Casais v City of New York
2021 NY Slip Op 31345(U)
April 20, 2021
Supreme Court, New York County
Docket Number: 157499/2016
Judge: J. Machelle Sweeting
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

---x

JESUS CASAIS, JR.,

Index No. 157499/2016

Plaintiff,

DECISION AND ORDER ON MOTION SEQUENCE NUMBERS 001 AND 002

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and MTA CAPITAL CONSTRUCTION COMPANY,

Defendants.

---x

HON. SWEETING, J. MACHELLE, J.S.C.

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on October 5, 2015, when, while working at a construction site, located at a newly built subway station beneath 97th Street and Second Avenue, in Manhattan (the "Premises"), the ladder he was using fell, causing him to fall to the floor.

In Motion Sequence Number 001, Jesus Casais, Jr. ("Plaintiff") moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants The City Of New York (the City), New York City Transit Authority (NYCTA), Metropolitan Transportation Authority (MTA) and MTA Capital Construction Company (MTACC) (together, "Defendants").

In Motion Sequence Number 002, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and, in the alternative, for dismissal of plaintiff's lost wages claim.

BACKGROUND

On the day of the accident, the City was the owner of the Premises. It leased the Premises to NYCTA for the purpose of operating a subway station. NYCTA in turn, authorized the MTA to construct a subway station at the Premises (the "Project"). MTA, through MTACC, hired non-party E.E. Cruz & Tully, Joint Venture ("EE Cruz") to provide general contracting services for the installation of finishes on the Premises' 96th street subway station. Plaintiff was a union laborer employed by EE Cruz.

Plaintiff's 50-h Hearing Testimony

At his 50-h hearing, plaintiff testified that he was born in Spain, where he studied and taught electrical engineering. Due to various crises in Spain, he came to the United States and bought a falsified social security number and permanent resident card (*id.* at 15). Using those documents, he obtained work at non-party Judlau Construction. He was terminated when they determined his documents were falsified. Utilizing the same documents, plaintiff then began working for EE Cruz.

Plaintiff also testified that on the day of the accident, he was a laborer employed by EE Cruz. His supervisor was an EE Cruz employee named "Sal" (plaintiff's 50-h transcript at 44). Sal gave him his directions for the day. Plaintiff's work took place in the subway station beneath 96th Street and Second Avenue. The area where he worked consisted of three rooms, with each room having a different ceiling height.

Plaintiff stated that the accident occurred around 2:30 in the afternoon. Sal directed plaintiff to enter one of the rooms to remove cement and dust from pipes and the newly installed metal supports for a drop ceiling. To do so, plaintiff needed to use a ladder. Plaintiff stated that

he could not find an A-frame ladder that would fit in the area where he needed to work, so he retrieved a 10-foot extension ladder from a room he had worked in earlier that day. Specifically, plaintiff explained, the ladder was the top half of an aluminum extension ladder (*id.* at 64), and that it "didn't have any rubber on the lower legs or the upper part" (*id.* at 100) (the "Ladder"). Plaintiff testified that he knew the Ladder was not the proper ladder to use because it did not have rubber feet. He felt that he had to use it "[b]ecause they told us to" (*id.* at 86).

Plaintiff began his work in the room. He did not have a co-worker with him. Plaintiff placed the ladder against the wall, climbed it and began cleaning. To perform his work, he needed to reposition the Ladder several times to access the various parts of the room. Approximately a half hour later, he had cleaned half of the room. He then set the Ladder up on the bare, flat, concrete floor near the room's doorway; checked that it was stable; and climbed up.

While he was on the Ladder, cleaning the top of the door frame, "[t]he ladder moved backwards and fell and [plaintiff] fell too with [his] left leg on top of the ladder and [his] upper body on the cement" floor (*id.* at 105). Specifically, plaintiff explained, the "bottom part" of the Ladder slid "away from the wall" (*id.* at 113-114).

After the accident, plaintiff tried to stand, but could not. He called for help and Sal came in to assist him. Once Sal saw what happened, he left to get more people to help. Sal returned with two or three co-workers. He also brought an A-frame ladder and directed a worker to remove the Ladder. Plaintiff was then put on a stretcher and transported to the street level to be taken to a medical facility. While on the stretcher, his co-worker, "Ramon" told plaintiff "to say that [he] had fallen from the A-frame ladder, not the extension ladder" because "it was better for [plaintiff]" (*id.* at 163).

