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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9

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EDISON LOJA CASTRO,

Plaintiff

-against-

EVELYN BRITO and TITO G. VILLAVICENCIO,

Defendants.

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Index No. 800715/2022E
Motion Seq No. 1

DECISION & ORDER
Hon. Myrna Socorro, J.S.C.

The following papers were read on this motion by the plaintiff (Seq. No. 1) for summary judgment submitted on November 28, 2023.

Papers	NYSCEF Doc. No.
Notice of Motion by Plaintiff, Affirmation in Support, Statement of Material Facts, and Exhibits	Doc. # 15-26
Defendant's Notice of Cross Motion, Affirmation in Opposition to Motion and in Support of Cross Motion, Affidavits, Exhibits, Memorandum in Opposition to Motion and in Support of Cross Motion and Statement of Material Facts	Doc. # 39-55
Plaintiff's Opposition to Cross Motion/Reply to Motion	Doc. # 57-58
Defendants' Reply to Cross Motion	Doc. # 59

Plaintiff commenced the instant action on January 14, 2022, for personal injuries allegedly sustained on January 12, 2022, when he fell from an alleged defective ladder while he performed a roof repair. Plaintiff now moves pursuant to CPLR § 3212 for an Order granting summary judgment to plaintiff on the issue of liability under Labor Law §240(1) and §241(60 as against defendant Tito G. Villavicencio. Defendants cross move for summary judgment on plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims.

According to plaintiff, he was injured while performing a roof repair on the garage of the premises located at 532 Calhoun Avenue, Bronx, New York. The premises is owned by defendant Evelyn Brito (hereinafter "Brito"), who lives there with her husband - defendant Tito G. Villavicencio (hereinafter "Villavicencio"). Plaintiff testified that Villavicencio would hire and pay day laborers to perform work and repairs on the subject premises when needed and that he did so with Brito's approval. Villavicencio met plaintiff at a gas station approximately six or seven years prior to the

subject incident and had hired him about seven or eight times prior to the subject incident for various jobs. Three weeks prior to the incident, Villavicencio noticed water pouring through the garage roof and contacted plaintiff to repair the leak. On January 9, 2022, plaintiff met with Villavicencio at the subject premises to discuss the work to be performed and then Villavicencio took plaintiff to Home Depot to purchase the materials necessary for the repair. On the same day, plaintiff climbed up onto the garage using a wooden ladder owned by defendants to look at the roof. On the day of the incident, Villavicencio was not home. Brito opened the garage for plaintiff to give him access to the tools and materials to use for the repair. In the garage, there was both a metal ladder and the wooden ladder that plaintiff had used to look at the roof on January 9, 2022. No instruction was given to plaintiff as to which ladder to use. Plaintiff used the wooden ladder that he had used on January 9, 2022. As he began to climb down from the roof upon finishing the repair, the ladder shook, turned over, and collapsed to the ground, which caused plaintiff to fall and fracture his right arm. In support of his motion, plaintiff argues that he is a covered worker under Labor Law § 240(1) and that Villavicencio is a proper Labor Law §§ 240(1) and 241(6) defendant. Plaintiff argues that the 1-2 family homeowner's exemption does not apply to the spouse of an owner.

Defendants oppose plaintiff's motion and cross-move for summary judgment as it relates to plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims. In support of their motion, defendants argue that at a minimum, Brito is entitled to summary judgment since the homeowner's exemption applies to her as she is the titled owner of the subject property and had no role in the work conducted by plaintiff. Defendants further argue that Villavicencio is equally entitled to the homeowner's exemption warranting summary judgment in his favor as husband and wife they contribute towards the mortgage and upkeep of the home eventhough Villavicencio is not on the title to the premises. Additionally, defendants argue that they are entitled to summary judgment as plaintiff was the sole cause of the accident as he chose to use the smaller wooden ladder instead of the taller metal ladder available. Defendants aver that they did not instruct plaintiff as to which ladder to use. Defendants further argue that the means and methods of repairing the roof are not the proximate cause of the accident.

In his summary judgment motion, plaintiff alleges violation of 12 NYCRR § 23-1.21(b)(1)(l). Defendants argue that said claim should be dismissed as plaintiff was the sole cause of the accident. It is defendants' position that plaintiff was the only person who exercised control over his work as he was the one responsible for choosing the supplies, equipment, devices and tools to use. Defendants argue that 12 NYCRR § 23-1.21(b)(1)(l) is inapplicable as plaintiff does not offer any evidence that the ladder could not sustain the load amount required under the regulation. Also, defendants note that the ladder did not collapse, fall apart or otherwise break. As to plaintiff's Labor Law § 200 claim, defendants argue that it should be dismissed as defendants did not exercise the

degree of control required to sustain a Labor Law § 200 or common law negligence claim.

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law 240(1)

Labor Law 240(1) provides in part: "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."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

"Owners of a one- or two-family dwelling used as a residence are exempt from liability under Labor Law §§ 240(1) and 241(6) unless they directed or controlled the work being performed." *Abdou v Rampaul*, 147 AD3d 885, 885-86 [2d Dept 2017].

