Plummer v Metropolitan Transp. Auth.
2021 NY Slip Op 31209(U)
March 29, 2021
Supreme Court, Kings County
Docket Number: 10971/2014
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of March, 2021.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

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ARMANDO PLUMMER,

Plaintiffs,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY AND THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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METROPOLITAN TRANSPORTATION AUTHORITY AND THE NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Plaintiffs,

- against -

MCKEON ROLLING STEEL DOOR CO., INC. D/B/A MCKEON DOOR COMPANY; MCKEON DOOR EAST INC., MCKEON REALTY ASSOC., LLC, LIBERTY MUTUAL, LIBERTY MUTUAL D/B/A FIRST LIBERTY INSURANCE CORPORATION, FIRST LIBERTY INSURANCE CORPORATION, AND CAITLIN SPECIALITY INSURANCE COMPANY,

Third-Party Defendants.

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Index No. 10971/2014

DECISION AND ORDER

Motions Sequence #7, #9

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	2-15, 16-21
Opposing Affidavits (Affirmations)	17-21, 24-30, 32-35
Reply Affidavits (Affirmations)	37, 38-43, 48, 49

Upon the foregoing e-filed papers, plaintiff moves (Motion Sequence #7) for partial summary judgment on his Labor Law § 240 (1) cause of action against defendants Metropolitan Transportation Authority (MTA) and the New York City Transit Authority (TA) (collectively, defendants or TA/MTA), and for an immediate trial on damages. Defendants cross-move (Motion Sequence #9) for summary judgment dismissing plaintiff's common-law negligence claim as well as his Labor Law §§ 241 (6) and 200 causes of action insofar as asserted against them.

Facts

The instant personal injury action arises out of ladder-fall accident that occurred on February 28, 2014 when plaintiff was engaged in the replacement of a motor and assembly pipe of a motorized roll-up door at a facility owned by the TA. The facility was known as the Coney Island Yard (the TA Yard) and was located at 2556 McDonald Avenue in Brooklyn, New York.

According to Mr. Edward Minks, the Maintenance Supervisor for the TA Yard, on the date of the accident, there were three buildings at the TA Yard that were used to house supplies, consisting of two enclosures/buildings and one shed. Both enclosures had motorized roll up doors powered by electricity. The TA had a maintenance contract with third-party defendant McKeon Rolling Steel Door Co., Inc. d/b/a McKeon Door Company (McKeon) to repair these doors.

Plaintiff and his coworker, Jose Gil, were employed by McKeon. Plaintiff testified that three to four weeks prior to the accident, he and Gil had reported to the TA

Yard to inspect a motorized roll-up door after the TA had notified McKeon that the door had malfunctioned. Plaintiff was there because he had been responding to a complaint from the TA and did not go there to perform "regular maintenance."

Plaintiff and Gil examined the door, the control for the door, the motor, the pipe assembly, and the gate and determined that the pipe assembly was corroded, which had damaged the motor or had caused the motor to malfunction. In particular, plaintiff testified that the motor did not have the "proper push to handle the door" and that the pipe assembly - which was holding up the motor - had to be changed because it had become corroded, damaged and rusty, and was causing the motor to burn. Plaintiff described the pipe assembly as "a big pipe going across, this pipe holding the door . . . with a chain [that runs up and down one side of the door which] is connect[ed] to the motor." When viewing a photograph of the door, plaintiff testified that the pipe assembly was a big "round" (i.e. cylindrical) pipe that extended horizontally along the length of the door which was positioned above the brown slates of the door itself. He also testified that on either end, the pipe assembly was attached to a plate with screws.[2]

On the date of the accident, plaintiff was assigned to work at the TA Yard pursuant to a McKeon work order Gil had received that morning. The work order directed Gil and plaintiff to install a new motor, a pipe assembly, and another part on the motorized roll-up door they had previously inspected at the TA Yard. To prepare for the job, Gil loaded a new pipe assembly and motor onto the truck he and plaintiff were using,

[2]When viewing another photograph of the roll up door plaintiff drew an arrow identifying the pipe assembly (NYSCEF Doc No. 20).

as well as tools and ladders necessary for the work, including an 8-foot A-frame ladder, a 10-foot A-frame ladder and a 20-foot extension ladder.

When they arrived at the TA Yard, they parked the truck. In order to disassemble the roll-up door, plaintiff and Gil unloaded two A-frame ladders and Gil removed the 20-foot extension ladder. They also unloaded a screw gun, wrenches, and a pulley. The pulley was a device that would be used to lower the old pipe assembly to the ground and to raise up the new pipe assembly.

Plaintiff then chose to use the eight-foot ladder in order to disconnect the power supply to the motor. He chose the 8-foot ladder because the 10-foot ladder would have been too high, namely "then the position of the ladder, the top of the ladder, it's going to be where the motor is." Before setting up the ladder, plaintiff inspected it and made sure it had rubber on its feet. He then made sure the braces in the middle of the ladder were locked, and that the ground where the ladder would be placed was concrete, level, dry, not slippery and did not contain any debris. He then placed the ladder on the left side of the rolling door (from the vantage point of facing the rolling door). At the same time, Gil was setting up the other eight-foot A-frame ladder on the right side of the rolling door.[3]

Plaintiff went up and down the ladder twice before the accident occurred. During these two times, he did not experience any problems using the ladder; the ladder did not move or shake; the ladder felt steady; and neither he nor anyone else repositioned the ladder from the time he first set it up until the accident occurred.

[3]Gil testified that he used the extension ladder.

