SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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JOSE A. PRADA,

Plaintiff,

-against-

MURANE BUILDING CONTRACTORS, INC.,

Defendants.

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Index No.: 703359/2018

Motion Seq. No. 5

DECISION/ORDER

MURANE BUILDING CONTRACTORS, INC.,

Defendant/Third-Party Plaintiff,

-against-

THE OAK GROUP, INC., d/b/a OAK NYS GROUP AND SUN ENTERPRISE GROUP, LLC

Third-Party Defendant.

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PRESENT: HONORABLE ULYSSES B. LEVERETT

	Papers Numbered
Defendant's Third-Party Notice of Motion-Affirmation-Exhibits	EF 77-87
Plaintiff's Notice of Cross Motion-Affirmation in Support of Cross Motion-Exhibits	EF 92-96
Plaintiff's Affirmation in Opposition to Motion-Exhibits	EF 98-100
Defendant's Affirmation in Opposition to Cross Motion-Exhibits	EF 101-102
Defendant's Reply Affirmation in Support of Motion	EF 105
Plaintiff's Reply Affirmation in Support of Cross Motion	EF 106

Upon the foregoing papers, the decision and order on this motion is as follows:

Defendants/Third-Party Plaintiff Murane Building Contractors, Inc., (Murane Inc.) brings this motion (sequence 5) pursuant to Civil Practice and Rules (CPLR) §3212 for an order granting summary judgment dismissing plaintiff Jose Prada's complaint and granting such other relief the Court deems just, proper and equitable. Plaintiff Jose Prada brings a cross motion for summary judgment pursuant to Labor Law §240(1) against defendant/third party Murane Inc.

Plaintiff commenced this action on or about March 21, 2018 alleging that on or about May 26, 2017 he was caused to fall from a ladder at the subject premises located at 1220 Washing Avenue, Building No. 4, Albany, NY and alleged that his injuries/damages were caused by the negligence of Defendant/Third-Party plaintiff Murane Building Contractors, Inc. (Murane Inc.). Plaintiff seeks recovery for injuries pursuant to Labor Law §200, §240(1), and §241(6).

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The state of New York owned the subject premises and retained Murane Inc. to provide Construction services there. Murane Inc. contracted with SCE Environmental Group (SCE), which subcontracted with plaintiff's employer Sun Enterprise Group, LLC/The Oak Group, Inc. (Sun/Oak) to abate asbestos. Murane Inc. asserts in its motion to dismiss the complaint, that this action stems from an unwitnessed fall from a ladder that occurred as plaintiff Prada removed a light fixture at an abatement project. Plaintiff was standing on a six to eight foot A-framed ladder while unscrewing the five to seven-pound metal casing surrounding the light fixture. The casing was positioned at eye level. Plaintiff stated that fixture casing fell as he unscrewed it and struck the ladder causing it to tip over. The casing did not however, strike plaintiff nor has plaintiff argued that the A-frame ladder was defective but rather inadequate.

Plaintiff in opposition and by cross-motion claims that defendant Murane Inc. is failed to supervise his work, or created or had knowledge of a dangerous condition in violation of Labor Law §200. Plaintiff also claims that defendant Murane Inc. is liable under Labor Law §241(6) by violating sections of the New York State Industrial Code. Additionally, plaintiff claims the defendant Murane is liable under Labor Law §240(1) as a contractor for breach of his nondelegable duty to protect plaintiff as a construction worker from the risks of elevation related hazards by failing to provide plaintiff adequate safety devices.

It is well established that the proponent of a motion for summary judgment must make prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). Once the movant has made such a showing, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of material issues of fact requiring a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Labor Law §200 imposes a common law duty of an owner or general contractor to provide workers a safe place to work. To prevail on Labor Law §200 claim of defects and dangers of materials and equipment provided, the plaintiff must show that defendant Murane, Inc. had the authority to supervise or control the performance of the work. *See Ortega v. Puccia*, 57 A.D.3d 54 (2008).

Labor Law §241(6) provides that owners and contractors and their agents shall be liable for failing to comply with enumerated rules promulgated by the commissioner of the Department of Labor.

