the facts is peculiarly within the possession of the movant (see *Ellis v. Allstate Ins. Co.*, 151 A.D.2d 543, 544, 542 N.Y.S.2d 318, 318–19; *Frame v. Markowitz*, 125 A.D.2d 442, 443, 509 N.Y.S.2d 372; *see also, Hoffman–Rattet v. Ortho Pharm. Corp.*, 135 Misc.2d 750, 516 N.Y.S.2d 856). There is no evidence, other than the plaintiff's own deposition testimony, of how the accident occurred and his credibility should be resolved on cross-examination before a factfinder, rather than on summary judgment (see, *Batzin v. Ferrone*, 140 A.D.3d 1102, 1104, 32 N.Y.S.3d 660, 662 [citations omitted]). Accordingly, the plaintiff failed to establish his prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim and that branch of the motion for partial summary judgment under Labor Law § 240(1) must be denied regardless of the sufficiency of the

opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

The Claim pursuant to Labor Law § 241(6):

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty 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" (*Lopez v. New York City Dept. of Envtl. Protection*, 123 A.D.3d 982, 983, 999 N.Y.S.2d 848; see also *Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085, 1086, 22 N.Y.S.3d 545, 546–47). To prevail on a section 241(6) cause of action, a plaintiff must allege and prove a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code (*see Misicki v. Caradonna*, 12 N.Y.3d 511, 515, 882 N.Y.S.2d 375, 909 N.E.2d 1213; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82). However, even if a plaintiff establishes, as a matter of law, that the defendant violated a concrete specification of the Industrial Code, granting summary judgment on that claim is not appropriate. As the Appellate Division, Second Department explained in *Seaman v. Bellmore Fire District:*

> [W]here such a violation is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and "thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *see Long v. Forest–Fehlhaber*, 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Daniels v. Potsdam Cent. School Dist.*, 256 A.D.2d 897, 898, 681 N.Y.S.2d 852).

Seaman v. Bellmore Fire Dist., 59 A.D.3d 515, 516, 873 N.Y.S.2d 181, 182–83).

Accordingly, the plaintiff failed to establish his prima facie entitlement to partial summary judgment on the issue of defendant's liability under Labor Law § 241(6) (id.), and that branch of plaintiff's motion for partial summary judgment under Labor Law § 241(6) must be denied regardless of the sufficiency of the opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

That branch of the Motion for Leave to Amend the Bill of Particulars:

Plaintiff's motion to serve an amended bill particular in the form of next to plaintiff's moving papers is granted and the amended bill of particulars is deemed served nunc pro tunc (see *Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp.*, 271 A.D.2d 231, 232, 705 N.Y.S.2d 577, 579).

Accordingly, it is hereby

ORDERD that the motion insofar as it seeks leave of Court to serve an amended bill of particulars in the form of next to plaintiff's moving papers is **GRANTED** and the amended bill of particulars is deemed served *nunc pro tunc*. The motion is in all other respects **DENIED.**

This constitutes the decision and order of the Court.

Dated: October 29, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020