SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

----------X

CARLOS SANTOS,

Plaintiff,

- v -

AVALON BAY COMMUNITIES, INC., AVALON GREAT NECK, LLC,

Defendant.

----------X

INDEX NO. 157906/2017

MOTION DATE 12/06/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries he alleges were incurred when he fell from a ladder at a construction site during the course of his employment. Avalon Bay Communities, Inc. (Avalon Bay) and Avalon Great Neck, LLC (Avalon) are the owners of the premises located at 140 East Shore Road, Great Neck, New York (Subject Premises). Defendants retained Nova Concrete Contractors, Inc. (Nova) to work on the project. Plaintiff was employed by Nova.

ALLEGED FACTS

Avalon Bay entered into an agreement with Nova to perform work at the Subject Premises, involving the construction of a new mid-rise residential building.

On March 4, 2016, plaintiff, a cement worker employed by Nova, was working at the Subject Premises, when he fell from a ladder and sustained injuries. Plaintiff had been working at the site for approximately 4-5 months prior to the day of the accident. On the date of the

accident, the building had "three levels." That day, the workers were preparing to pour concrete to put up iron on the third level.

However, before that work began, snow removal had to be performed at the site because there were several inches of snow on the ground that morning. So, the Nova workers cleared snow at the site. After performing snow removal, the Nova workers organized the concrete forms and were then sent to tie long pieces of rebar together to be able to pour the concrete. Plaintiff had a special tool to tie the wire, which he had left on the third level of the building. Plaintiff alleges there were approximately three extension ladders set up to gain access to the third floor. Plaintiff was never advised not to use any particular ladder to access the third floor.

Plaintiff used ladder that was closest to the area where he was working; The subject extension ladder had already been in place in this location when plaintiff arrived on the site. Although, generally, ladders at the site would be secured, plaintiff did not see any wire tying the subject ladder to the third level prior to the accident. Prior to this accident, plaintiff had used the same ladder to climb every day for at least a week.

In addition, the subject extension ladder did not extend above the third level. The accident occurred when plaintiff went to step off the ladder onto the third floor and the ladder moved under his other foot, causing him to fall to the ground. Plaintiff did not see the ladder after the accident and did not know if the ladder also fell in addition to moving under him.

There were no witnesses to the accident.

John Siragusa (JS), the senior lead superintendent for Avalon Bay, received a call notifying him of the accident. By the time JS arrived at the scene, plaintiff had already been taken to the hospital. JS did not speak to plaintiff but spoke with a foreman Paul who told him which ladder he believed plaintiff had fallen from. The ladder JS inspected was secured to the

second floor. JS testified that all extension ladders at the site should have been secured to the area of the work being done.

JS testified that the ladder he observed and photographed after the accident was secured to the second floor and extended approximately five feet beyond the second level. JS testified that the extension ladder he observed was extended about 15 feet from bottom to top. The ladder extended to, but did not go higher than the third level, which had plywood flooring. JS testified that an extension ladder is supposed to be placed with two rungs of the ladder above the higher level, and that all extension ladders at the site should have been secured to the area of the work being done. JS further testified that workers were not required or expected to use a harness to climb an extension ladder.

Defendants allege that the ladder was not intended to access the third floor of the Subject Premises and there were several other ladders available to the plaintiff with access to the third floor that plaintiff was aware of and had previously used. Plaintiff alleges that there was no indication that plaintiff was expected to use another ladder to access the third floor and the ladder slipped while plaintiff was using it.

Plaintiff's expert Herbert Heller, Jr, P.E., opined, that the subject ladder that moved as plaintiff was climbing it was a violation of Labor Law §240(1) and proximately caused the subject accident. Mr. Heller further attested that, even if defendants were to claim that the ladder was only intended for the second level and not the third level, it was still a §240(1) violation because there should have been signs and warnings not to use the ladder to reach the top floor, given that it was in a position where it could be used to reach that floor. Mr. Heller also attested that the failure to secure the ladder at the third level and the failure to position the ladder where it extended two feet above the top level violated construction site safety standards as well as rules

and regulations including the Industrial Code, rule 23-1.21(b)(4), which he asserted was a predicate for a Labor Law §241(6) violation that was a proximate cause of the subject accident.

PENDING MOTION

On July 13, 2021, plaintiff moved for summary judgment as to liability, and on September 22, 2021, defendants cross-moved for summary judgment and dismissal of the complaint. The motions are consolidated herein for disposition and granted to the extent set forth below.

