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| <b>Castaneda v Amsterco 67, LLC</b>                                                                                                                                                                                            |
| 2022 NY Slip Op 35089(U)                                                                                                                                                                                                       |
| July 5, 2022                                                                                                                                                                                                                   |
| Supreme Court, Bronx County                                                                                                                                                                                                    |
| Docket Number: Index No. 30981/2019E                                                                                                                                                                                           |
| Judge: Lucindo Suarez                                                                                                                                                                                                          |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. # 4

MARK CASTANEDA,

Index No.: 30981/2019E

Plaintiff,

- against -

**DECISION and ORDER**AMSTERCO 67, LLC, PAN AM EQUITES, INC.,  
PREMIER COMPANY, and OUTSECT  
INCORPORATED,

Defendants.

and Third-Party action.

|                                                                                                                                                                                  | PAPERS NUMBERED |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| Plaintiff's Notice of Motion, Statement of Material Facts, Affirmation in Support, Exhibits                                                                                      | 1, 2, 3, 4      |
| Defendant Outsect Incorporated's Notice of Cross-Motion, Statement of Material Facts, Response to Statement of Material Facts, Memorandum of Law in Support/Opposition, Exhibits | 5, 6, 7, 8, 9   |
| Defendant/Third-Party Plaintiff Premier Company's Notice of Cross-Motion, Affirmation, Memorandum of Law in Support/Opposition, Counter Statement of Material Facts              | 10, 11, 12, 13  |
| Defendant/Third-Party Plaintiff Premier Company's Notice of Cross-Motion, Affirmation, Memorandum of Law in Support/Partial Opposition, Response Statement of Material Facts     | 14, 15, 16, 17  |
| Plaintiff's Affirmation in Opposition/Reply, Memorandum of Law, Counter Statements to Material Facts, to Cross-Motions                                                           | 18, 19, 20, 21  |
| Defendant Outsect Incorporated's Partial Affirmation in Opposition to Defendant/Third-Party Plaintiff Premier Company's Cross-Motion                                             | 22              |
| Third-Party Defendant Pestmax Environmental Service's Partial Affirmation in Opposition, Exhibits to Defendant/Third-Party Plaintiff Premier Company's Cross-Motion              | 23, 24          |
| Defendant Outsect Incorporated's Reply Affirmation                                                                                                                               | 25              |
| Defendant/Third-Party Plaintiff Premier Company's Reply Memoranda of Law                                                                                                         | 26, 27          |

Upon the enumerated papers; and due deliberation; this court finds:

The issue in Plaintiff's summary judgment motion is whether the work he was engaged in at the time of the accident was a protected activity under Labor Law §240(1). In addition, the issue raised in Defendant Outsect Incorporated's ("Outsect") and Defendant/Third-Party Plaintiff Premier Company's ("Premier") respective cross-motions is whether they established their entitlement to dismissal of the Labor Law §§241(6) and 200 claims. This court holds Plaintiff failed to demonstrate his *prima facie* burden that the injury-producing work was a protected



activity under Labor Law §240(1). In addition, Premier and Outsect demonstrated their entitlement to dismissal of the Labor Law §§241(6) and 200 claims.<sup>1</sup>

This action stems from an accident that occurred on September 2019, on a property owned by Premier. Premier contracted Outsect to remedy a pigeon nuisance problem by installing netting and spikes onto the façade of a building located on Premier's property. Subsequently, Outsect sub-contracted Angel Maldonado to install the netting and spikes. Mr. Maldonado then sought the assistance of Plaintiff to complete the netting and spike work.

According to Plaintiff, on the day of the accident, he was installing netting and spikes at the top portions of the building's outer wall close to the ledge of a pit. He testified the building's outer wall was approximately ten feet in height, and the pit was around twenty feet deep and that Mr. Maldonado placed a ladder against the outer wall. However, the ladder was not tied down or secured. He further testified that while working Mr. Maldonado positioned himself at the ladder's base to ensure it remained steady and erect. Plaintiff alleges that Mr. Maldonado upon handing him a piece of plywood left the ladder unattended. Thereafter, Plaintiff claims that while attempting to secure the plywood board, the bottom portion of the ladder suddenly went up in the air causing him to fall forward into the pit rendering him injured.

This court finds Plaintiff failed to establish that the injury-producing work was a protected activity under Labor Law §240(1). The netting and spike work may have changed the outward appearance of the building, but there was no evidence that it changed the building's structure or composition, thus the injury-producing work was more akin to cosmetic maintenance or decorative modification rather than an alteration envisioned by Labor Law §240(1). *See*

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<sup>1</sup> In light of the dismissal of the Labor Law §§240(1), 241(6), and 200 claims Premier's second cross-motion for summary judgment seeking judgment on its cross-claims for contractual and common law indemnity against Outsect is rendered moot.



*Munoz v. DJZ Realty, LLC*, 5 N.Y.3d 747, 834 N.E.2d 776, 800 N.Y.S.2d 866 (2005); *see also* *Allen v. City of NY*, 89 A.D.3d 406, 931 N.Y.S.2d 853 (1st Dep't 2011); *see also* *Anderson v. Schwartz*, 24 A.D.3d 234, 808 N.Y.S.2d 26 (1st Dep't 2005).

Furthermore, the injury-producing work cannot constitute an alteration because attaching anchors to a building's façade to connect netting and spikes to prevent a pigeon nuisance was not part of an important building-wide system as the Appellate Division, First Department, found in *Mananghaya. cf. Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 165 A.D.3d 117, 83 N.Y.S.3d 444 (1st Dep't 2018) wherein the court stated: "Here, the work being performed was a significant change to the hospital's air conditioning system, which the hospital must operate in warm weather in order to meet its regulatory requirements... the deinstallation and removal of the rented chiller altered the configuration or composition of the structure by changing the way the [hospital buildings] react to . . . the elements."

Likewise, the injury-producing work cannot be considered a "repair" as envisioned by Labor Law §240(1). The injury-producing work consisting of re-installing eight to ten anchors to the side of the building involved only component replacement in the course of normal wear and tear, which is routine maintenance and not "repairing" within the meaning of the statute. *See Cordero v. SL Green Realty Corp.*, 38 A.D.3d 202, 831 N.Y.S.2d 145 (1st Dep't 2007); *see also* *Arevalo v. Nasdaq Stock Mkt., Inc.*, 28 A.D.3d 242, 813 N.Y.S.2d 383 (1st Dep't 2006).

Moreover, Premier and Outsect demonstrated that the injury-producing work is not covered under Labor Law §241(6). There was no evidence presented by Plaintiff to suggest that the netting and spike work was connected to construction, demolition or excavation of a building or structure, therefore, it is not within the statute's coverage. *See Amendola v. Rheedlen 125th*



*St., LLC*, 105 A.D.3d 426, 963 N.Y.S.2d 30 (1st Dep't 2013); *see also Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 782 N.E.2d 558, 752 N.Y.S.2d 581 (2002).

Lastly, Premier and Outsect demonstrated their *prima facie* burdens regarding dismissal of the Labor Law §200 claim. In response, Plaintiff failed to raise any triable issues of fact precluding the dismissal as he did not demonstrate that Premier or Outsect exercised supervision or control over the injury-producing work or that they possessed actual or constructive knowledge of the conditions that led to the accident.

Accordingly, it is

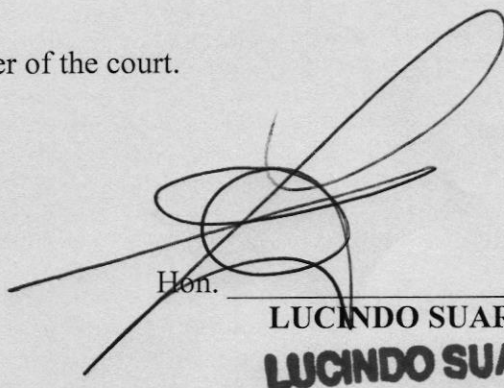
ORDERED, that Plaintiff's summary judgment seeking judgment on liability with respect to the Labor Law §240(1) claim is denied; and it is further

ORDERED, that Premier's and Outsect's respective cross-motions for summary judgment seeking dismissal of the Labor Law §§240(1), 241(6), and 200 claims are granted; and it is further

ORDERED, that Premier's second cross-motion for summary judgment seeking judgment as to its cross-claims for contractual and common law indemnity against Outsect is denied as moot.

This constitutes the decision and order of the court.

Dated: 7/5/2022

  
Hon. \_\_\_\_\_  
**LUCINDO SUAREZ, J.S.C.**  
**LUCINDO SUAREZ, J.S.C.**