The first issue to decide is whether Villavicencio is a proper labor law defendant. Plaintiff states that the exemption does not apply to the spouse of the homeowners and provides legal authority for same. In opposition, defendants have failed to provide any legal authority to support their argument that the homeowner's exemption applies to Villavicencio. Upon a review of the motion papers, this

Court finds that Villavicencio is a proper labor law defendant. The fact that Villavicencio has been married to Brito, the title owner, for twenty-three years and lives in the home and both him and Brito contribute toward paying the mortgage and all costs relating to the upkeeping of the house, does not entitle Villavicencio to the homeowner's exemption. As stated in *Fisher v Coghlan*, 8 AD3d 974, 976 [4th Dept 2004], "the term 'owner' in sections 240 (1) and 241 (6) does not encompass a spousal relationship with the titleholder because that relationship does not create the requisite legal or beneficial interest in the property for purposes of those sections."

As to defendant Brito, this Court finds that defendant Brito made a prima facie showing that she is entitled to the homeowner's exemption. *See Abdou v Rampaul, supra*. In opposition, plaintiff failed to raise a triable issue of fact. Accordingly, plaintiff's Labor Law 240(1) and 241(6) as against Brito only are hereby dismissed.

The second issue to decide is whether Labor Law § 240(1) was violated. Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents. "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured… It is not a defendant's title that is determinative, but the amount of control or supervision exercised." *Linkowski v City of New York*, 33 AD3d 971, 974-75 [2d Dept 2006]. Here, it is undisputed that Villavicencio hired plaintiff to repair the roof and Villavicencio had supervisory control and authority over the roof repair. Thus, Villavicencio acted as an agent of Brito. Furthermore, it is undisputed that Villavicencio took plaintiff to purchase the materials necessary for the repair and that Villavicencio made available two ladders, one wooden and one metal, which were stored in the garage, for plaintiff's use. While Villavicencio did not instruct plaintiff which ladder to use, defendants owned both ladders. In his deposition, Villavicencio admitted that he had previously used the subject wooden ladder and when asked whether it ever wobble, Villavicencio indicated that "[i]t moved, but a little bit." Additionally, it is undisputed that when plaintiff visited the subject premises on January 9, 2022 to look at the repairs that had to be done, he used the subject wooden ladder without any objection by Villavicencio.

"It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" *Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013] citing to *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]. Upon a review of the motion papers, this Court finds that plaintiff established his *prima facie* burden of a Labor Law 240(1) violation as the evidence shows that his injuries were caused by an unsecured ladder, which failed to provide adequate protection for plaintiff's work on the roof. In opposition, defendants failed to raise an issue of fact.

Labor Law 241(6)

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. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law 241(6) claim, plaintiff argues that § 23-1.21(b)(1)(1) was violated. Said section states, "Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon." Insofar as the Labor Law 241(6) claim is predicated on violation of Industrial Codes 12 NYCRR § 23-1.21(b)(1)(1), defendants established their *prima facie* entitlement to dismissal of same. The record is devoid of any evidence that the ladder could not sustain the load amount as required by the regulation. It was the fact that the ladder was unsecured that caused plaintiff to fall.

Labor Law 200/Common-Law Negligence

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. See *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]. Pursuant to Labor Law 200, "liability for an injury resulting from a dangerous condition at the work site may be imposed on the owner where the owner either exercised supervision and control over the work or had actual or constructive notice of the unsafe condition. *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]. "Unlike Labor Law §§ 240 and 241, section 200 does not contain any single- and two-family homeowners' exemption." *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]. Upon a review of the motion papers, this Court finds that defendants failed to make a prima facie showing that they did not exercise the degree of control required to sustain a Labor Law § 200 claim or that they did not have constructive notice of the defective ladder.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby

ORDERED, that the motion by the plaintiff seeking summary judgment in plaintiff's favor on the Labor Law 240(1) claim as against defendant Villavicencio is **GRANTED** it is further

ORDERED, that the cross motion by defendant Brito seeking summary judgment and dismissal of the Labor Law §240(1) claim as against her is **GRANTED**; and it is further

ORDERED, that the cross motion by defendant Villavicencio seeking summary judgment and dismissal of the Labor Law §240(1) claim as against him is **DENIED**; and it is further

ORDERED that the cross motion by defendants Brito and Villavicencio seeking summary judgment and dismissal of the Labor Law §241(6) claim as against them is **GRANTED**; and it is further

ORDERED, that cross motion by defendants Brito and Villavicencio seeking summary judgment and dismissal of the Labor Law §200 or common law negligence claim as against them is **DENIED**; and it is further

ORDERED, that the clerk of the court is directed to enter judgment accordingly; and it is further,

ORDERED, that the counsel for the plaintiff shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the upload of this order in NYSCEF.

This constitutes the decision and order of this court.

Dated: June 28, 2024

HON. MYRNA SOCORRO

Hon. Myrna Socorro, J.S.C.