Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

MAURO ROJAS,

Plaintiff,

-against-

1700 FIRST AVENUE, LLC, ALL CITY REMODELING, INC., SOLIL MANAGEMENT, LLC.,

Defendants.

1700 FIRST AVENUE, LLC, ALL CITY REMODELING, INC., SOLIL MANAGEMENT, LLC.,

Third-party Plaintiffs,

-against-

CAPITAL AWNING CO., INC.,

Third-party Defendant.

1700 FIRST AVENUE, LLC, ALL CITY REMODELING, INC., SOLIL MANAGEMENT, LLC.,

Second-Third-party Plaintiff,

-against-

LIVE LINE INSTALLATION, INC.,

Second-Third-party Defendant.

Index No: 30621/10

Motion Date: 3/22/17

Motion Seq. No.: 3

The following papers numbered 1 to 13 read on this motion by plaintiff for summary judgment in his favor and against the defendants, 1700 FIRST AVENUE, LLC (owner), ALL CITY REMODELING, INC. (All City) as to liability on his claims based upon the alleged violation on Labor Law § 240(1) and § 241(6); and cross-motion by defendants/third-party plaintiffs for summary judgment dismissing all causes of action asserted in the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
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Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows.

This is an action to recover for personal injuries plaintiff, an employee of Capital Awning Co., Inc. (Capital Awning), allegedly sustained on August 24, 2010 at 400 East 89th Street, in New York City. Plaintiff was in the process of removing an awning when he allegedly fell from a ladder as a result of sustaining an electrical shock. Plaintiff commenced this action against defendants 1700 FIRST AVENUE, LLC, the owner of the property, and its managing agent SOLIL MANAGEMENT, LLC(Solil) and the general contractor, ALL CITY REMODELING, INC. (All City) (collectively the defendants), alleging violations of Labor Law §§ 240, 241 and 200, and based upon common-law negligence. The defendants commenced a third-party action against Capital Awning and a second third-party action as against Live Line Installation, Inc.(Live Line)[1] for common-law and contractual indemnification, contribution and breach of contract to obtain insurance.

Plaintiff now moves for summary judgment in his favor as against the owner and All City on his Labor Law §§ 240(1) and 241(6) claims. Defendants cross-move for summary judgment dismissing all causes of action asserted against them in the complaint.

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[1]Second Third-party action against Live Line was dismissed by Order dated April 6, 2017.

Labor Law § 240(1) imposes a non-delegable duty upon owners and contractors, and their agents to provide construction workers with appropriate safety devices, which are so constructed, placed and operated as to give proper protection to a worker against gravity related accidents such as falling from a height or being struck by a falling object (see Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 [2003]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Novak v Del Savio, 64 AD3d 636, 637-638 [2009]). A violation of this duty results in absolute liability without regard to plaintiff's possible comparative negligence (see Stolt v General Foods, 81 NY2d 918 [1993]; Bland v Manocherian, 66 NY2d 452 [1985]).

The mere fact that a plaintiff fell is insufficient, in and of itself, to establish that the statute was violated or that a device did not provide proper protection (see Blake v Neighborhood Housing Services of New York City, Inc., supra; Martinez v Ashley Apts Co., LLC, 80 AD3d 734, 735 [2011]; Duran v Kijak Family Partners, L.P., 63 AD3d 992, 994 [2009]). To establish entitlement to summary judgment on a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see Blake v Neighborhood Hous. Servs. of New York City, supra at 287; Bland v Manocherian, supra; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]).

In support of their motion and cross-motions the plaintiff and defendants submitted the deposition testimony of the plaintiff, his co-worker Sergio Mendoza, Lisa Sorace, employed by All City as a Project Manager, Michael Catalano Vice President of Capital Awning, Ralph Sorache the principal of Live Line, and non-party Dr. Ariane Lewis who examined plaintiff in the emergence room at NAU-Langone Medical Center.

The deposition testimony demonstrated, inter alia, that while the plaintiff was on an A frame ladder he allegedly sustained an electrical shock and fell to the ground. However, the deposition testimony is unclear as to whether the plaintiff fell because the ladder, which was not shown to be defective in any way, moved or for some other reason. Plaintiff's counsel's claim that the plaintiff testified that the ladder was not properly welded is a mischaracterization of plaintiff's testimony. Plaintiff testified that "the square pipe" caused the ladder to fall" because "it was not welded well" (see p. 44 of transcript of plaintiff's January 11, 2016 deposition). Rather than resolve all issues of fact the depositions raise numerous issues of fact including how the accident occurred, whether plaintiff fell from a ladder and if he did, whether the ladder

provided proper protection or were additional safety devices necessary (see Karapati v K.J. Rocchio, Inc., 12 AD3d 413, 415 [2004]; Gange v Tilles Inv. Co., 220 AD2d 556, 558 [1995]).

Accordingly, the branch of the plaintiff's motion for summary judgment in his favor on his Labor Law § 240(1) claim and the defendants' cross-motion for summary judgment dismissing the plaintiff's Labor Law § 240(1) claim are denied.