Plaintiff first went up the ladder to cut off the power to the motor, to disconnect the motor and to take the motor down from the door. To do this, he loosened wires that were connected to the motor, removed screws and bolts on the motor with a wrench, and then passed the motor to Gil using a chain that was attached to the motor.[4] While doing this, he was standing on the step of the ladder which was one step below the top or "platform" of the ladder. The distance between the top of the ladder and the motor was five feet, and the motor weighed between 35 and 50 pounds.

The next step was for plaintiff and Gil to remove the cover to the pipe assembly by plaintiff removing two screws on his side (left) and Gil removing two screws on his side (right) while they were standing on their ladders. After that, the cover to the pipe assembly would be attached to the pulley and brought down.

After plaintiff and Gil removed the cover to the pipe assembly, plaintiff came down from the ladder and retrieved tools (wrenches) that he needed to remove the end plate. Plaintiff explained that the end plate was a piece that attached the motor to the pipe assembly; that the pipe assembly was attached with its own screws and bolts to the end plate (i.e. the pipe assembly was attached to the end plate on both ends by four bolts and screws on each side); and that the end plate would have to be removed before taking down the pipe assembly (i.e. if the end plate is removed, the pipe assembly is still attached).

In order to remove the end plate, plaintiff climbed back up the ladder and stood in the same position on his ladder as he had been when he had removed the cover to the pipe

[4]Gil testified that he removed the motor using the same ladder plaintiff had been using.

assembly. With a rag, he first cleaned around the four "nuts"[5] which had rust on them and then began loosening the nuts connected to the end plate using two wrenches. In particular, to loosen the nuts, plaintiff had a wrench in each hand, the wrenches were on either side of the end plate, and he was moving the wrenches "opposite of each other." About 15 seconds after he started untightening and applying pressure with the wrenches, a bolt broke. When the bolt broke, the ladder shook almost immediately afterward (possibly from side to side).[6] With his right hand, plaintiff tried to grab the pipe assembly, which was to his right. Although he touched the pipe assembly, he was unable to grab it, and he then dropped or "lost" the wrenches. The pipe assembly, which was circular, also moved or "rolled," and plaintiff then fell off the ladder. When plaintiff landed on the ground, he was facing the ladder. After he fell, the ladder appeared to be in the same position as it was when he had set it up.

A surveillance camera captured plaintiff's accident on video tape. This video has been exchanged with all parties. The TA/MTA contend that the video demonstrates that the ladder remained secure, upright and did not shake prior to plaintiff's fall. They assert that the left portion of the pipe assembly, which as noted rests above the rolling door, came loose as Gil descended the extension ladder, at which time plaintiff fell back off the ladder and landed on the ground. Similarly, McKeon states that the surveillance video "shows that when the nut broke defendant lost his balance before he fell and that the

[5]At this point in the deposition, counsel and then plaintiff were using the term "bolts and "nuts" interchangeably.

[6] When asked how far the ladder moved or shook, plaintiff testified that "[i]t was a little because it was as soon as it [the bolt] broke [I] remember I got my pressure in my hand and then the ladder move[d] and then I was trying to grab it [the pipe assembly]." Thus, it appears plaintiff was referring to the bolt which broke, not the pipe assembly.

force he exerted caused him to fall and it appears he would have fallen even if the ladder did not move at that time."

Plaintiff filed a notice of claim upon the TA and MTA, respectively, or about April 21, 2014 and April 24, 2014. On May 23, 2014, a General Municipal Law § 50-h hearing was held at which plaintiff was deposed. On or about July 29, 2014, plaintiff commenced the instant action against the TA/MTA by service of a summons and verified complaint asserting causes of action for common-law negligence and Labor Law §§ 240 (1), 241 (6) and 200. The TA/MTA joined issue by service of a joint answer on or about August 25, 2014, in which defendants generally denied the allegations of the complaint and asserted two affirmative defenses. On or about August 21, 2014, the TA/MTA served a combined demand for a bill of particulars.

On or about July 15, 2016, by summons and verified complaint, the TA/MTA commenced a third-party action against the McKeon and insurance third-party defendants. On or about September 14, 2016, issue was joined by service of an answer from McKeon Rolling Steel Door Co., Inc. d/b/a McKeon Door Company, McKeon Door East Inc. and McKeon Realty Assoc., LLC in which the third-party defendants generally denied the allegations of the third-party complaint. On November 28, 2017, a stipulation of discontinuance without prejudice was executed, discontinuing the third-party action against the First Liberty third-party defendants.[7] Plaintiff filed his note of issue on October 18, 2019 pursuant to and in compliance with the order of this court dated July 3, 2019.

[7]Plaintiff states that on or about December 6, 2018, he served a supplemental bill of particulars; however, the court is unable to locate this in the record.

Subsequently, plaintiff made the instant motion for partial summary judgment on his Labor Law § 240 (1) cause of action, and the TA/MTA cross-moved to dismiss plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) causes of action insofar as asserted against them.

Discussion

Labor Law § 240 (1)

"Under Labor Law § 240 (1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). Accordingly, "[t]o succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (*id.*). In this regard, "[a] worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (*id.*, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). However, "[w]hen . . . the worker's own conduct is the sole proximate cause of the accident, no recovery under Labor Law § 240 (1) is available" (*Roblero,* 175 AD3d at 1447). Specifically, "'[l]iability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident'" (*Lorde v Margaret Tietz Nursing & Rehabilitation Ctr.*, 162 AD3d 878, 878

[2d Dept 2018], quoting *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). "In such cases, plaintiff's own negligence is the sole proximate cause of his injury" (*id.*).

Finally, "'[w]hether 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'" (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], quoting *Melchor v Singh,* 90 AD3d 866, 868 [2d Dept 2011]). Specifically, "with regard to accidents involving ladders, 'liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries'" (*id.*, quoting *Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2d Dept 2012]; *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 996-997 [2d Dept 2017]). Stated otherwise, "[t]o establish a violation under Labor Law § 240 (1), '[t]here 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'" (*Cioffi,* 188 AD3d 788, 791, quoting *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). "Where, for instance, the plaintiff falls from a ladder because the plaintiff lost his or her balance, and there is no evidence that the ladder was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach" (*id.*). Conversely, "where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation" (*id.*, citing *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; *see also Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Ricciardi v Bernard*

Janowitz Constr. Corp., 49 AD3d 624, 625 [2d Dept 2008]; *Vicuna v Vista Woods, LLC*, 168 AD3d 1124, 1125 [2d Dept 2019]; *Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]).

In summary, in a ladder-fall accident, a plaintiff makes a prima facie showing of entitlement to summary judgment on a Labor Law § 240 (1) cause of action by demonstrating that the ladder on which he or she was standing moved, shifted or collapsed for no apparent reason, causing him or her to fall (*Cabrera*, 163 AD3d at 759-760). On the other hand, "a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1)" (*DeSerio v City of New York*, 171 AD3d 867, 867–968 [2d Dept 2019] [internal citations and quotation marks omitted]).

In support of his motion for partial summary judgment on his Labor Law § 240 (1) claim, plaintiff contends that the evidence and deposition testimony establishes that he was exposed to elevation-related hazards while performing a task within the scope of the statute, and that the failure to protect him from these hazards was the proximate cause of his injuries.

In opposition to plaintiff's motion and in support of their cross motion, the TA/MTA argue that plaintiff's ladder was an adequate safety device, i.e. it was neither defective nor inadequate, since: 1) the surveillance video establishes that plaintiff's ladder did not move and remained in an open, locked upright position during the entire incident, showing also that there were no problems with the ladder after the accident; 2) plaintiff admitted using the same or a similar A-frame ladder in the past on multiple occasions without incident; and 3) before plaintiff had placed the ladder, he inspected its

feet, locked it in place, and inspected the ground for debris, and had no problem with the ladder before the bolt allegedly broke. In the alternative, defendants contend that based on plaintiff's version of the accident that the ladder shook, which conflicts with the images of the accident on the surveillance video, material issues of fact exist as to how the accident occurred, and whether the alleged failure of the ladder was a proximate cause of the accident. Finally, assuming plaintiff is permitted to argue in reply that the dislodging of the assembly pipe constituted a § 240 violation, defendants contend that the "dislodging was a separate and unrelated event . . . not . . . attributable to the kind of extraordinary elevation-related risk the statute was intended to guard against."[8]

McKeon also opposes plaintiff's motion. McKeon argues that: 1) a material question of fact exists as to whether plaintiff's conduct or the condition of the ladder was a proximate cause of plaintiff's accident; 2) that the surveillance video raises a material question of fact as to whether plaintiff fell because of his own actions or because the ladder was defective; 3) plaintiff has not provided any evidence that the ladder was defective or was the proximate cause of his accident; and 4) plaintiff's conduct was the sole proximate cause of his accident based on: a) the surveillance video, b) the *manner* in which plaintiff attempted to remove the end plate (albeit no further analysis is provided), and c) plaintiff's use of the 8-foot A-frame ladder - i.e. standing one step below the top of

[8]Although defendants also argue that "even accepting plaintiff's version as true, the mere fact that a ladder shakes and a plaintiff falls does not automatically equate to absolute liability, *particularly when plaintiff's own actions are a proximate cause of the fall*," and that the ladder did not shake before plaintiff's fall, "*and . . . other factors caused and contributed to the accident*," they do not argue that plaintiff's conduct was the sole proximate cause of his accident (emphasis added).

the ladder while working on the motor, which was five feet above the ladder - rather than using the 10-foot A-frame ladder, where the motor would have been.[9]

McKeon also argues that plaintiff was not engaged in a protected activity under the statute. In particular, McKeon first contends that plaintiff was not engaged in repairing because he and Gil were replacing a worn out, rusted and corroded (piece of) hardware and a malfunctioning motor which operated the rolling door pursuant to a service contract - which by its nature necessitated replacement of parts in the course of routine maintenance.

In addition, McKeon asserts that a triable issue of fact exists as to whether plaintiff was engaged in altering as defined by the statute because at the time of the accident "plaintiff was not physically altering the door he was servicing but merely replacing a motor that was always part of the door."

Based upon the record evidence, a triable issue of fact exists as to whether plaintiff was provided with a proper safety device, i.e. the ladder, and whether the failure of that safety device was a proximate cause of his accident. In this regard, plaintiff testified that while on the ladder using a wrench in each hand attempting to loosen a bolt, the bolt broke, the ladder shook, possibly from side to side, he dropped the wrenches in an effort to grab the pipe assembly and then fell off the ladder to the ground, landing on his foot, facing the ladder. However, the surveillance video shows that the ladder did not move at any time prior to plaintiff's fall or, stated differently, only moved after plaintiff started to

[9]As noted above, plaintiff testified that he used the 8-foot ladder because the 10-foot ladder would have been too high, stating "then the position of the ladder, the top of the ladder, it's going to be where the motor is."

fall. Moreover, even plaintiff testified that after he fell, the ladder appeared to be in the same position it was in when he first set it up. "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" (*Von Hegel,* 180 AD3d at 729 [internal citations and quotation marks omitted]. In light of the conflicting versions of how the accident occurred, a material question of fact exists as to whether "the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries" (*id.*).

Plaintiff argues in his reply, in part based on the affidavit of his mechanical engineer expert (Robert Nobilini, Ph.D), that the surveillance video demonstrates that simultaneously with the breaking of the bolt, the pipe which had been supported by the end plate - fastened with the bolts - including the one that broke, slipped down and struck plaintiff, knocking him off the ladder; that there was no chain supporting the pipe and once the bolt broke, the unsecured pipe fell; and that Gil was on an extension ladder working above the middle of the door area where there should have been a chain support. Based upon the foregoing, plaintiff contends that the assembly pipe which dislodged constituted a falling object that "required securing for the purposes of the undertaking" (*Outar v City of New York,* 5 NY3d 731 [2005]) and that the slipping of the visibly unsecured pipe (i.e. the failure to secure the pipe when the bolts which supported it were being removed) and the shaking of the ladder were proximate causes of the accident and violations of § 240 (1), which demonstrate that he was not the sole proximate cause of his accident.

Plaintiff also points out that the TA/MTA essentially concede that the pipe assembly caused plaintiff to fall from the ladder. In this regard, in their affirmation in support of the cross motion, defendants state that:

> "the left portion of the pipe assembly, which rests above the door, unexpectedly and unforeseeably came loose as Mr. Gil descended the extension ladder, at which time plaintiff fell back and landed on the ground" (¶17).

Further, at paragraph ¶18, defendants state that Gil was on an extension ladder in the middle section of the rolling gate, not at the far end, and at ¶19, defendants admit that plaintiff fell off the ladder when the pipe fell, namely:

> "At [minute] 11:23:27, Gil begins to descend the extension ladder. Almost immediately, at [minute]11:23:29, the left portion of the pipe assembly drops down and plaintiff falls back off the ladder to the ground."

"A party moving for summary judgment generally cannot meet its *prima facie* burden by submitting evidence for the first time in reply" (*Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 664 [2d Dept 2017]). However, exceptions to this general rule include "when the evidence is submitted in response to allegations raised for the first time in the opposition papers or when the other party is given an opportunity to respond to the reply papers (*id.*). Moreover, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion" (*Lee v Law Offs. of Kim & Bae, P.C.*, 161 AD3d 964, 965-966 [2d Dept 2018]).

Here, in their combined affirmation in support of their cross motion and in opposition to plaintiff's motion, the TA/MTA argue that the dislodging of the pipe

assembly immediately preceding plaintiff's fall was not raised by plaintiff in his motion and therefore may not be raised in his reply. In any event, defendants contend that the dislodging of the pipe assembly does not qualify as a Labor Law 240 § (1) violation. However, inasmuch as defendants raised this issue in support of their combined affirmation in support of their cross motion *and in opposition to plaintiff's motion*, plaintiff is entitled to argue in his reply that the slipping of the unsecured pipe constituted a § 240 (1) violation.

Even assuming the contrary, based upon the surveillance video, which is the only evidence demonstrating that the pipe assembly slipped, a material question of fact exists as to whether the dislodging of the pipe assembly was a § 240 (1) violation and whether this violation was a proximate cause of plaintiff's accident. In this regard, the TA/MTA assert that the video shows that the pipe assembly struck plaintiff, which caused plaintiff to fall off the ladder. On the other hand, McKeon argues that the video demonstrates that while plaintiff was standing on the fifth or sixth rung of the ladder, a metal nut broke, that plaintiff fell to the ground, and that plaintiff's own physical reaction to the broken hardware was the sole cause of the accident. In addition to these two conflicting interpretations, upon the court's own review of the video, the court finds it unclear: 1) whether the pipe assembly was an object which required securing and which caused plaintiff to fall, 2) whether the broken bolt caused plaintiff to fall, or 3) whether plaintiff merely lost his balance, causing him to fall. Therefore, a material question of fact exists as to whether the pipe assembly constituted a falling object which required securing (*see e.g. Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960 [2d Dept 2011]; *Rzymski*

v Metropolitan Tower Life Ins. Co., 94 AD3d 629 [1st Dept 2012]), and whether the dislodging of the pipe was a proximate cause of plaintiff's accident.

In its own affirmation in opposition, third-party defendant McKeon references the affidavits of Gil and its expert engineer, Mr. Michael Tracey, P.E.. While McKeon essentially adopts their arguments, it fails to make reference to their affidavits in its analysis. In any event, Gil avers in his affidavit that for no good reason, plaintiff chose to use the 8-foot A-frame ladder instead of using the 10-foot A-frame ladder, which was available to use, and which was safe and free from defects. Mr. Tracey states, in effect, that plaintiff chose the eight-foot A-frame ladder, which was too short to access his work area, and then stood unsafely on the top step of the ladder to perform his work, all in violation of industry standards and OSHA guidelines. Mr. Tracey concludes that the accident would not have occurred had plaintiff used the proper 10-foot A-frame ladder, and that plaintiff's use of the 8-foot A-frame ladder was the sole proximate cause of his accident.[10]

Despite the foregoing, these affidavits fail to demonstrate that plaintiff's conduct was the sole proximate cause of the accident. In this regard, the court has already determined that a triable issue of fact exists as to cause of the accident. As McKeon acknowledges, "it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff s injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury . . . Thus, 'if a statutory violation is a proximate cause of

[10]Plaintiff incorrectly states that Mr. Tracey bases his affidavit upon Gil's affidavit. However, in his affidavit, Mr. Tracey does not refer to Gil's affidavit. Mr. Tracey bases his conclusions solely on the basis of plaintiff's testimony, as well as industry standards and OSHA regulations.

an injury, the plaintiff cannot be solely to blame for it'" (NYSCEF Doc No. 24 at ¶ 56, quoting *Blake*, 1 NY3d at 290-291). Since there is a material question of fact as to whether a statutory violation is a proximate cause of the accident, there is a material question of fact as to whether plaintiff is the sole proximate cause of the accident.

As an initial matter, the affidavit of Gil lacks evidentiary value. As plaintiff argues, Gil testified at his deposition with the aid of a Spanish interpreter, yet his affidavit, written in English, fails to comply with CPLR 2101(b). Moreover, the notarization is incomplete. In addition, during his deposition, Gil testified that when he and plaintiff arrived at the accident site on the day of the accident, they unloaded 8-foot A-frame ladders and extension ladders, and did not mention any 10-foot A-frame ladders. In any event, as noted above, in his affidavit, Gil avers that for no good reason, plaintiff chose to use the 8-foot A-frame ladder instead of using the 10-foot A-frame ladder, which was available to use, and which was safe and free from defects. Thus, Gil's affidavit presents a "feigned issue of fact, designed to avoid the consequences of [his] earlier deposition testimony" and is insufficient to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident (*Ramos v Michael Epstein Sports Prods., Inc.*, 173 AD3d 1079, 1081 [2d Dept 2019] [internal citations and quotation marks omitted]).

As noted above, McKeon also argues that plaintiff was not engaged in a covered activity under Labor Law § 240 (1). "While the reach of [Labor Law] section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition,

repairing, altering, painting, cleaning or pointing of a building or structure'" (*Quituizaca v Tucchiarone*, 115 AD3d 924, 926 [2d Dept 2014], quoting *Martinez v City of New York*, 93 NY2d 322 [1999]). Further, "[t]he intent of [Labor Law § 240 (1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*Bonilla-Reyes v Ribellino*, 169 AD3d 858, 860 [2d Dept 2019], quoting *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Moreover, "[t]he statute is to be construed as liberally as may be for the accomplishment of [that] purpose (*id.* [internal citations and quotations omitted]). "'[T]he question whether a particular [activity] falls within section 240 (1) must be determined on a case-by-case basis, depending on the context of the work'" (*id.*, *quoting Prats*, 100 NY2d at 883).

"[A]ltering within the meaning of Labor Law § 240 (1) requires making a significant physical change to the configuration or composition of the building or structure" (*Holler v City of New York*, 38 AD3d 606, 607 [2d Dept 2007], *lv denied* 9 NY3d 802 [2007] [internal citations and quotation marks omitted]). "Whether a physical change is significant depends on its effect on the physical structure" (*McCarthy v City of NY*, 173 AD3d 1165, 1166 [2d Dept 2019], *lv denied* 36 NY3d 901 [2020] [internal citations and quotation marks omitted]). Moreover, "[t]he physical change does not need to be permanent in order to qualify as an alteration under the statute" (*id.*). "By contrast, routine maintenance and decorative modifications do not constitute the 'altering' of a building or structure" (*Goodwin*, 144 AD3d at 746). Accordingly, "[w]here the work does not involve a significant or permanent physical change, dismissal of a Labor Law § 240 (1) cause of action is appropriate" (*Holler*, 38 AD3d at 607).

"In determining whether a particular activity constitutes 'repairing,' courts are careful to distinguish between repairs and routine maintenance, the latter falling outside the scope of section 240 (1)" (*Ortega v 669 Meeker Ave., LLC*, 191 AD3d 686, 2021 NY Slip Op 00570, *2 [2021] [internal citations and quotation marks omitted]). In this regard, the statute "does not cover routine maintenance in a non-construction, non-renovation context" (*Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008] [internal citations and quotation marks omitted]). Specifically, "courts have held that work constitutes routine maintenance where the work involves replacing components that require replacement in the course of normal wear and tear" (*Ortega v 669 Meeker Ave., LLC*, 191 AD3d 686, 2021 NY Slip Op 00570, *2 [2021]).

McKeon has failed to raise a triable issue of fact as to whether plaintiff was engaged in repairing or altering at the time of this accident. In this regard, it is undisputed that at the time of the accident, the job plaintiff and Gil were performing consisted of removing the motor and assembly pipe from the motorized rolling gate and replacing those parts with a new motor and assembly pipe because the door was either malfunctioning, not functioning or inoperable. As Gil testified, it was necessary to remove all the old equipment from the door, which he and plaintiff intended to do before installing the new equipment. Further, according to Gil, the motor was mounted on the rolling door, ladders were needed to remove the old equipment, and the end plate needed to be removed before the motor could be removed. Moreover, the rolling door was attached to the enclosure/ building that housed material/equipment for subway trains.

In addition, according to Mr. Minks, McKeon was an outside company which provided repair services with respect to rolling doors at the subject site. In this regard, he testified that if a rolling door were broken and required repair, the procedure was to first call TA plant maintenance (or "in-house" TA employees physically located at the subject facility) to make the repair because the goal was to get the door fixed immediately. If plant maintenance was unable or too busy to make the repair, Mr. Minks would then fax the TA infrastructure department a "roll up door request repair form" to request that the door be repaired. In this case, Mr. Minks did not recall whether plant maintenance attempted to repair the subject door. However, he sent an email to the infrastructure department advising that the subject rolling door needed to be fixed because it had been stuck in a down position for approximately one month. Thereafter, Mr. Minks contacted two other TA infrastructure departments/units (Maintenance of Way [M.O.W] and Iron South) and asked them to repair the door. Both TA infrastructure departments/units attempted but failed to repair the rolling door, and thereafter Ms. Ibrahim, a TA mechanical engineer who managed contracts and who started the process of contacting a vendor to repair the door, contacted McKeon to request that it diagnose and repair the door.