When asked whether he had even told anyone that he missed a step while climbing down the Ladder, plaintiff testified "[n]o" (*id.* at 164).

Plaintiff's Deposition Testimony

Plaintiff appeared for a deposition, taken over two days. His deposition testimony largely mirrors his 50-h testimony.

Plaintiff testified that prior to starting work with EE Cruz, he went to EE Cruz's office, provided his name, address and the social security number he had purchased and "filled out a form" (plaintiff's December 1, 2017 tr at 18), and signed the form. No one raised a question about his immigration status at that time. He then immediately went to the work site and began working. He worked for EE Cruz for four weeks before the accident.

Plaintiff also reiterated the nature of the accident and the way it occurred. He also stated that Ramon visited him once in the hospital and told plaintiff that "they got rid of" the Ladder after the accident (plaintiff's April 12, 2018 tr at 37).

Plaintiff further testified that earlier in the day, on the day of the accident, he and Ramon used the Ladder in one of the rooms. Ramon climbed the Ladder while plaintiff steadied it. No one was with plaintiff to steady the Ladder at the time of his accident.

Plaintiff, again, reiterated that he looked for an A-frame ladder, but "there were no ladders available" (*id.* at 60). He testified that he looked in all the other rooms on the subfloor where he had been working, as well as the floor's "entrance" (*id.* at 62), but he "couldn't find any other ladder" that would fit into the room where he was working (*id.* at 60).

Plaintiff testified, as he had at his 50-h hearing, that the bottom of the Ladder – which did not have rubber feet – slid backwards, causing the ladder to fall, taking him with it (*id.* at 71-72). Plaintiff then stated that he "slipped, actually, from the ladder" as it was moving backwards (*id.* at

81). He landed on his left side, with his knee hitting the ladder and his left shoulder and the side of his head striking the concrete.

According to plaintiff, his supervisor, Sal, came to help, bringing two co-workers and a foreman from another team. They brought a stretcher and an A-frame ladder with them. While they were assisting plaintiff onto the stretcher, Ramon "placed an A-frame ladder in the room" while another co-worker took the Ladder out of the room (*id.* at 94). Then, Ramon indicated that plaintiff should say that he fell from "step number 3" of the A-frame ladder (*id.* at 100), despite having been on the fifth step of the Ladder at the time of the accident. At that time, another co-worker "put his finger to his lips" in a shushing manner as he removed the Ladder from the room (*id.* at 95).

Plaintiff was shown an MTACC incident report (the Report), which was read into the record as follows, in pertinent part:

> "[Plaintiff] states that while he was climbing an A-frame ladder . . . he missed the third step and struck his leg below the knee on the ladder tread and fell to the ground. . . . [Plaintiff] stated that he was not rushing . . . but just missed the step"

(*id.* at 122). Plaintiff denied ever making such a statement. He further explicitly denied that he ever stated that he was climbing an A-frame ladder or that he missed a step.

Deposition Testimony of Jose Ramon Noceda (Plaintiff's Coworker)

Jose Ramon Noceda testified that on the day of the accident he was a laborer at the Projec, employed by EE Cruz. He was the person who recommended that plaintiff seek employment with EE Cruz. Noceda was present at the Premises on the day of the accident, though he did not witness it. He was working nearby at that time and heard plaintiff yell for assistance. He went into the room where plaintiff was working and saw him on the ground, in pain. He could not recall whether there was a ladder in the room, and he was not aware of anyone bringing a ladder into the room

after the accident. He did not know whether plaintiff had access to an A-frame ladder at the time of the accident.

After the accident, Noceda helped plaintiff onto a stretcher and brought him to a nearby clinic. He stayed with plaintiff at the clinic and waited on x-rays. Once it was determined that plaintiff would need to go to the hospital, Noceda went home. The next day, he visited plaintiff in the hospital.

Noceda was asked whether he had ever told plaintiff to say he fell from an A-frame ladder. He denied doing so, and further denied ever speaking to plaintiff about how the accident happened.

Deposition Testimony of Saverio Marsicano (EE Cruz's Labor Foreman)

Saverio Marsicano testified that on the day of the accident he was the labor foreman for EE Cruz. His responsibilities included supervising laborers at the Project, including plaintiff. He knew plaintiff to be a "[g]ood worker, always on time" who worked in a safe and attentive manner (Marsicano tr at 9).

Shortly before the accident, Marsicano directed plaintiff to dust off "debris that had [fallen] on the tracks for the drop ceiling" (*id.* at 17). The area plaintiff was directed to clean was between eight and eleven feet above the concrete floor. Marsicano testified that the EE Cruz laborers had access to extension ladders and A-frame ladders ranging in height "from six to sixteen feet" (*id.* at 25). His crew, which included plaintiff, had access to several ladders, which were stored in a room with their gang box, unless they were in use. If a worker needed equipment, they could ask Marsicano, and he would obtain it for them.

Marsicano did not witness the accident. At the time, he was "maybe 20, 25 feet away" in the hallway leading to the room where plaintiff was working (*id.* at 33). He saw a "helmet fly out

of the room." He went to see what happened, and found plaintiff sitting on the floor near an upright, open 6-foot A-frame ladder, "nursing his leg" (*id.* at 35).

Marsicano testified that, after the accident, he asked plaintiff if he was okay and then helped carry him out to the street level. He initially testified that he had no other conversation with plaintiff and "never spoke to him again" (*id.* at 40). After a brief recess, Marsicano then testified that he had also asked plaintiff what happened, and plaintiff responded that "he fell off the ladder" (*id.* at 41). When further questioned about what plaintiff stated, Marsicano testified that plaintiff told him that he "slipped" (*id.* at 61).

A few days after the accident, he provided a statement to a safety investigator regarding the accident.

Deposition Testimony of Jean Dorceus (EE Cruz's Safety Manager)

Jean Dorceus testified that on the day of the accident, he was EE Cruz's safety manager for the Project. His duties included holding safety meetings and making sure workers complied with safety guidelines. He also walked the Premises to observe the ongoing work. He had the authority to stop work if he saw an unsafe practice or condition.

Dorceus testified that EE Cruz had many ladders available in its storage area. The storage area was locked, but workers could request access to the room, or ask their foreman to get equipment for them.

Dorceus was present on the day of the accident, but he did not witness it. He learned of the accident and notified MTACC of an injury before he went to see what happened. He arrived at the accident location approximately five minutes later. He found plaintiff sitting on the floor holding his knee. Plaintiff's foreman, Marsicano, was present, as were a few of plaintiff's co-workers.

Dorceus testified that he had asked plaintiff several questions, and Marsicano translated them into Spanish. Marsicano then translated the answers into English. Dorceus took notes of this conversation and prepared the Report. According to Dorceus, plaintiff pointed to the third rung of an A-frame ladder while speaking in Spanish. Marsicano then translated, stating that plaintiff missed that step, striking his knee on the third rung before falling (Dorceus tr at 21-23).

Dorceus testified that he does not speak Spanish and he relied on Marsicano's translation to be accurate. Dorceus used this information to prepare his report.

After speaking with Marsicano and plaintiff, Dorceus inspected the A-frame ladder and found it to be in good condition. He then tagged and removed that ladder from circulation at the work site.

Marsicano's Written Statement

Marsicano prepared a written statement on October 8, 2015, (three days post accident), where he stated that he had instructed plaintiff to dust debris from the drop ceiling's framework. Plaintiff did not have a co-worker for this work. The report states that Marsicano heard a loud noise and saw a hard hat roll out from the room where plaintiff was working. He entered the room and saw plaintiff "on his knees hunched over" (affirmation in opposition, exhibit A). Marsicano then stated that he "d[id] not know what rung [plaintiff] was on, probably the first or second" (*id.*).

The Incident Report

The Report, dated October 6, 2015 (notice of motion, exhibit 14; NYSCEF Doc. No. 47) was prepared and signed by Dorceus. In pertinent part, the Report states:

> "[Plaintiff] states that while he was climbing an A frame ladder to dust off the frame work for the drop ceiling system he missed the third step and struck his leg right below the knee on the ladder tread and fell to the ground while holding onto the ladder he struck his leg again on the ground, He was taken to City MD where the X-Ray showed that he had fractured his leg and was taken by Ambulance

> to the Hospital Awaiting Surgery. He stated that he was not rushing and was facing the ladder while climbing up but just missed the step"

(*id.*).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240(1) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 240(1) claim against all defendants. Defendants move for summary judgment dismissing the same.

Labor Law § 240(1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes,

and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240(1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240(1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240(1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Here, plaintiff has established prima facie entitlement to summary judgment in his favor on the Labor Law § 240(1) claim, as he testified that while working from a height on the Ladder, it slid out from underneath him and fell to the floor, causing plaintiff to fall with it (*see Garcia v Church of St. Joseph of the Holy Family of City of N.Y.*, 146 AD3d 524, 525 [1st Dept 2017]

["Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1)"]).