Labor Law § 241(6) imposes a non-delegable duty upon owners, general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (see Rizzuto v L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]; Ross v Curtis Palmer Hydro-Electric Co., supra at 501 [1993]). To prevail on a Labor Law § 241(6) claim, a plaintiff must establish a violation of a New York State Industrial Code which contains a specific, positive command applicable to the circumstances of the accident, that such violation was a proximate cause of his injuries (see Rizzuto v L.A. Wenger Construction Co., supra; Ross v Curtis Palmer Hydro-Electric Co., supra at 501 [1993]; Forschner v Jucca Co., 63 AD3d 996 [2009]) and the plaintiff's lack of comparative negligence (see Roman v A1 Limousine, Inc., 76 AD3d 552, 553 [2010]).

Although plaintiff alleged the violation of numerous Industrial Codes in his bill of particulars he relies only the alleged violations of Industrial Codes § 23-1.13(b)(4) in support of his motion for summary judgment on his Labor Law § 241(6) claim and has apparently abandoned the remaining cited Industrial Codes (see Kronick v L.P. Thebault Co., Inc., 70 AD3d 648, 649 [2010]).

Accordingly, the defendants' cross-motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim insofar as it is predicated upon the alleged violation of all of the Industrial Codes asserted in his bill of particulars is granted except as to the claim predicated upon the alleged violation of Industrial Code § 23-1.13(b)(4).

Section 23-1.13(b)(4) entitled "Electrical hazards" provides in pertinent part as follows:

> Protection of employees. "No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in

> the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.

The plaintiff and his co-worker both testified that before beginning their work they each separately asked the electrician and the "construction guy" whether the electricity was turned off. They waited about a half hour whereupon they were told that the first section was turned off. Later they were told that the power was completely off. Plaintiff testified that while working on the 5th or 6th awning trying to cut the silicon that was holding it to the building, he felt like something hit him hard, he saw white and began to shake, scream and then lost consciousness. Mendoza testified that he heard the plaintiff screaming and saw him shaking and then saw him fall to one side and the ladder fell to the other side. When plaintiff was on the ground, he saw smoke coming from the plaintiff.

Ralph Sorace, the principal of the electrical sub-contrator, testified, inter alia, that he arrived at the location just after plaintiff sustained an electric shock. He testified that he saw plaintiff walk down the ladder whereupon plaintiff told him he got an electric shock. Sorace went up the ladder and saw a light fixture with no bulb in it. He testified that he tested and found that it had no power.

In view of the conflicting deposition testimony, issues of fact exist as to whether the code was violated and, if so, whether the it was a proximate cause of the plaintiff's injuries.

Accordingly, the plaintiff's motion and the defendants' cross-motion for sumary judgment on the plaintiff's Labor Law § 241(6) insofar as it is predicated upon the alleged violation of Industrial Code 23-13(b)(4) are denied.

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (Kim v Herbert Constr. Co., 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (see Aranda v Park East Constr., 4 AD3d 315 [2004]; Akins v Baker, 247 AD2d 562, 563 [1998]). Where, as here the plaintiff's claim is based upon an alleged unsafe or dangerous condition of the premises, supervisory authority is not

an element of a Labor Law § 200 cause of action (see Roppolo v. Mitsubishi Motor Sales of Am., 278 AD2d 149, 150 [2000] quoting Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1998]; Ortega v Puccia, 57 AD3d 54, 61 [2008]).

The defendants' evidence, merely demonstrating that they did not have the authority to supervise or direct the plaintiff's work, is insufficient to demonstrate, prima facie, their entitlement to dismissal of the plaintiff's common law negligence and/or Labor Law § 200 claims. The defendants failed to submit any evidence to show that they did not own, operate, maintain, manage or control the premises (see Morgan v Neighborhood Partnership Housing Development Fund Co., Inc., 50 AD3d 866 [2008]; Hellyer v Law Capitol, Inc., 124 AD2d 782, 783) [1986]) or that they exercised reasonable care in maintaining the property in a reasonably safe condition (see Blake v City of Albany, 48 NY2d 875, 877 [1979]).

Ms. Sorace testified that the Capitol Awning Company Scope of Work proposal for all City Remodeling expressly provided that "All building power lights if they are attached to the awning must be diconnected by All City before Capital Awning removes awnings." Defendants have failed to demonstrate that All City performed its obligation to turn off the electricity. Although Sorace testified that there was no power to the fixture that was within the awning, there is no evidence that plaintiff sustained an electric shock from touching the fixture. In this regard, plaintiff testified that his hand was probably on the metal pipe of the awning. The defendants' evidence raise triable issue of fact as to whether the defendants created an unreasonable risk of harm by failing to turn off the electricity and whether that was a proximate cause of the plaintiff's injuries (see Dunham v Hilco Constr. Co., 89 NY2d 425, 429 [1996]).

Accordingly, the defednants' cross-motion to dismiss the plaintiff's claim based upon Labor Law § 200 and common-law neglgence is denied.

Dated: May 18, 2017
D# 56

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J.S.C.