Alam v 25 Monroe Place LP
2022 NY Slip Op 32015(U)
June 16, 2022
Supreme Court, Kings County
Docket Number: Index No. 513728/2018
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 360 Adams Street, Brooklyn, New York, on the 16th day of June 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

---X

MONJUR ALAM,

Plaintiff,

-against-

25 MONROE PLACE LP and 25 MONROE PLACE REALTY L.P.

Defendants.

---X

Index No. 513728/2018

DECISION AND ORDER

Motions Sequence #6

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

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Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	71-84,
Opposing Affidavits (Affirmations)	85-89,
Reply Affidavits (Affirmations)	92-98

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff Monjur Alam (hereinafter the "Plaintiff") alleges causes of action pursuant to New York State Labor Law §§ 240, and 241(6) against Defendants 25 Monroe Place L.P. and 25 Monroe Place Realty, L.P. (hereinafter the "Defendants"). Plaintiff alleges in his Verified Bill of Particulars that he was injured on July 28, 2017, while employed as a construction worker by non-party Hassan General Construction and working at 25 Monroe Place, Brooklyn, New York (hereinafter the "Premises"). Specifically, the Plaintiff alleges that he suffered personal injuries when the ladder he was using slipped and caused him to fall and that the ladder fell on top of him. The Plaintiff also claims that he was injured when acid, that had been used as a cleaning fluid and

had been hanging from the ladder, was splashed onto his face while other parties sought to clean the acid from the ground.

The Plaintiff now moves (motion sequence #6) for an order pursuant to CPLR 3212 granting the Plaintiff summary judgment against the Defendants with respect to the issue of liability in relation to alleged violations of §§ 240(1) and 241(6) of the Labor Law of the State of New York. More specifically, the Plaintiff contends that the Defendants are liable under Labor Law 240(1) given that the Plaintiff was injured while employed as a construction worker at the Premises and fell from a ladder that slipped away from a wall at the Premises. The Plaintiff argues that the ladder that Plaintiff was using was defective and did not properly provide protection as required by Labor Law 240(1) by failing to safely support the Plaintiff and his materials. The Plaintiff also contends that summary judgment is appropriate as it relates to his Labor Law 241(6) claims in that the facts show a violation of the stated Industrial Code provisions. In his Bill of Particulars, as supplemented, the Plaintiff contends that Industrial Code provisions 23-1.8(a), 23-1.7(h), 23-1.8(c)(4), 23-1.16, 23-1.17, 23-1.21(b)(3), 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv) and 23-1.21(b)(4)(v) have been violated.[1] Specifically, the Plaintiff contends that the Industrial Code provisions he has cited relate to the use of corrosive substances and chemicals and that he was not provided with the appropriate protective apparel and eye ware.

The Defendants oppose the motion.[2] In opposition to the Plaintiff's motion as it relates to his Labor Law 240(1) claim, the Defendants argue that the Plaintiff's activities at the Premises are not covered by Labor Law 240(1) as Plaintiff's worksite was not a construction site and the

[1] The Plaintiff in opposition does not address Industrial Code provisions 23-1.16, 23-1.17 and 23-1.21(b)(4)(v), therefore, the Plaintiff's motion in relation to these provisions is denied and will not be addressed herein.
[2] The Defendants contend that the Plaintiff has also moved for summary judgment on his Labor Law §200 claims, but that is incorrect.

Plaintiff was merely cleaning the outside of the Premises with a brush. Further, the Defendants contend that there is an issue of fact as to whether the ladder the Plaintiff used was defective and no inspection or testimony regarding its condition has been provided in support of the Plaintiff's motion. The Defendants also contend that the Plaintiff's application for summary judgment as it relates to his Labor Law 241(6) claim should also be denied. Specifically, the Defendants argue that the work conducted by the Plaintiff does not fall under Labor Law 241(6), that the Defendants did not supervise or control the work of the Plaintiff to sufficiently fall under Labor Law 241(6), and that no corrosive substances were being used at the time of the alleged incident.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 NY2d 361, 364, 362 N.Y.S.2d 131 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d320, 324, 508 N.Y.S.2d 923 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824

N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Labor Law § 240(1)

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

> All contractors and owners and their agents ... 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) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted." *Walker v. City of New York*, 72 AD3d 936, 937, 899 N.Y.S.2d 322, 323 [2d Dept 2010]. In order to prevail on a Labor Law 240 (1) cause of action, "[a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries" *Delahaye v. Saint Anns School*, 40 AD3d 679, 682, 836 N.Y.S.2d 233 [2d Dept 2007]; *see Berg v. Albany Ladder Co., Inc.*, 10 NY3d 902, 904, 861 N.Y.S.2d 607 [2008]; *Robinson v. East Med. Ctr., L.P.*, 6 NY3d 550, 814 N.Y.S.2d 589 [2006]. "Liability may, therefore, be imposed under the statute only where the "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Nicometi v. Vineyards of Fredonia, LLC*, 25 NY3d 90, 97, 30 N.E.3d 154, 158 [2015].

"While the reach of 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.'" *Gonzalez v. Woodbourne Arboretum, Inc.*, 100 A.D.3d 694, 698, 954 N.Y.S.2d 113, 117 [2d Dept 2012], quoting *Martinez v. City of New York*, 93 N.Y.2d 322, 326, 712 N.E.2d 689, 692 [1999]. As it relates to cleaning activity, "an activity cannot be characterized as "cleaning" under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project." *Soto v. J. Crew Inc.*, 21 N.Y.3d 562, 568, 998 N.E.2d 1045, 1049 [2013].

Turning to the merits of the Plaintiff's motion, the Court finds that the Plaintiff has met his *prima facie* burden. The Plaintiff argues that he was engaged in cleaning activity covered by Labor Law 240(1) and the ladder that was provided to him was inadequate for the task at hand, was not properly secured, and proper safety devices were not provided to him. In support of his application, the Plaintiff relies primarily on his deposition as well as the deposition of Daniel Gillies, an employee of Benchmark Real Estate Group, the apparent management company of the Premises. During his deposition, the Plaintiff stated that he and two other workers were driven to the work site by non-party Hassan Construction's vehicle. (Plaintiff's Motion, Exhibit D, Pages 27-28). When asked what his assignment was at the Premises, the Plaintiff stated "[m]y job on that day

was to do power wash." (Plaintiff's motion, Exhibit D, Page 28) He stated that he was not provided with goggles (Page 30). When asked where he was power washing, the Plaintiff stated "[t]he external surface of the walls of the building." When asked who supplied the ladder, the Plaintiff stated (Plaintiff's motion, Exhibit D, Page 32) "[t]hat ladder was supplied by Hassan Construction [his employer]" When asked about the weather that day, the Plaintiff stated "[i]t was a light drizzle, not much, a very light drizzle." (Plaintiff's motion, Exhibit D, Page 34) When asked where the bucket of cleaning acid was while he was on the ladder, the Plaintiff explained that "[t]his was actually tied to the ladder so I can use it" and "Hassan instructed me to tie the bucket to the ladder, and this way, and then work with it." (Plaintiff's motion, Exhibit D, Page 46-47) When asked to describe the accident, Plaintiff stated that "Hassan gave me the ladder from the van, pointed, saying, 'This is the place on the wall that you have to clean.' I saw then at that time that the ladder was kind of very old and rickety. It was not sturdy. I told Hassan, 'Look here. This ladder doesn't seem to be very sturdy. I really don't want to use this, to climb this ladder.' He said 'No.' Hassan told me, 'You start working. If anything happens, remember, I am right here.' So I started working on the ladder using the bucket with acid and would dip my brush in that and then scrub the wall with it. Now, while I was doing that or started doing this, Hassan went out to get lunch for everybody. So then he would to get lunch, so I was working and the ground was not really good out there because it was wet. The ground was slippery. So the ladder suddenly slipped and fell down, and I fell with it. So when I fell down, I fell straight down to the hard concrete, and the left side of my face and head hit the ground hard and my neck was also hurt as a result and my left shoulder was also hit hard -- hit the ground hard -- right shoulder also not as much. My waist and lower back area hit the ground really hard." (Plaintiff's motion, exhibit D, Page 48-49) When asked

what happened to the ladder after the fall, the Plaintiff stated that "when the ladder fell, I fell and the ladder fell on top of me." (Plaintiff's motion, Exhibit D, page 50).

This testimony is sufficient for the Plaintiff to show that he was engaged in cleaning activity covered by Labor Law 240(1) and that he was injured as a consequence of a failure to provide adequate protection against an elevation related risk. Based upon the Plaintiff's testimony, the nature of the work he was performing was not routine and required certain equipment and substances not ordinarily used for routine maintenance or cleaning. There was clearly an elevation risk. Although the Plaintiff was unclear as to the overall nature of the work performed that is not required. All of the factors in *Soto* do not have to be met. "Whether [an] activity is 'cleaning' is an issue for the Court to decide after a review of all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in the totality, the remaining considerations militate in favor of placing the task in one category or the other." *Pena v. Varet & Bogart, LLC,* 119 AD3d 916, 918, 989 N.Y.S.2d 901 [2d Dept 2014], quoting *Soto v. J. Crew Inc.,* 21 N.Y.3d 562, 568, 998 N.E.2d 1045, 1049 [2013]. Moreover, there was no indication that the Plaintiff was the sole proximate cause of the accident. Plaintiff states that he followed clear directions by his employer and utilized employer supplied equipment. See generally, *Probst v. 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 712, 965 N.Y.S.2d 513, 515 [2d Dept 2013][window cleaning]; *Fox v. Brozman-Archer Realty Servs., Inc.,* 266 AD2d 97, 98, 698 N.Y.S.2d 654 [1st Dept 1999][power washing canopy]; *Mazzarisi v. New York Soc'y for Relief of Ruptured & Crippled, Maintaining Hosp. for Special Surgery*, No. 155022/16, 2022 WL 1309109 [1st Dept 2022][power washing chillers]; *Gordon v. E. Ry. Supply, Inc.,* 82 N.Y.2d 555, 556, 626 N.E.2d 912 [1993][sand blasters] and *Artoglou v. Gene Scappy Realty Corp.,* 57 AD3d 460, 869 N.Y.S.2d 172 [2d Dept 2008].

In opposition to the motion, the Defendants have failed to raise an issue of fact that would prevent the Court from granting the Plaintiff's application as it relates to Labor Law 240(1). Defendants rely primarily on the testimony of a non-party witness, Mohammad N. Hassan, the purported president of Hassan General Contracting Corp. However, Plaintiff argues that when a non-party witness's deposition transcripts are unsigned by the witness, and there is no notice to the witness requesting that they review and sign the transcript, such evidence is inadmissible and may not be considered. Transcripts are inadmissible if a party fails to show that the unsigned deposition transcripts of a witness in support of a motion were sent to the relevant witness for his or her review pursuant to CPLR 3116(a). *Santos v. Intown Assocs.*, 17 AD3d 564, 793 N.Y.S.2d 477 [2d Dept 2005]; *see Marmer v. IF USA Express, Inc.*, 73 AD3d 868, 869, 899 N.Y.S.2d 884, 885 [2d Dept 2010]; *Myers v. Polytechnic Preparatory Country Day School*, 50 AD3d 868, 869, 855 N.Y.S.2d 650, 651 [2d Dept 2008]; *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902, 850 N.Y.S.2d 201, 203 [2d Dept 2008]; *McDonald v. Mauss*, 38 AD3d 727, 728, 832 N.Y.S.2d 291, 292 [2d Dept 2007]. Moreover, the Defendants failed to provide a reasonable excuse for not providing the document in admissible form. *See Moffett v. Gerardi*, 75 AD3d 496, 498, 904 N.Y.S.2d 757 [2d Dept 2010]. In fact, the Defendants do not even acknowledge the issue. Therefore, the deposition testimony of Mohammad N. Hassan will not be considered.

While the deposition of Daniel Gilles, Chief Operating Officer of Benchmark Realty, is admissible, it does not raise a material issue of fact. When asked whether there were construction projects occurring at the Premises, including the renovation of apartments and the exterior, when the Plaintiff's accident occurred, Mr. Gilles stated "[y]es." (See Defendants' Affirmation in Opposition, Exhibit C, Page 12) When asked if there was a contract with the Plaintiff's employer, Mr. Gilles stated "[n]o, there is no written contract." (See Defendants' Affirmation in Opposition,

Exhibit C, Page 14) When asked whether he was aware of the scope of the work being performed by Hassan Contracting, Mr. Gilles stated "I'm not clear on the exact scope." (See Defendants' Affirmation in Opposition, Exhibit C, Page 15) The testimony of Mr. Gilles has failed to raise an issue of fact regarding whether the work conducted by the Plaintiff is such that it merely constitutes routine cleaning such that Labor Law 240(1) does not apply. If anything, Mr. Gilles' testimony serves to support the Plaintiff's 240(1) claim. *See Goodwin v. Dix Hills Jewish Ctr.*, 144 AD3d 744, 747, 41 N.Y.S.3d 104, 108 [2d Dept 2016]; *Pena v. Varet & Bogart, LLC*, 119 AD3d 916, 917, 989 N.Y.S.2d 901, 903 [2d Dept 2014]. Accordingly, the Plaintiff's motion for summary judgment on his Labor Law 240(1) claim is granted.

Labor Law § 241(6)

Labor Law § 241 (6) imposes on owners and contractors a non-delegable duty "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Perez v. 286 Scholes St. Corp.*, 134 AD3d 1085, 1086, 22 N.Y.S.3d 545, 546 [2d Dept 2015]; *Lopez v. New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983, 999 N.Y.S.2d 848, 850 [2d Dept 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v. Caradonna*, 12 NY3d 511, 515, 882 N.Y.S.2d 375, 377 [2009]; *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505, 601 N.Y.S.2d 49, 55 [1993]; *La Veglia v. St. Francis Hosp.*, 78 AD3d 1123, 912 N.Y.S.2d 611 [2d Dept, 2010]; *Pereira v. Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 N.Y.S.2d 220 [2d Dept 2010].

Turning to the merits of the Plaintiff's claim made pursuant to Labor Law §241(6), the Court finds that the Plaintiff has failed to meet his *prima facie* burden. "Labor Law § 241(6) protects only those workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition." *Moreira v. Ponzo*, 131 A.D.3d 1025, 16 N.Y.S.3d 813 [2d Dept 2015]. In support of his application, the Plaintiff relies primarily on his deposition. Labor Law 241(6) imposes vicarious liability on building owners where there is a violation of an Industrial Code provision that proximately causes injury to a worker at a construction, excavation or demolition site. "[T]he protections of Labor Law § 241(6) are inapplicable outside of the context of construction, demolition, or excavation." *Alberici v. Gold Medal Gymnastics*, 197 A.D.3d 540, 542, 152 N.Y.S.3d 704, 707 [2d Dept 2021]; *see Esposito v. New York City Indus. Dev. Agency*, 1 NY3d 526, 528, 770 N.Y.S.2d 682; *Nagel v. D & R Realty Corp.*, 99 NY2d 98, 100-101, 752 N.Y.S.2d 581.

Construction work is defined in the Industrial Code as:

> All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose. 12 NYCRR § 23-1.4.

Plaintiff's testimony established that he was cleaning the exterior of the Premises with a power washer sufficient to qualify under Labor Law 240(1). However, Plaintiff did not provide sufficient testimony or other evidence that the work performed at the Premises was such so as a to qualify as "construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures", as required by Labor Law 241(6). *See Quituizaca v. Tucchiarone*, 115 AD3d

924, 926, 982 N.Y.S.2d 524, 526 [2d Dept 2014]. Accordingly, the Plaintiff has failed to make a *prima facie* showing in relation to his 241(6) claim. As such there is no need to address the Defendant's affirmation in opposition. See *Nankervis v. Long Island Univ.,* 78 AD3d 799, 800, 911 N.Y.S.2d 393, 395 [2d Dept 2010].

Based upon the foregoing, it is hereby Ordered that:

The Plaintiff's motion (motion sequence #6) for summary judgment on the issue of liability, as it relates to the Plaintiff's Labor Law 240(1) claim, is granted and the balance of the motion is denied.

The foregoing constitutes the Decision and Order of the Court.

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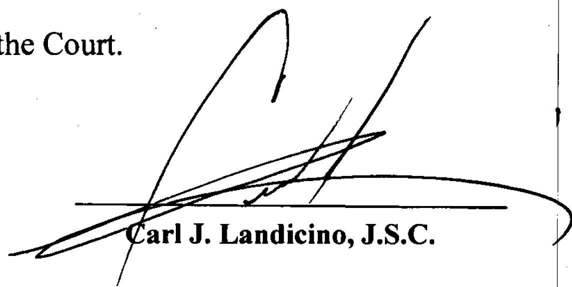

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