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection.'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] 2004], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; C*uentas v Sephora USA, Inc.* 102 AD3d 504, 504 [1st Dept, 2013], quoting *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996] ["'It is well settled that [the] failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)]'"]).

In addition, "a presumption in favor of plaintiff arises when a . . . ladder collapses or malfunctions for no apparent reason" (*Quattrocchi v F.J. Sciame Constr. Corp*., 44 AD3d 377, 381 [1st Dept 2007] [internal quotation marks and citation omitted]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, and that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240(1)]).

In opposition, defendants argue that the Ladder did not fall over – and, in fact, argue that the Ladder was not used at all. Rather, they claim, based on the Report and non-eyewitness testimony from plaintiff's co-worker and supervisors, that plaintiff was using an A-frame ladder, that the A-frame ladder did not fall, and that plaintiff merely slipped and/or missed a step, causing him to lose his balance and fall (Dorceus tr at 21-23; Marsicano tr at 35, 41 and 61; notice of

motion, exhibit 14 [the Incident Report]; affirmation in opposition, exhibit A [Marsicano's written statement]).

"A fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection" (*Campos v 68 E. 86th St. Owners Corp.,* 117 AD3d 593, 593 [1st Dept 2014]). A defendant "would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]).

Here, the conflicting testimony of plaintiff, Dorceus and Marsicano raises questions of fact as to the nature and cause of the accident, and raises questions as to the credibility of these witnesses. The variances in the defendants' version of the accident – i.e., Marsicano's written statement, which describes the accident slightly differently than Dorceus's incident report – directly implicates the credibility of these two witnesses. Moreover, plaintiff's testimony that Marsicano, Noceda and Dorceus essentially engineered a coverup by replacing the Ladder with the A-frame further underscores this credibility issue.

The resolution of such issues is inappropriate on summary judgment (*Asabor v Archdiocese of N. Y.*, 102 AD3d 524, 527 [1st Dept 2013] *quoting Anderson v Liberty Lobby, Inc*., 477 US 242, 255 [1986] ["'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge'"]).

In addition, this testimony establishes two versions of plaintiff's accident, one where the Ladder collapsed and, therefore, the Labor Law would apply; and one where it did not collapse and plaintiff merely missed a step, where the Labor Law would not apply. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment

inappropriate" (*Ellerbe*, 91 AD3d at 442; *see also Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009]). Accordingly, defendants have sufficiently raised questions of fact as to whether plaintiff's accident falls within the scope of Labor Law §240(1).

Defendants also argue that, even if plaintiff's version of the accident occurred as he alleges it did, they could not be liable because plaintiff was recalcitrant, in that he knew that the Ladder was an inappropriate safety device and that he used it anyway, despite the availability of proper safety devices.

"The recalcitrant worker defense requires a showing of 'the injured worker's deliberate refusal to use available and visible safety devices in place at the work station'" (*Harris v Rodriguez*, 281 AD2d 158, 158 [1st Dept 2001] [citation omitted]). Here, plaintiff testified that he looked for an A-frame ladder, but he could not find any of the appropriate size. Defendants counter that they had several A-frame ladders at the work site for plaintiff's use. However, there is no testimony establishing, as a matter of law, that an appropriately sized A-frame ladder was available for plaintiff's use (i.e. not in use by other workers) at the time of the accident. Therefore, defendants' evidence fails to establish, as a matter of law that, if plaintiff's version of the accident is credited, he deliberately refused to use an available or visible safety device.

Thus, given the foregoing, plaintiff is not entitled to summary judgment in his favor on the Labor Law §240(1) claim against defendants and defendants are not entitled to summary judgment dismissing the same.

The Labor Law §241(6) Claim (Motion Sequence Number 002)

Defendants move for summary judgment dismissing the Labor Law §241(6) claims against them.