Labor Law §240(1) imposes a nondelegable duty on all contractors and owners and their agents in the repairing of a building or structure who do not furnish or cause to be furnished inter alia hoists, stays, ladder, pulley, braces, ropes and other devices which give proper protection to a person so employed.

Here, defendant Murane Inc. has presented uncontroverted deposed testimony of its lack of authority to control or supervise the work of plaintiff and established its prima facie entitlement to a judgment as a matter of law to dismiss the statutory Labor Law §200 claim. Plaintiff Prada as the direct employee of defendants Sun/Oak has not presented evidentiary proofs in opposition to defendant's motion to raise a triable issue of fact of plaintiff's Labor Law

§200 claim.

Accordingly, defendant Murane Inc. motion for summary judgment dismissing plaintiff Labor Law §200 claim is granted.

Defendant's motion to dismiss plaintiff's complaint and cross motion on plaintiff Labor Law §241(6) claims is granted. Labor Law §241(6) imposes a nondelegable duty of owners and contractors to provide reasonable and adequate protection and safety to construction worker. Plaintiffs are required to plead and prove violations of the industrial code regulations which proximately caused the injury, but are subject to the valid defense of contributory and comparative negligence. *See Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y.2d 494 (1993). Plaintiff claims violation of 12 NYCRR §§ 23-3.3(c), 23-1.7(a) and 23-1.33.

Defendant has provided evidence in support of his motion for summary judgment that plaintiff Labor Law §241(6) claims are not factually applicable. Section 23-3.3(c) mandates continuing inspections to "detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material." Here, plaintiff argues that the fixture that he was unscrewing/loosening constitutes loosened materials within § 23.3-3(c) however, plaintiff also asserts that the screw on the opposite side of the fixture that he loosened were still in place. Plaintiff provided no citation to the record that there was any structural instability caused by the progress of any demolition. Section 23.3.3(c) is not applicable where the hazard arose from plaintiffs' actual performance of the work and not from structural instability caused by progress of other demolition. *See Garcia v. 255 East 57th Street Owners Inc.*, 96 A.D.3d 88 (1st Dep't 2012) and *Badznierowski v. Pbak LLC*, 2004 Slip Op 51207(u). Here, plaintiff does not present any evidence that the injuries were caused by structural instability. Defendant motion to dismiss plaintiffs Labor Law §241(6) and 12 NYCRR §23-3.3(c) claim is granted.

Plaintiff Labor Law §241(6) claims based on 12 NYCRR §23-1.7(a) and §23-1.33 are also inapplicable. 12 NYCRR §23-1.7(a) prescribes for overhead protection in places that are normally exposed to falling material or objects. The industrial code is inapplicable where there is no evidence of regular falling objects in a plaintiff work area. *See Amato v. State*, 241 A.D.2d 400 (1st Dep't 1997). Plaintiff has not presented evidence of regular falling objects in plaintiff's work area.

Similarly, 12 NYCRR §23-1.33 is inapplicable. The code section requires reasonable and adequate protection and safety shall be provided for all persons passing by areas, buildings or other structures in which construction, demolition or evacuation work is being performed. Here, plaintiff was performing work in a designated to area and was not a passerby specified in the code. Additionally, the §23-1.33 has insufficient specification for compliance and cannot support a claim under Labor Law §241(6). *See McMahon v. Durst*, 224 A.D.2d 324 (1st Dep't 1996).

Accordingly, defendant's motion to dismiss plaintiff Labor Law §241(6) claims predicated on 12 NYCRR §23-1.7(a) and §23-1.33 for inapplicability is granted.

Finally, defendant Murane Inc. argues in its motion for summary judgment and in opposition to plaintiffs' cross motion for summary judgment that Labor Law §240(1) does not apply to plaintiff's accident.

Labor Law §240(1) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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) imposes a non-delegable duty on all contractors and owners and their agents in the repairing of a building or structure who do not furnish or cause to be furnished inter alia hoists, stays, ladder, pulley, braces, ropes and other devices which give proper protection to a person so employed. The non-delegable duty imposed by Labor Law §240(1) applies only if the listed devices are necessary to provide protection. *See La France v. Niagara Mohawk Power Corp.*, 89 A.D.2d 757 (1982). A defendant's failure to provide adequate protection from reasonable preventable gravity related accidents will result in liability. *See Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1 (2011). Labor Law §240(1) is a strict liability statute and comparative negligence is not a defense. *See Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35 (2004).

The plaintiff must prove [1] that Labor Law §240(1) has been violated by defendant's failure to provide required protection at the site and [2] that the violation was a proximate cause of the injury. *See Barreto v. Metropolitan Transportation Authority*, 25 N.Y.3d (2015), *Chacha v. Glickenhaus Doynow Sutton Farm Development*, LLC, 69 A.D.3d 896 (2010), and *Blake v. Neighborhood Housing Services of NY City*, 1 N.Y.3d 280 (2003).

Additionally, in falling object or falling worker cases the court must examine whether the worker's injuries were the direct consequence of a failure to provide adequate protection from a physically significant elevation differential. The statute does not provide for coverage for every worker that falls at a worksite. Recovery is not available for routine workplace risks. *See Robinson v. East Medical Center*, LP, 6 N.Y.3d 550 (2006).

Here, defendant provided plaintiff with a six to eight foot A-frame ladder to use while unscrewing a five to seven-pound metal casing surrounding the fixture. The fixture was attached to an approximate nine-foot ceiling and was at plaintiff's eye level. Plaintiff claimed that the fixture fell as he unscrewed it and struck the ladder causing it to tip over. Defendant argues ladder was functional and adequate statutory device for the purpose of the undertaking of the removal of the fixture. Defendant further argues that §240(1) is not applicable where plaintiff lost his balance after a five to seven-pound object positioned at eye level struck a fully functional ladder since no physically significant elevation related hazard occurred. Defendant asserts the object of minimal weight situated at a de minius height is an ordinary construction hazard. Defendant also argues that plaintiff gave inconsistent accounts of the accident by stating he jumped from the ladder, that plaintiff is not credible and that plaintiff is the sole proximate cause of the accident.

Plaintiff in opposition to defendant's motion and in support of its motion for summary judgment argues that based upon the work he was performing the ladder was not the proper device to provide plaintiff protection from the falling object or to protect him from falling. Plaintiff argues that while performing asbestos treatment and demolition work he was required to wear two hazmat jumpsuits, respirator and a helmet. He has to use both hands to remove the fixture which was five feet long and could not steady himself on the ladder. Plaintiff asserts via an engineer report that a scaffold was the appropriate safety device which was not provided by defendant to protect him from falling.

In a motion for summary judgment a party is entitled to summary judgment when it is clear that there are no material issues in dispute requiring trial. The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. If the movant makes a prima facie showing of entitlement to summary judgment the burden shifts to the opposing party to demonstrate by admissible evidence that there is a factual issue requiring trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

In Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001) the Court differentiated that the hazard posed to falling worker from an elevated height, without scaffold or ladder, is that the worker might be injured in a fall. Falling objects are associated with failure to use different devices such as ropes, pulleys or irons to prevent objects from falling. The Narducci Court held "[a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute.

The Court finds that defendant established its prima facie case that plaintiff's work did not entail a physically significant elevation differential for the falling light fixture and plaintiff has not provided evidentiary proofs to demonstrate that an issue of fact as to the existence of a physically significant elevation difference as a Labor Law §240(1) falling object case. However, plaintiff has set forth sufficient testimonial evidence to raise a triable question of fact as to whether the A-frame ladder was an adequate safety device for the hazard posed by the elevated asbestos removal/demolition work as falling worker case under Labor Law §240(1). Additionally, the credibility of plaintiff evidence is the province of the jury. Plaintiff cross motion for summary judgment for liability pursuant to Labor Law §240(1) likewise denied.

Accordingly, defendants Murane Building Contractor's Inc. motion for summary judgment dismissing plaintiff's Labor Law §240(1) claim as fallen worker is denied. Defendant motion to dismiss plaintiff Labor Law §200 and §241(6) claim is granted. Plaintiff Prada's cross motion of summary judgment pursuant to Labor Law §240(1) is denied.

This is the decision and order of this Court.

Dated: 11/16/2021

Ulysses B. Leverett, J.S.C.

FILED
11/16/2021
COUNTY CLERK
QUEENS COUNTY

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