DISCUSSION

It is well established that CPLR § 3212 authorizes the grant of summary judgment if it can be shown that no issues of material fact exist which require a trial. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). *See also Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974) (*where there is no genuine issue to be resolved at trial, the case should be summarily decided*). To establish entitlement to judgment as a matter of law, the movant must make a *prima facie* showing by tendering sufficient evidence to eliminate any material issues of fact from the case. *Penthouse Terraces, Inc. v. McGrath*, 163 A.D.2d 144 (1st Dep't 1990). Once the moving party demonstrates its entitlement to summary judgment, the burden then shifts to the opposing party to present facts demonstrating that genuine, triable issues of fact exist, which would preclude the granting of summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Plaintiff's Claims Pursuant to Labor Law § 200 and Common Law Negligence Are Dismissed

The duty to provide a safe worksite imposed upon owners, general contractors and their agents is based upon supervision and control. "The purpose of the [Labor Law] is to protect workers by placing the "ultimate responsibility' for worksite safety on the owner and general

contractor instead of the workers themselves." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500; *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513. Labor Law § 200 is the codification of the common-law duty of owners, general contractors and their agents to protect the health and safety "of all persons employed therein or lawfully frequenting such places." *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299(1978). An implicit precondition of this duty "is that the party charged with that responsibility has the authority to control the activity bringing about the injury." *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981).

Labor Law § 200 applies where workers are injured as a result of dangerous or defective premises conditions at a worksite or where a worker is injured by the manner in which the work is performed. When a premises condition is at issue, the owner may be held liable for a violation of the statute if the owner created the condition that caused the accident or had actual or constructive notice of the dangerous condition. *See, Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728, 730 (2d Dep't 2008); *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626 (2d Dep't 2005).

In *Cody v. State of New York*, 82 A.D.3d 925, 927 (2nd Dept. 2011), the Appellate Division, Second Department held that cases fall into the "means and methods of the work" category if the object which caused the alleged injury "had been a product of ongoing construction work…" *Id.* Where the material that caused plaintiff's injury was being used by the plaintiff or his co-workers, then the case falls into the "means and methods of the work" category. *See, Gomez v. City of New York*, 56 A.D.3d 522, 523 (2d Dept. 2008); *Mas v. Koehn*, 283 A.D.2d 616 (2d Dept. 2001). When the action involves the manner in which work is performed liability will not attach to the owner based solely on notice of the allegedly unsafe manner in which work was performed. *Dennis v. City of New York*, 304 A.D.2d 611, 612 (2nd Dept. 2003). Rather, "[t]o impose liability under section 200, it is necessary to show authority

and control over plaintiff's 'work.'" *Bell v. Bengomo Realty, Inc.*, 36 A.D.3d 479, 481 (1st Dept. 2007). Specifically, where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under the statute creating a general duty to protect the health and safety of employees. *Reilly v. Newireen Associates*, 303 A.D.2d 214 (1st Dept. 2003).

Here, plaintiff was injured due to the means and methods of the ongoing construction, i.e., the use of a ladder, rather than an unsafe condition on the premises, and the common-law negligence and Labor Law § 200 claims as against defendants are dismissed, since the undisputed evidenced establishes that defendants never directed or controlled plaintiff's work. There is no evidence defendants were negligent or created an unreasonable risk of harm that caused or contributed to the plaintiff's accident. Nor is there evidence that defendants had sufficient control over the construction site or plaintiff's work to establish liability.

Moreover, assuming *arguendo* the ladder is deemed a condition as argued by plaintiff rather than a means and method injury as argued by defendant, the common law negligence claim must still be dismissed because there is no evidence that defendants caused or had actual or constructive notice of the hazardous condition which precipitated the injury. *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 (1994). It is undisputed that the ladder from which plaintiff fell was owned and installed Nova, and there is no evidence movants had actual or constructive notice of any alleged defective condition in regard to the ladder. Defendants who do not have actual or constructive notice of a hazardous condition should not be liable for an incident that occurs. *See Gordon*, 67 N.Y.2d at 837. No actual notice is alleged in this case.

With respect to constructive notice, the Court of Appeals has reiterated the well-settled standard that, "[t]o constitute constructive notice, a defect must be visible and apparent and it

must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v. Am. Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

Here, there is no proof of constructive notice. No party has produced any evidence that there was notice of a defective condition with the ladder, or that there were prior complaints or similar accidents involving the ladder. In fact, plaintiff alleges that there were no prior complaints regarding the ladders at the construction site, and there were no prior accidents of someone falling off an extension ladder. There were also no violations that were issued regarding the ladder and the manner that it was tied to the building structure prior to and after March 4, 2016. Similarly, plaintiff admitted that he had no prior issues with the ladder from which he fell and that he was unaware of any co-workers complaining about the ladder from which he fell.