Mr. Minks was shown and identified a work order signed by him for the furnishing and installing of a pipe and motor to supply room 60M. He explained that the document was an invoice from Mckeon for work that had been completed at Storeroom 60, the name of the enclosure/building where the accident occurred.

In addition, Ms. Ibrahim testified that McKeon was the contractor retained to repair the rolling door after its estimate was approved, pursuant to a "repair and replace contract" (as opposed to a contract for "preventive maintenance"); that there was a service request from the TA Yard that stated that the rolling door was broken and needed to be repaired; that the estimate had been approved by the TA on February 13, 2014; and that the motor had ultimately been replaced on March 4, 2014.[11]

Moreover, the TA's accident report indicated that the accident occurred in the course of a repair ["while performing repairs on the overhead door on the dock at Storeroom 60 [plaintiff] fell and injured himself . . ."]). Finally, plaintiff testified that he was at the TA Yard because he had been responding to a "complaint" from the TA about the rolling door, not to perform "regular maintenance" on it.

Thus, despite McKeon's claims to the contrary (*supra*), the record indicates that on the day of the accident, plaintiff and Gil had been specifically sent by McKeon, after TA approval, to "repair" an inoperable motorized rolling door, which included replacing the motor and the pipe assembly and, by the very nature of the work, were not there to conduct ordinary period maintenance. Conduct of this type has been held to constitute "repairing" under the statute (*see Barrios v 19-19 24th Ave. Co., LLC*, 169 AD3d 747, 748 [2d Dept 2019] [the activity of removing an old roll-up gate and installing a new roll-up gate is a repair within the purview of Labor Law § 240 (1)]; *Lofaso v J.P. Murphy Assoc.*,

[11]Gil testified that he was sent back to the TA Yard to complete the work but was not sure when. He also testified that he was not sure whether he had finished the work on the day of the accident. Further, the items that were replaced were the "half horsepower 230 Volt 3 Phase *motor*, 6 inch *complete pipe 23 assembly*,[] [the] 2 1/2 inch by 2 1/2 inch 3/16th thickness bottom bar, [] the Electric Miller Edge that goes underneath the door . . . and . . . the coil cord 20 feet extended" (NYSCEF Doc No. 21 at 20) (emphasis added).

37 AD3d 769, 770-771 [2d Dept 2007] [where plaintiff-mechanic and installer of automatic doors was "repairing a nonfunctioning door, he was engaged in the type of repair work which is protected under Labor Law § 240 (1)"]; *Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 624 [2d Dept 2007] [where an injured plaintiff and his coworker, another refrigeration technician, went to a refrigerated warehouse on "an emergency call regarding a refrigeration system malfunction that ultimately took 29 1/2 hours to repair, and . . . the work involved, inter alia, rewiring, installing a 'tattletale relay', and replacing a standard thermostat with a digital electronic thermostat . . . [it] constituted 'repair' for the purposes of Labor Law § 240 (1)"]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 393 [2d Dept 1997] ["the injured plaintiff was engaged in the repair of a nonfunctioning air conditioner, and as such was engaged in the type of 'repair' work which is specifically protected under Labor Law § 240 (1)"]).

Moreover, given the work plaintiff and Gil were performing, which also included replacing a motor which was mounted on the door of a building, as well as a pipe assembly which rested just above the motorized rolling door, plaintiff was also engaged in "altering" under the statute (*see Wade v Atl. Cooling Tower Servs., Inc.*, 56 AD3d 547, 548-549 [2d Dept 2008] [the plaintiff's dismantling of the sprinkler system, which "was attached to the cooling tower, consisted of numerous metal pipes, and was not a temporary installation . . . [t]hus [it] . . . constituted the alteration of the structure within the meaning of Labor Law § 240 (1)"]; *Destefano v City of New York*, 39 AD3d 581, 582 [2d Dept 2007] [installation of a temporary boiler in a mobile unit on the street outside of a building owned by the City "involved acts which were alterations to the building, and . . . the work

which the plaintiff was performing at the time of the accident was ancillary to such acts"]; *Becker v ADN Design Corp.*, 51 AD3d 834, 836-837 [2d Dept 2008] [where plaintiff was injured while running wire in an attic crawl space, plaintiff's work was "properly characterized as 'altering' within the meaning of Labor Law § 240 (1)," not routine maintenance]).

In sum, plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim is denied.

Labor Law § 241 (6)

Labor Law § 241(6) provides:

> "All contractors and owners and their agents . . . 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

"Labor Law § 241 (6) 'imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Harrison v State of New York*, 88 AD3d 951, 953 [2d Dept 2011], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998], quoting Labor Law § 241). Specifically, the statute "'requires owners and contractors to . . . to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor'" (*Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1669 [2d Dept 2020], quoting *Ross*, 81 NY2d at 501-502 [internal quotation marks

omitted]). Accordingly, "[t]o establish liability under Labor Law § 241 (6), a plaintiff . . . must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case, and sets forth a specific standard of conduct and not simply a recitation of common-law safety principles" (*Reyes v Astoria 31st St. Devs., LLC*, 190 AD3d 872, 875 [2d Dept 2021] [internal citations and quotation marks omitted]).