Labor Law §241(6) provides, in pertinent part, as follows:

> "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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law §241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, except for Industrial Code §§ 12 NYCRR 23-1.5 [c][3]; 23-1.21[b][3][i] and 23-1.21[b][4][ii], plaintiff does not oppose the dismissal of the alleged Industrial Code violations. Thus, they are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations

that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law §241(6) claim predicated on those abandoned provisions, and the court need only address Industrial Code §§ 12 NYCRR 23-1.5[c][3]; 23-1.21 [b][3][i] and 23-1.21[b][4][ii]

Industrial Code 12 NYCRR 23-1.5 (c)(3)

Industrial CodeSsection 23-1.5 governs the general responsibilities of employers. Subsection 23-1.5(c) provides, in pertinent part, the following:

> "(c) Condition of equipment and safeguards.
> * * *
> "(3) All safety devices, safeguards and equipment shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

Industrial Code 12 NYCRR 23-1.5(c)(3) has been held sufficiently specific to support a Labor Law § 241(6) claim (*see Becerra v Promenade Apts. Inc.,* 126 AD3d 557, 558 [1st Dept 2015]).

Here, plaintiff argues that the Ladder was unsound because it was merely the top portion of an extension ladder that had been removed from the bottom portion of the extension ladder and then provided to workers, without proper footing, making it unsound, damaged and in need of repair. Defendants' argument focuses primarily on the position that the A-frame ladder was sound and undamaged and, therefore, that this provision was not violated.

As discussed above, a question of fact exists as to what ladder plaintiff actually used. This question of fact prevents the court from determining whether section 23-1.5(c)(3) was violated. Therefore, summary judgment is not warranted as to this provision at this time.

Thus, defendants are not entitled to summary judgment dismissing that portion of the Labor Law § 241(6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.5(c)(3).

Industrial Code 12 NYCRR 23-1.21(b)(3)(i)

Industrial Code section 23-1.21 (b)(3) governs the maintenance of ladders. It provides in pertinent part, the following:

> "(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
>
> "(i) If it has a broken member or part."

Section 23-1.21 (b)(3)(i) is sufficiently specific to support a Labor Law § 241(6) claim (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]).

As with section 23-1.5 (c)(3), the dispute over which ladder plaintiff used at the time of his accident – the top half of an extension ladder with no footing, or a properly footed and secured A-frame ladder – prevents this court from determining whether plaintiff's accident involved a ladder with a "broken member or part."

Thus, defendants are not entitled to summary judgment dismissing that portion of the Labor Law § 241(6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.21 (b) (3) (i).

Industrial Code 12 NYCRR 23-1.21 (b)(4)(ii)

Industrial Code section 23-1.21(b)(4) governs the installation and use of ladders. It provides in pertinent part, the following:

> (4) Installation and use.
> * * *
>
> (ii) All ladder footings shall be firm."

Section 23-1.21 (b)(4)(ii) is sufficiently specific to support a Labor Law § 241(6) claim (*Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]).

As with the prior Industrial Code provisions, the dispute over which ladder plaintiff used at the time of his accident – the top half of an extension ladder with no footing, or a properly footed and secured A-frame ladder – prevents this court from determining whether plaintiff's accident involved a ladder with firm footings.

Thus, defendants are not entitled to summary judgment dismissing that portion of the Labor Law § 241(6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.21 (b)(4)(ii).

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 002)

Defendants move for summary judgment dismissing the common-law negligence and Labor Law §200 claims against them.

Labor Law §200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], *citing Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law §200(1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to Section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is

inherent in the premises (*see e.g. Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"'Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law §200 unless it had the authority to supervise or control the performance of the work'" (*Soller v Dahan*, 173 AD3d 803, 805 [2d Dept 2019]. Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

However, where an injury stems from a dangerous condition inherent in the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner [or contractor] created the dangerous condition [causing an injury] or when the owner [or 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, 630 [1st Dept 2018], quoting *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, the accident was caused by the means and methods of the work – i.e. the use of the Ladder for cleaning construction debris from an elevated surface. The record is devoid of any evidence that defendants had the actual authority to supervise or control the use of the Ladder or the method of cleaning. In addition, importantly, plaintiff does not oppose the dismissal of these claims.

Thus, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Plaintiff's Lost Wages Claim (Motion Sequence Number 002)

Defendants move for summary judgment dismissing that part of plaintiff's damages claim predicated on lost wages on the grounds that he is an undocumented immigrant.

Under a federal framework set forth in the Immigration Reform and Control Act of 1986 (IRCA), the employment of undocumented immigrants is prohibited. As amended in 2006, the IRCA requires that employers verify that each new worker hired after 1986 is authorized to work in the United States. Regulations promulgated under the IRCA require employers to fill out and maintain copies of a United States Citizenship and Immigration Services (USCIS) Form I-9, known as the "Employment Eligibility Verification Form" (Form I-9).[1]

In *Hoffman Plastic Compounds, Inc. v N.L.R.B.* (535 US 137 [2002]), the Supreme Court of the United States (SCOTUS) analyzed whether an undocumented immigrant employed in the United States may sue for back pay and lost wages. There, the plaintiff provided a falsified social security card to his employer before he was hired.

SCOTUS explained that the IRCA "makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents" (*id.*, at 148). Therefore, the Court noted, "awarding backpay in a case like this . . . trivializes the immigration laws [and] condones and encourages future violations" (*id.* at 150). The plaintiff's lost wages claim was denied.

---

[1] Every employer, before hiring any person must verify that the potential employee is not undocumented by examining specified documents establishing that person's identity and eligibility for employment (*see* 8 CFR § 274a.2 [a] [2]). An employer is required to physically examine the documents presented and to "ensure that the documents presented appear to be genuine and to relate to the individual" (8 CFR § 274a.2 [b][1][A]).

If the documentation required in the Form I-9 is not presented, a person may not be hired (*see* 8 USC § 1324a [a][1]).

A few years later, the New York Court of Appeals addressed whether lost wage claims in Labor Law actions brought by undocumented immigrants could stand in light of SCOTUS's decision in *Hoffman*. The Court of Appeals explained, as follows:

> "The Labor Law . . . applies to all workers in qualifying employment situations – regardless of immigration status . . . . Additionally, limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands.
>
> * * *
>
> "An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens"

(*Balbuena v IDR Realty LLC*, 6 NY3d 338, 358-359 [2006]). In *Balbuena*, unlike in *Hoffman,* the plaintiff did not present falsified documents to his employer. Rather, "it was the employers who violated IRCA by failing to inquire into plaintiffs' immigration status or employment eligibility" (*id.* at 360).

The Court of Appeals in *Balbuena* did not directly address what would happen if falsified documents were, in fact, provided to an employer. Rather, it reasoned that, because the defendant employer had failed to meet its own obligations under the IRCA, the defendants could not hide behind the IRCA's protections with respect to the plaintiff's lost wages claim.

After Balbuena was decided, the Second Department, in *Coque v Wildflower Estates Devs., Inc.* (58 AD3d 44 [2d Dept 2008]), addressed whether an employee who, in fact, did provide falsified work documentation to an employer may recover for lost wages. There, the Second Department held that a lost wages claim may be denied only where an "innocent employer is duped

by fraudulent documentation into believing that the employee is a United States citizen or otherwise eligible for employment" (*id.* at 52). More specifically, it held:

> "We do not believe that . . . [an undocumented] worker forfeits his or her right to recover lost earnings at the time he or she is hired. Rather, the false document must actually induce the employer to offer employment to the plaintiff. . . . If the employer was, or should have been, aware of the plaintiff's immigration status, and nonetheless hired plaintiff with a wink and a nod, the false document was not necessary to obtain employment"

(*id.* at 52-53 [internal quotation marks and citation omitted]). The Second Department concluded by reiterating the following:

> "[W]here an employer violates the IRCA in hiring an employee, such as by failing to properly verify the employee's eligibility for work, the employee is not precluded, by virtue of his submission of a fraudulent document to the employer, from recovering damages for lost wages as a result of a workplace accident"

(*id.* at 54).

The First Department adopted the *Coque* rationale in *Macedo v J.D. Posillico, Inc.,* (68 AD3d 508 [1st Dept 2009]), when it analyzed a situation similar to the instant action. In *Macedo*, the plaintiff admitted he supplied a false Social Security number to his employer. However, he was never directed to fill out a Form I-9. The First Department held:

> "[I]t is undisputed that [the employer] did not complete or have plaintiff sign an I-9 Form until months after the accident took place. Accordingly, even assuming that plaintiff had submitted his social security card at the time of his hire, it is clear that [the employer] failed to comply with its employment verification obligations in good faith. Thus, it cannot be concluded that plaintiff induced [the employer] to hire him based on his social security card"

(*id.* at 511).

In sum, the progression of cases – from *Hoffman* to *Balbuena* to *Coque* and *Macdeo* – establishes that a plaintiff is barred from recovery of damages for lost wages if the defendants can

establish that the plaintiff's employer: (1) was supplied false citizenship and/or work authorization documents; (2) relied on such documents; and (3) met its own burdens under the IRCA to verify the plaintiff's employment status (*Balbuena,* 6 NY3dat 360; *Coque*, 58 AD3d at 54; *Macedo*, 68 AD3d at 511).

Here, defendants argue that plaintiff's submission of falsified employment documents to EE Cruz, (social security number and permanent resident identification card), when considered alongside his timely completion and signing of a Form I-9 before he began working, there should preclude him from recovering any damages for lost wages in this action.

Additional Facts Relevant to this Motion

The Affidavit of Christine Vinces (EE Cruz's Administrative Assistant)

Christine Vinces stated that at the time of the accident, she was an administrative assistant for EE Cruz. Her duties included "overseeing [EE Cruz's] employment application/hiring process, which involved the review of information and documentation submitted to [Cruz] in connection with applications for employment" (Vinces affidavit, ⁋ 2). According to Vinces, EE Cruz requires all prospective employees to provide proof of work eligibility and to fill out a Form I-9, as required by the IRCA.

On September 14, 2015, plaintiff met with Vinces. At the meeting, he filled out and signed the Form I-9, which included a social security number, permanent resident identification number and a signature. Plaintiff also provided a Permanent Resident Card.

Vinces stated that she examined the Permanent Resident Card "and believed it to be a genuine form of identification" (*id.*, ⁋ 4). Vinces then countersigned the Form I-9 on September 15, 2015.

The Form I-9

Annexed to Vinces's affidavit is plaintiff's Form I-9 (Vinces affidavit, exhibit A), dated September 14, 2015. On it, plaintiff provided a social security number and a permanent resident ID number.

The Form I-9 also includes the following directives:

> "Section 1. Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer).
>
> * * *
>
> "Section 2. Employer or Authorized Representative Review and Verification (Employers . . . must complete and sign section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A . . .)"

(*id.*).

Section 2 also contains an employer "Certification." The Certification states the following:

> "I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above named employee, (2) the above listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States"

(*id.*).

In Section 1, a box was checked indicating that plaintiff was a lawful permanent resident. The form then listed both a social security number and an Alien Registration Number. Plaintiff signed and dated section 1 of the Form I-9 on September 14, 2015.

In section 2, a permanent resident card number was filled in under the List A document header. On the following day, September 15, 2015, Vinces signed and dated section 2 of the Form I-9 below the Certification.

Finally, annexed to the Form I-9 is a copy of the permanent resident card that plaintiff submitted as proof of his employment status. It bears a photograph of plaintiff (plaintiff does not dispute this) and a 9-digit USCIS number, alongside plaintiff's accurate country of birth and birthday, and an expiration date in 2024 (*id.*).

As an initial matter, plaintiff objects to the court's consideration of Vinces's affidavit on the ground that Vinces was not identified as a witness prior to the filing of the note of issue and was never disclosed or made available for deposition. A court should not generally consider an undisclosed witness's affidavit (*Ravagnan v One Ninety Realty Co.,* 64 AD3d 481, 482 [1st Dept 2009]). However, a court may consider such an affidavit when it does not contradict testimony, evidence, or official records, or raise new theories of liability (*Baez v 1749 Grand Concourse LLC*, 178 AD3d 520, 523 [1st Dept 2019]).

Here, Vinces's affidavit does not contradict plaintiff's testimony that, on the day he began working for EE Cruz, he provided false documentation and filled out and signed a form with that information. Nor does Vinces's affidavit contradict the Form I-9 itself, which plaintiff does not claim was excluded from discovery. Moreover, plaintiff does not contest the accuracy of the Form I-9, which was signed and certified by Vinces under penalty of perjury. As Vinces's affidavit does no more than reiterate (1) what plaintiff confirmed in his own testimony and (2) what the Form I-9 itself establishes, it may be considered.

Turning now to the material issue before the court, the question presented is whether filling out and signing the Form I-9 by both the plaintiff and a representative of EE Cruz, in and of itself, satisfies the requirement that EE Cruz "properly verify the employee's eligibility for work," such that it became immune to plaintiff's lost wages claim (*Coque,* 58 AD3d at 52). There does not

appear to be any case directly on point with respect to this issue. So, the court must look to the regulations themselves.

The regulation in question – 8 CFR 274a.2 – is entitled "Verification of identity and employment authorization." It establishes "requirements and procedures for compliance by persons or entities when hiring" (8 CFR 274a.2[a]). It also formally creates and sets forth the form and substance of the Form I-9 (8 CFR 274a.2 [a][2]).

Most relevant to the instant inquiry is section 274a.2[b], which establishes "Employment verification requirements." It provides, in pertinent part, the following:

> "(1) Examination of documents and completion of Form I-9.
>
> > "(i) A person or entity that hires . . . an individual for employment must ensure that the individual properly:
> >
> > > (A) Completes section 1 – "Employee Information and Verification" – on the Form I-9 at the time of hire and signs the attestation with a handwritten or electronic signature . . .
> > >
> > > (B) Present to the employer . . . documentation as set forth in paragraph (b) (1) (v) of this section establishing his or her identity and employment authorization . . .
>
> * * *
>
> > (ii) Except as provided [elsewhere], an employer . . . must within three business days of the hire:
> >
> > > (A) Physically examine the documentation presented by the individual establishing identity and employment authorization as set forth in paragraph (b) (1) (v) of this section and ensure that the documents presented appear to be genuine and to relate to the individual; and
> > >
> > > (B) Complete section 2 – "Employer Review and Verification" – on the Form I-9 within three business

> days of the hire and sign the attestation with a handwritten signature or electronic signature . . .

* * *

> (v) The individual may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity. . . .
>
> (A) The following documents, so long as they appear to relate to the individual presenting the document, are acceptable to evidence both identity and employment authorization:

* * *

> (2) An Alien Registration Receipt Card or Permanent Resident Card . . . ."

(8 CFR 274a.2[b]).

As set forth above, the regulation only requires an employer to "physically examine" (8 CFR 274a.2 [b][1][ii][A]) an employment document such as a permanent resident card (8 CFR 274a.2[b][1] [v][A][2]). After examining the document and confirming that it "appear[s] to be genuine and relate[s] to the individual" (8 CRF 274a.2[b][1][ii][A]), an employer must then attest, under penalty of perjury, that it has done so, within three business days of employment (8 CFR 274a.2 [b][1][ii][B]). There appears to be no further requirement for verification on behalf of the employer.

Here, it is uncontested that plaintiff supplied EE Cruz with a false permanent resident card. It is also uncontested that plaintiff met with an EE Cruz representative and filled out and signed a Form I-9. It is uncontested that the Form I-9 indicates that Vinces reviewed plaintiff's false permanent resident card and found it to appear to be genuine and to relate to plaintiff. Said review

took place within three business days of plaintiff's hiring. Accordingly, EE Cruz complied with the requirements of section 274a.2[b] and sufficiently verified plaintiff's work status.

Plaintiff does not claim, nor does he present any evidence supporting the position that his false permanent resident card, on its face, was so obviously false that Vinces's attestation as to its authenticity, itself, might be considered fraudulent. As there is no evidence in the record suggesting that Vinces's sworn attestation on the Form I-9 was not improper, plaintiff has not established that the fully executed Form I-9 should be disregarded.

Finally, plaintiff argues that his lost wages claim should be allowed to continue because a jury may consider whether plaintiff "could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents required by IRCA . . . and would likely be authorized to obtain future employment in the United States" (*Balbuena*, 6 NY3d at 362). This argument is unpersuasive. Plaintiff fails to provide any testimony or evidence that he is in the process of obtaining such employment documents or status. Accordingly, plaintiff has not established the existence of a question of fact as to his potential future employment status in the United States sufficient to overcome the bar to his lost wages claim.

Thus, defendants are entitled to summary judgment dismissing that part of plaintiff's damages claim that seeks recovery for lost wages.

The parties' remaining arguments have been considered and were found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Jesus Casias, Jr.'s ("Plaintiff") Motion (Motion Sequence Number 001), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §240(1) claim as against defendants The City Of New York (the City), New York City Transit Authority (NYCTA), Metropolitan Transportation Authority (MTA) and MTA Capital Construction Company (MTACC) (together, "Defendants") is DENIED; and it is further

ORDERED that defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is GRANTED to the extent that the common-law negligence and Labor Law §200 claims, as well as those parts of the Labor Law §241(6) claim predicated upon the abandoned Industrial Code provisions are dismissed; and it is further

ORDERED that defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's lost wages damages claim is GRANTED, and defendants' motion is otherwise DENIED.

This is the Decision and Order of this court.

Dated: April 20, 2021

ENTER:

HON. J. MACHELLE SWEETING, J.S.C.

☒ NON-FINAL DISPOSITION