Based on the foregoing, there is no evidence that defendants controlled or directed plaintiff's work or were otherwise negligent. As such, plaintiff's common law negligence and Labor Law §200 claims are dismissed.

Plaintiff is entitled to Summary Judgment on the Labor Law § 240(1) Claim

It has long been recognized that "Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners or contractors . . . for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" *Jock v. Fien*, 80 N.Y.2d 965, 967-968 (1992); *quoting Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509; *and also citing Lombardi v. Stout*, 80 N.Y.2d 290 (1992); *Bland v. Manocherian*, 66 N.Y.2d 452, 459 (1985). Labor Law §240(1) applies to both "falling worker" as well as "falling object" fact pattern where there is a significant risk inherent in the relevant elevation from which the object or materials fall and "falling object" cases. *Roco3vich v. Consolidated Edison Co.*, *supra* at 514.

Labor Law §240(1) renders owners, their agents, and contractors strictly liable for the absence or inadequacy of safety devices to properly protect workers from risks inherent in elevated work sites. *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555 (1993). The duty imposed upon owners under §240(1) is non-delegable and exists irrespective of whether they exercised control over the worksite or the workers. *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 (1993); *Ragubir v. Gibraltar Mgt. Co.. Inc*., 146 A.D.3d 563, 564 (1st Dept. 2017).

Defendants are admitted owners of the site and are therefore subject to liability under §240(1). *Coleman v. City of New York*, 91 N.Y.2d 821, 822-23 (1997). Avalon Bay also contracted for the work, retaining Nova to perform the work plaintiff was performing at the time of the accident.

On a motion for summary judgment, plaintiff establishes liability under §240(1) by showing that the statute was violated and the violation a proximate cause of his injuries-that is, "a plaintiff merely has to demonstrate that he ... was injured when an elevation-related safety device failed to perform its function to support and secure him from injury." *Ortega v. City of New York*, 95 A.D.3d 125, 128 (1st Dept. 2012); *Nazatio v. 222 Broadway, LLC*, 135 A.D.3d 506 (1st Dept. 2016) ("the ladder itself may not have been defective, it is not a requirement that ... the safety device was defective or failed to comply with safety regulations. The worker's burden is to show that ... the inadequacy of the safety devices provided to protect the worker from a fall, was a proximate cause of his ... injuries").

In cases involving ladders that move for no apparent reason plaintiff has established a violation. *Kebe v. Greenpoint-Goldman Corp*., 150 A.D.3d 453, 454 (1st Dept. 2017); *Cioffi v. Target Corp*., 188 AD3d 788, 791 (2d Dept. 2020); *Santiago v. Rusciano & Son, Inc*., 92 A.D.3d 585, 586 (1st Dept. 2012); *Nascimento v. Bridgehampton Const. Corp*., 86 A.D.3d 189, 191 (1st

Dept. 2011); *Picano v. Rockefeller Ctr. N., Inc.*, 68 A.D.3d 425 (1st Dept. 2009); *Hart v. Turner Const. Co.*, 30 A.D.3d 213, 214 (1st Dept. 2006).

For example, in *Sinera v. Embassy House Eat, LLC*, 188 A.D.3d 549 (1st Dept. 2020), the First Department held that summary judgment was warranted for a plaintiff who "testified that the ladder he was ascending, ... moved ... while he was on it, thereby establishing prima facie defendants' liability under Labor Law §240(1)." *Id.* Similarly, in *Garcia v. Church of St. Joseph of the Holy Family City of New York*, 146 A.D.3d 524 (1st Dept. 2017), the First Department reversed the denial of summary judgment to plaintiff by the trial court, holding that "[p]laintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of ... §240(1)." *Id.* at 525. There, "[p]laintiff [had] testified that as he descended ... on a ... ladder, which was permanently affixed to the wall, the ladder shifted." *Id.* Here, plaintiff has established his *prima facie* entitlement to summary judgment through his uncontradicted testimony that the ladder moved under him, causing him to fall and sustain injuries. Thus, the inadequately secured ladder failed to protect plaintiff from falling while using it to ascend to the higher, third level at the work site to retrieve a tool he needed for his work. "The failure to secure the ladder ... against slippage by any means whatsoever constitutes a violation of Labor Law §240(1) as a matter of law, for which defendants are absolutely liable." *Ausby v. 365 W. End LLC*, 135 A.D.3d 481, 481 (1st Dept. 2016). *See also Pierrakeas v. 137 E. 38th St. LLC*, 177 A.D.3d 574, 574-75 (1st Dept. 2019). Here, while defendants argue that, after the accident, a ladder that their witness observed was tied to the second level of the building, there is no evidence that the subject ladder was adequately secured to prevent movement and to prevent plaintiff from falling while he was ascending it to retrieve his tool from the upper level, as it is undisputed that the ladder did move as plaintiff was using it. As such, plaintiff established