The TA/MTA argue that plaintiff's Labor Law § 241 (6) claim must be dismissed because the accident did not occur in connection with construction, demolition or excavation and that, in any event, the only violation plaintiff pled is section 6.2.2.2 of the American National Standards Institute (ANSI), which is not a proper predicate for a claim under the statute.

In opposition, plaintiff notes that in his bill of particulars he alleged violations of Industrial Code § 23-1.21 (b) (4) (ii) and (e) (3); that the statute is not restricted to work conducted at construction sites; and that a triable issue of fact exists as to whether these regulations were violated because the ladder from which he fell shifted. Industrial Code § 23-1.21 (b) (4) (ii) and (e) (3) provide that:

> "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings" (12 NYCRR § 23-1.21 [b] [4] [ii]).
>
> "Stepladder footing. Standing stepladders shall be used only on firm, level footing" (12 NYCRR § 23-1.21 [e] [3]).

As defendants argue, "unlike Labor Law § 240, which includes repair work, Labor Law § 241 (6) is limited to those areas in which construction, excavation, or demolition work is

being performed . . ." (*Barrios,* 169 AD3d at 749 [plaintiff was injured while involved in the repairing a broken roll-up gate door on the defendants' premises]). Here, "Labor Law § 241 (6) is inapplicable because the plaintiff was not performing work in the context of construction, demolition, or excavation" when the accident occurred (*id.*).

In any event, as defendants argue in reply, the Industrial Code provisions which plaintiff alleges were violated are inapplicable to the facts of this matter. As defendants point out, and as noted above, plaintiff testified, among other things, that on the day of the accident, before placing the ladder, he inspected it and made sure it had rubber on its feet; then made sure the braces in the middle of the ladder were locked, and that the ground where the ladder would be placed was concrete, level, dry, not slippery and did not contain any debris. Under the circumstances, the Industrial Code provisions relied on by plaintiff are inapplicable to the present facts. Plaintiff's reliance upon *Hart v Turner Constr. Co.* (30 AD3d 213, 214 [1st Dept 2006]) is misplaced because in that case, unlike here, the court found that a factual issue was raised as to whether the violations of the same provisions were a proximate cause of his accident.

Finally, "[ANSI] standards do not constitute statutes, ordinances, or regulations" and therefore a violation of such standards may not serve as a predicate for a Labor Law § 241 (6) cause of action (*cf. Gonzalez v City of New York*, 512 [2d Dept 2013]). In view of the foregoing, this branch of the TA/MTA's motion to dismiss plaintiff's Labor Law § 241 (6) cause of action is granted.

Labor Law § 200 and Common-law Negligence

"Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). "Where . . . the accident arises . . . from a dangerous premises condition, a property owner [or general contractor] is liable under Labor Law § 200 when the owner [or general contractor] created the dangerous condition . . . or when the owner [or general contractor] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Bradley v HWA 1290 III LLC*, 157 AD3d 627, 629-630 [1st Dept 2018], *affd* 32 NY3d 1010 [2018] [internal citations and quotation marks omitted]). Further, [w]here a plaintiff's Labor Law § 200 and common-law negligence claims are predicated upon the existence of a dangerous or defective premises condition, the defendant must make a *prima facie* showing that it neither created nor had actual nor constructive notice of the dangerous condition (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52-53 [2d Dept 2011]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 149-150 [2d Dept 2010]).

Here, the TA/MTA argue that they neither supervised nor controlled plaintiff's work nor did they create or have actual or constructive notice of "an *alleged* dangerous condition which caused the accident." In support of these claims, defendants first

correctly note that both plaintiff and Gil testified that defendants had not provided them with any equipment; that the ladders they used were owned by their employer; that plaintiff had used these ladders at least 30 times before the accident and had inspected them each time and found them safe; and that the TA had not provided plaintiff or Gil with any tools or equipment or given them any instructions on how to do their work.

Further, defendants point out that Ms. Ibrahim, a TA mechanical engineer, testified that when a door was broken or stuck and needed repair, the TA would call McKeon to inspect the door and send the TA an estimate. In addition, defendants note that plaintiff testified that his only contact with the TA on the day of the accident was when a supervisor at the TA Yard let him and his coworker into the facility.

Moreover, while Mr. Minks escorted plaintiff and Gil to their work area, Mr. Minks did not remain there while they performed their work; he did not know what type of repairs they made on the date of the accident; and the TA did not provide plaintiff and Gil with equipment nor did it supervise or instruct them on how to perform their work.

Defendants also argue that the surveillance video demonstrates that "the ladder was not defective in any way but operated and remained secured the entire time, including at the time of the fall" and therefore "[p]laintiff's fall was . . . not due to a dangerous condition." Even assuming the ladder was defective, defendants assert that the ladders were not their property or under their control.

In opposition, plaintiff argues that since the condition of the end plate and the breaking of the screw contributed to his accident, and TA maintenance personnel attempted to repair the door before he and Gil attempted to do so, that there are issues of

fact as to whether defendants had actual or constructive notice or created "a hazardous condition." In support of this claim, plaintiff asserts that Mr. Minks had memory lapses/gaps when testifying about "his supervisory role in the repair of the rolling door and the role of [TA] iron workers and maintenance workers in the repair process," as well as about missing records.

Plaintiff further asserts that "[i]n *Reyes v Arco Wentworth [Mgt.] Corp.* [] [83 AD3d 47 (2d Dept 2011)] the court held that to the extent the causes of action under § 200 and common law negligence are predicated on the existence of a dangerous or defective premises condition, defendant must demonstrate the absence of prior actual or constructive notice" and that "because [the] defendant [in *Reyes*]. . . failed to meet its *prima facie* burden as to the premises liability standard, the court did not need to . . . address the plaintiff s papers submitted in opposition to the motion to dismiss the causes of action alleging Labor Law §200 and common-law negligence."

In their reply, defendants assert that "plaintiff's accident arose solely as a result of the means and methods he was using to perform his work, which, *at the time, was the loosening of the bolts to remove an end plate on the rolling gate door* . . .". (emphasis added). Defendants also argue that plaintiff attempts to divert attention from the speculative nature of his argument by relying upon Mr. Mink's purported gaps in memory during his deposition.

This branch of defendants' motion is denied. "[T]he *prima facie* showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (*Clark v Tong*, 2014 NY Slip Op 32903

[U], *4 [Sup Ct, Westchester County 2014], quoting *Carlucci v Village of Scarsdale*, 104 AD3d 797, 798 [2d Dept 2013] [internal citations omitted]). Here, plaintiff alleges in his complaint and verified bill of particulars that defendants were negligent and caused the accident because they, among other things, failed to provide him with a safe place to work and with a safe ladder, failed to properly maintain the area, failed "*to properly secure the end plate*" and "caused or created the defective condition" (emphasis added). The bill of particulars also states that while it is not necessary to allege that defendants had actual or constructive notice of the dangerous condition, plaintiff was in fact making that allegation.

The broad allegation that defendants did not properly secure the end plate is sufficient to encompass plaintiff's claim that defendants created a dangerous condition with respect to the end plate when TA personnel attempted to repair the rolling door (*see e.g Clark v Tong*, 2014 NY Slip Op 32903 [U], *4 [Sup Ct, Westchester County 2014]). Further, this theory of defendants' liability (creation of a defective condition) was thereafter developed through Mr. Minks' deposition testimony that TA personnel had attempted to repair the rolling door approximately one month before plaintiff and Gil had attempted to do so, and created a dangerous condition with respect to the bolt as a result. In this regard, Mr. Minks was asked what Iron South did when attempting to repair the door, and whether M.O.W. and Iron South (TA maintenance personnel) manipulated the bolt which broke when plaintiff's accident occurred (*id.*). Moreover, defendants concede that the accident involved the bolt which broke just prior to plaintiff's fall.

Despite the foregoing, defendants have failed to make a *prima facie* showing that they did not create a dangerous condition with respect to the end plate or have actual or

constructive notice of it. In support of this branch of their motion, as noted, defendants only argue that *the ladder* was not defective and, even assuming the contrary, it was supplied by McKeon, not by them.

However, in order to sustain their *prima facie* burden, defendants were required to eliminate all triable issues of fact as to whether they had affirmatively created the allegedly dangerous condition with respect to the end plate through their purportedly negligent repair of the door, which they failed to do. Nor have defendants provided any evidence that they did not have either actual or constructive notice of a dangerous condition relating to the end plate. In this regard, as to constructive notice, defendants have failed to provide any evidence as to when the end plate and bolt were last viewed and inspected prior to the time of the plaintiff's fall (*see Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 975 [2d Dept 2012], *lv dismissed* 20 AD3d 965 [2012]). In fact, Mr. Minks testified that TA personnel did not perform any maintenance of the rolling doors. Finally, defendants argue in their reply that "[p]laintiff had every opportunity to demand and subpoena records, or further depose these [maintenance] workers at the TA Yard, but did not do so, or seek discovery-related remedies if necessary." Defendants further assert that plaintiff may not blame them for a lack of diligence to prove their Labor Law § 200 claim. However, it was defendants' burden to make a *prima facie* showing, for example, through the deposition of these maintenance workers. Given that defendants have failed to do so, the court need not address plaintiff's arguments in opposition. Accordingly, this branch of defendants' motion to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is denied.

In summary, plaintiff's motion for partial summary judgment (Motion Sequence #7) on its Labor Law § 240 (1) cause of action is denied. That branch of the TA/MTA's motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is granted (Motion Sequence #9), and the remainder of their motion is denied.

This constitutes the decision and order of the court.

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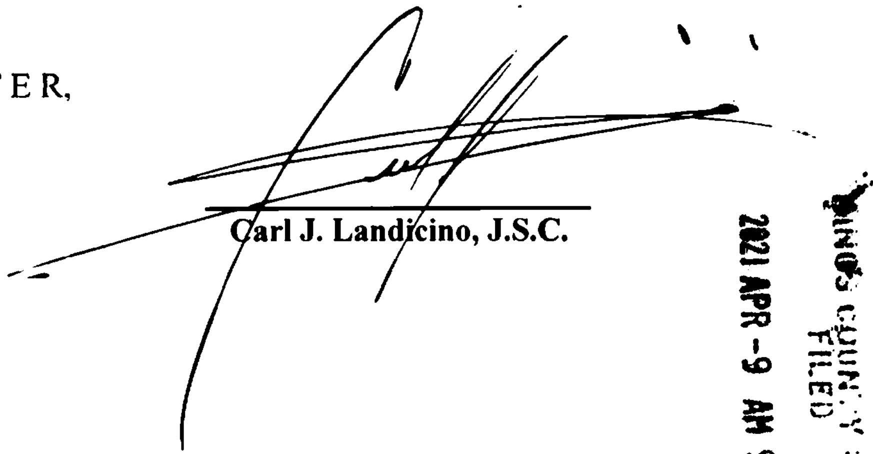

Carl J. Landicino, J.S.C.

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