his *prima facie* entitlement to summary judgment against the Defendant owners/owner agent under §240(1).

In opposition defendants failed to raise a triable issue of fact. None of coworkers who provided affidavits witnessed plaintiff fall from the ladder, and they did not contradict his testimony that the ladder suddenly moved. Although, defendants also submitted an unsworn accident report containing a statement from a coworker that plaintiff lost his balance and fell, this did not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved. Furthermore, defendants' reliance on *O'Brien v Port Auth. of N.Y. & N.J.* (29 NY3d 27 [2017]) is misplaced because that case, which found an issue of fact about whether a slippery exterior staircase provided adequate protection to the plaintiff, left intact the presumption that Labor Law § 240 (1) is violated where, as here, a ladder … malfunctions for no apparent reason").

Defendants' argument that plaintiff was a recalcitrant worker for using the subject ladder is also unavailing. There is no evidence that plaintiff was ever instructed not to use the subject ladder to access the third level, let alone any immediate and specific instruction. (*Phillips v. Powercrat Corp.*, 126 A.D.3d 590, 591 (1st Dept. 2015); *Balthazar v. Full Circle Constr. Corp.*, 268 A.D.2d 96, 99 (1st Dept. 2000); *Hernandez v. 151 Sullivan Tenant Corp.*, 307 A.D.2d 207 (1st Dept. 2003). That there may have been a railing around the third floor to prevent workers that floor from falling off the building from that level does not require a different outcome. There is absolutely no evidence that anyone ever instructed plaintiff not to use the subject ladder nor that anyone stopped him from doing so.

As such summary judgment is warranted against defendants on the Labor Law §240(1) claim.

Plaintiff is Entitled to Summary Judgment on the Labor Law § 241(6)Claim

Labor Law § 241 sets forth in relevant part that:

> 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 . . . [subsection] (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

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. LA Wenger Contr. Co.*, 91 N.Y.2d 343 (1998); *see also, Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993); *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290 (1978). The owners and contractors' duty under Labor Law § 241(6) is nondelegable, "regardless of their control or supervision of the jobsite." *Whalen v. City of New York*, 270 A.D.2d 340 (2d Dept. 2000); *see also Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290 (1978).

To support a cause of action pursuant to Labor Law § 241(6), plaintiff must demonstrate that a specific, applicable Industrial Code was violated, and the violation was the proximate cause of his or her injuries. *Cappabianca v. Skanska USA Building Inc.*, 99 A.D.3d 139 (1st Dept. 2012); *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847 (2d Dept. 2006).

Plaintiff asserts that defendants were in violation of Industrial Code Section 12 NYCRR §23-1.21(b)(4), which provides, in pertinent part:

> (i) Any portable ladder used as a regular means of access between floors or other levels in any ... structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall

> be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise. ...
>
> (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

Here, the evidence demonstrates that 12 NYCRR §23-1.21(b)(4) was violated in that the upper end of the ladder did not extend above the upper level; and there is no evidence that the upper end of the ladder was actually secured to the upper level, and, in fact, was not secured to prevent movement, as the evidence is undisputed that the ladder moved as plaintiff was climbing it, causing him to fall and sustain injuries.

Based on the foregoing, plaintiff is also entitled to summary judgment on this claim.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment is granted as to liability on its claims pursuant to Labor Law §241(6) and Labor Law §240(1) and is otherwise denied; and it is further,

ORDERED that defendant's cross motion for summary judgment is granted to the extent of dismissing the claims asserted pursuant to Common Law Negligence and Labor Law §200 and is otherwise denied; and it is further;

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);];and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

20220406173825SBKRAUSA8BA13CAD4B746F8B0615F645375A238

4/6/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE