[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 04

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK OCT 13 2011
COUNTY OF BRONX:

Nunez, Maritza X

Index Nº. 302209/08

-against-

Hon. Howard H. Sherman

Justice.

The Port Authority of New York X

The following papers numbered 1 to ____ Read on this motion,
Noticed on ____ and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - ~~Order to Show Cause~~ - Exhibits and Affidavits Annexed	1	
~~Answering Affidavit and Exhibits~~ Notice of X Motion - Exhs. A - L	2	
Replying Affidavit and Exhibits	3	4
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion and cross motion for respective awards of summary judgment are decided in accordance with the accompanying decision / order filed herewith

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 10/7/11

Hon. ____ J.S.C.
HOWARD H. SHERMAN

FILED Oct 13 2011 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------x

Maritza Nunez

Index No. 302209/08

Plaintiff,

-against-

DECISION/ORDER

The Port Authority of New York and New Jersey ,
British Airways PLC,
Anton's Airfood Inc., Anton Airfood Inc.,
Anton Airfoods, Anton's Airfood JFK Inc.,
Anton's Airfoods of JFK ,Anton Enterprises,
HMS Host Corporation, Autogrill Group, Inc,
AA1/Terminal 7, Inc and The City of New York

Howard H. Sherman

Defendants.

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Facts and Procedural History

Plaintiff seeks recovery for injuries sustained on October 19, 2007 when she fell a distance of 4-8 feet from the top of a restaurant stove while in the process of cleaning a ventilation system located above it. Plaintiff was employed by defendant HMS Host Corporation as a commercial cleaner at the time of the accident.

The restaurant was located within Terminal 7 of John F. Kennedy International Airport (JFK). Defendant Port Authority of New York and New Jersey ("Port Authority") leases the airport from co-defendant City of New York . Terminal 7 was leased from the Port Authority, by defendant British Airways, PLC ("British Air"),and pursuant to a Concessionaire Sublease between British Air as "Sublandlord" and Anton Airfood, Inc.,[1] ("Anton") as "Concessionaire" effective at the time of the accident, a portion of the terminal

[1] Host Services of New York Inc., succeeded to Anton's interest .

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was demised for concessions subject to the terms and condiitons of the Master Lease and the executed consent of the Port Authority. The restaurant in which plaintiff was working at the time of the accident was located within that portion of the terminal . Pursuant to the sublease, British Air and the Port Authority received a percentage of the restaurant's profits.

This action was commenced in March 2008 .

In April 2008, defendants Anton's Airfood Inc., Anton Airfood Inc., Anton Airfoods, Anton's Airfood JFK Inc., Anton's Airfoods of JFK ,Anton Enterprises, (*collectively,* "Anton Defendants") , HMS Host USA ,Inc., ("HMS") and Autogrill Group, Inc. served their answer in which was asserted seven affirmative defenses.

Also in April, an answer was served on behalf of defendants The Port Authority of New York and New Jersey ("Port Authority") , British Airways , PLC, HMS Host USA , Inc., HMS Host Corporation , Autogrill Group, Inc., and AA1/Terminal 7, Inc.

In June, an amended answer was served on behalf of the Port Authority .

Verified Bills of Particulars

Plaintiff alleges that defendants and their agents were negligent in causing plaintiff to fall from a height while engaged in commercial cleaning , by directing her to do so, and in allowing grease to accumulate and remain on the "elevated work platform" , and in failing to provide adequate safety devices for such work, as in so doing defendants were in violation of Labor Law Sections 200 and 240(1). It is further alleged that defendants violated Labor Law Section 241(6) by failing to conform with Industrial Code provision 12 NYCRR § 23-1.7 (d) [Verified Bill of Particulars ¶¶ 5-6].

With respect to the issue of notice plaintiff alleges that "[n]otice is not a condition

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precedent to the maintenance of this action [ ]", however, to the extent it is , defendants had both actual and constructive notice [Id. ¶¶ 8-9].

This action is consolidated with that commenced by plaintiff against the City of New York [Index No. 307744/08].

The Note of Issue was filed on December 10, 2010.

Motions and Contentions of the Parties

1) All **defendants** now moves for an award of summary judgment dismissing plaintiff's complaint on the grounds that: 1) plaintiff's own conduct in failing to use an available ladder while engaged in the cleaning of the stove hood demonstrates as a matter of law both the "recalcitrant worker" defense asserted , and that 2) such conduct by plaintiff was the the sole proximate cause of her accident; 3) at the time of the accident, plaintiff was engaged in "routine maintenance" and not a protected activity, and 4) the Anton defendants, as well as the HMS defendants, Autogrill Group , Inc., and AA1/Terminal 7, Inc. are entities related in corporate structure to plaintiff's employer, and as such are afforded the Workers' Compensation defense ; 5) with respect to the common law negligence claim, plaintiff cannot prove either a dangerous condition , or defendants' prior knowledge of one; 6) with respect to the § 200 claim, plaintiff cannot prove defendants' exercised supervision or control over her work activity with which she was engaged at the time of the accident, and 7) with respect to the § 241(6) claim, and the underlying Industrial Code violation alleged, plaintiff cannot establish either that she was using an elevated working surface at the time of the accident, or, in light of her testimony that the stovetop

was clean before she proceeded to step up on it, that the "working station" was slippery.

The motion is supported by the depositions of plaintiff, and employees of the defendant HMS and British Airways as well as the affidavit of the assistant corporate secretary of co-defendant HMS Host Corporation.

Plaintiff cross-moves for an award of partial summary judgment on her Labor Law 240(1) and 241(6) claims .

With respect to the former, it is argued that plaintiff must be afforded the protection **of 240(1)** as she was engaged in a statutorily denominated activity of "cleaning" at the time of the accident. In addition it is maintained that it is not necessary that plaintiff explain what caused her to fall from the stove.

It is argued that the duty imposed by the statute is non-delegable and absolute as against the City of New York , the Port Authority and British Airways as owners/lessees of the restaurant premises as the rent paid by Anton to British Airways was split between the Port Authority and British Airway, as was a percentage of the restaurant's profits [Affirmation in Support of Cross-Motion ¶ 5].

With respect to the "recalcitrant worker"/ sole proximate cause defenses raised , it is argued that there was no ladder available at the time capable of fitting in the tight work space adjacent to the stove where plaintiff was required to work.

With respect to the Workers' Compensation defense, it is argued that there is at least a material issue of fact that there is any relationship at all between the various Anton/ HMS /Autogrill /AA1/Termonal 7 defendants and plaintiff's employer, while a showing that the entities may be related is insufficient to sustain the defendants' burden on the motion.

Finally, plaintiff argues that there is no issue of fact concerning the defendants' violation of the Industrial Code regulation underpinning her **241(6)** claim as she was allowed to work on an elevated work space that was greasy , defendants neither having removed the grease, nor providing plaintiff with equipment with which to cover the surface, or "proper shoes which would have enabled her to perform her work on the slippery surface."

Applicable Law - Summary Judgment

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]. Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008]) . Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively

demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]).

Once this burden is met, the opposing party may defeat the motion with proof "sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). The court is required at this stage to discern whether any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., op.cit at 404). Although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (Navarez v NYRAC, 290 AD2d 400, [1st Dept. 2002]; see also, Briggs v 2244 Morris,L.P., 30 A.D.3d 216 [1st Dept. 2006]).

Labor Law 240(1)

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in pertinent part, that:

> All contractors and owners and their agents . . . 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 Scaffold Law "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 NY2d 965, 967-968 [1992])

As observed by the Court of Appeals in Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003], the term absolute liability

> is"absolute" in the sense that owners or contractors not actually involved in construction can be held liable (see *Haimes v New York Tel. Co.*, 46 N.Y.2d 132, 136, 385 N.E.2d 601, 412 N.Y.S.2d 863 [1978]), regardless of whether they exercise supervision or control over the work (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). Intending the same meaning as absolute liability in Labor Law § 240 (1) contexts, the Court in 1990 introduced the term "strict liability" (*Cannon v Putnam*, 76 N.Y.2d 644, 649, 564 N.E.2d 626, 563 N.Y.S.2d 16 [1990]) and from that point on used the terms interchangeably.
>
> Throughout our section 240 (1) jurisprudence we have stressed two points in applying the doctrine of strict (or absolute) liability. First, that liability is contingent on a statutory violation and proximate cause. As we said in *Duda* (32 N.Y.2d at 410), "[v]iolation of the statute alone is not enough; plaintiff [is] obligated to show that the violation was a contributing cause of his fall," and second, that when those elements are established, contributory negligence cannot defeat the plaintiff's claim. Section 240 (1) is, therefore, an exception to CPLR 1411, which recognizes contributory negligence as a defense in personal injury actions (see *Mullen v Zoebe, Inc.*, 86 N.Y.2d 135, 143, 654 N.E.2d 90, 630 N.Y.S.2d 269 [1995]; *Bland v Manocherian*, 66 N.Y.2d 452, 461, 488 N.E.2d 810, 497 N.Y.S.2d 880 [1985]).
>
> Blake, at 287

It is settled that "[t[he legislative history of the Labor Law, particularly sections 240 and 241, makes clear the Legislature's intent to achieve the purpose of protecting workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 NY Legis Ann, at 407), instead of on workers, who 'are scarcely in a position to protect themselves from accident' (*Koenig v Patrick Constr. Co.*, 298 NY 313, 318). " Zimmer v. Chemung County Performing Arts , 65 NY2d 513 , 520 [1985] The Court in Zimmer observed that

it is in recognition of this clearly articulated legislative intent, that it declared with respect to section 240, "which was then substantially in its present form, that ' this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. ' (*Quigley v Thatcher, 207 NY 66, 68,* quoted in *Koenig v Patrick Constr. Co., supra,* at *p 319*). " Zimmer, at 520-521

As applicable here, the Court of Appeals has recently determined that the denominated activity of "cleaning" , specifically, widow washing, [2] may be a covered activity even when performed in a non-construction , non-renovation context,

> [T]he crucial consideration under section 240 (1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240 (1); or whether a window's exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against.
>
> Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 680 [2007]

To prevail on a claim under Labor Law § 240 (1), a plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and (2) that the statutory violation proximately caused his or her injuries (see, Blake op cit., at 290; see also, Bland v Manocherian, 66 NY2d 452, 459, [1985]).

As also applicable here, "[t]o prevail on a motion for partial summary judgment on [her] cause of action under § 240(1), the plaintiff must show both that the statute was

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[2] However, the court preserved the established distinction between non-residential and routine *household* window washing, which is not a covered activity (see, Brown v. Christopher St. Owners Corp., 87 N.Y.2d 938, 939 [1996]; Broggy, supra., at 680)

violated and that the violation was a proximate cause of [her] injuries. *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39, 790 N.Y.S. 2d 74, 76, 823 N.E.2d 439, 441 (2004); *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 287, 771 N.Y.S.2d 484, 488, 803 N.E.2d 757, 761 (2003)." Auriemma v Biltmore Theatre, LLC, 82 A.D.3d 1, 9-10, [1st Dept. 2011]

While , as above noted, the principles of comparative fault are inapplicable , and contributory negligence "will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (Hernandez v. 42/43 Realty LLC, 74 AD3d 558 [1st Dept. 2010], citing authority of Blake v. Neighborhood Hous.Servs. of N.Y City ., op. cit., at 286), a defendant may successfully oppose a plaintiff's *prima facie* showing of 240(1) liability, by raising " an issue of fact as to whether the plaintiff 'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured. 'Cahill, 4 NY3d at 40, 790 N.Y.S.2d at 76, 823 N.E.2d at 441; see *Gallagher v. New York Post,* 14 NY3d 83, 88, 896 N.Y.S.2d 732, 734, 923 N.E.2d 1120, 1123 [2010]." Auriemma , *supra* , 14 ; see also, 1 NY PJI 2:217.2, at 1248-1249 [2011].

Moreover, it is settled that " '[a] worker does not become recalcitrant merely by disobeying a general instruction not to use certain equipment if safer alternatives are not supplied"), citing Stolt v. General Foods Corp., 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650, 651, 613 N.E.2d 556, 557 (1993), and Balthazar v. Full Circle Constr. Corp., 268 A.D.2d 96, 99, 707 N.Y.S.2d 70, 72-73 (1st Dept. 2000). Auriemma, op. cit. at 11

As observed by the Court of Appeals upon consideration of the "sole proximate cause" defense to a 240 (1) claim,

> [u]nder § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation.
>
> Blake v. Neighborhood Hous. Servs., op. cit., at 290

Whether there was a causative violation of the statute or whether plaintiff's conduct was the sole proximate cause of her injuries, "the issue to be addressed first is whether adequate safety devices were provided , 'furnished' or 'placed' for the worker's use on the work site. " (Cherry v. Time Warner, Inc. 66 AD3d 233, 236 [1st Dept. 2009]) .

Labor Law 241(6)

Section 241, sub. 6 of the Labor Law provides:

§ 241. Construction, excavation and demolition work

> 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 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 *507 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.

As recently restated by the Court of Appeals , "[t]he second sentence of this provision, requiring owners and contractors to comply with the Commissioner of Labor's rules , creates a nondelegable duty 'where the regulation in question contains a specific, positive command '(*Morris v. Pavarini Constr.*, 9 N.Y.3d 47, 50, 842 N.Y.S.2d 759, 874 N.E.2d 723 [2007] [internal quotation marks and citation omitted])." Nostrom v. A.W. Chesterton Co., 15 N.Y.3d 502,507 [2010]

Therefore, to establish a claim pursuant to Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by the violation of an applicable Industrial Code regulation which sets forth a concrete or specific standard of conduct , rather than a provision incorporating a common-law standard of care . It is also clear that a plaintiff need not prove that defendant had actual or constructive notice of the condition at issue .

In addition, as also restated in Nostrom, *supra* at 507-508

> Part 23 of the Industrial Code governs the protection of workers in construction, demolition and excavation operations. Its "Application" provision expressly states that the rules in part 23 apply to "owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work" (12 NYCRR 23-1.3). Hence, it is clear that part 23 was promulgated pursuant to the authority granted by Labor Law § 241(6) and that owners and contractors may be vicariously liable based on violations of part 23 regulations.

It is also settled that in contrast to a § 240(1) claim, "[a]n owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence (see, *Long v*

Forest-Fehlhaber, supra, at 159-161; *Ross v Curtis-Palmer Hydro-Elec. Co., supra,* at 502, n 4; *Zimmer v Chemung County Performing Arts,* 65 NY2d 513, 521-522, rearg denied 65 NY2d 1054)." (Rizzuto v. L.A.Wenger Contracting Co.Inc., 91 N.Y.3d 343,350 [1998])

Industrial Code Violations Alleged

12 NYCRR 23-1.7 Protection from General Hazards

> d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

It is well settled that this regulation " mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and is precisely the type of "concrete specification" that Ross requires (see, *Ross v Curtis-Palmer Hydro-Elec. Co., supra, at* 503-505; see also, *Hammond v International Paper Co.,* 178 AD2d 798, 799). " Rizzuto, *supra* at 351 Moreover, the regulation has been determined to be applicable to a roof used in the ordinary course of business (see, Roppolo v. Mitsubishi Motor Sales of America Inc., 278 A.D.2d 149, 150 [1st Dept. 2000]).

Labor Law § 200 and Common Law Negligence

Labor Law § 200, subd. 1, provides the following

§ 200. General duty to protect health and safety of employees; enforcement

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The

board may make rules to carry into effect the provisions of this section.

As observed by the Court of Appeals in Rizzuto v. L.A.Contracting Co., op.cit., at 352, "[u]nlike Labor Law § 241 (6), section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site (see, *Ross v Curtis-Palmer Hydro-Elec. Co.*, supra, at 505; see also, *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877)."

As the duty derives from the "broader common-law duty of a landowner to provide workers with a reasonably safe place to work (*see Lombardi v Stout,* 80 NY2d 290, 294, 604 NE2d 117, 590 NYS2d 55 [1992])" (Mejia v. Levenbaum, 30 AD3d 262, 263 [1st Dept. 2006]), its coverage, unlike sections 240 and 241(6), is not restricted to construction, excavation or demolition work places, but extends to all places of work within the state.

There is a distinction in § 200 cases between those alleging violations of an owner's duty to maintain the "premises" of the work site in a reasonably safe condition, and those, as here, based upon alleged defects or dangers arising from a subcontractor's methods or materials .

With respect to the former category, to establish a *prima facie* case, a plaintiff must establish that the owner either created the causative defect or " 'failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice' (*Chowdhury v. Rodriguez,* 57 AD3d 121, 128 [2008]; see also, *261 Schultz v. Hi-Tech Constr. & Mgt.Servs. Inc.*, 69 AD3d 701 [2010]; *Artoglou v. Gene Scrappy Realty* Corp., 57 AD3d 460 [2008])." (Mendoza v. Highpoint Associates, IX, LLC., 83 A.D.3d 1, 6 [1st

Dept. 2011]).

As to the latter category applicable here, " [a]n implicit precondition to this duty . . . . . [is] that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Reynolds v Brady & Co.,* 38 AD2d 746)." (Russin v. Picciano, 54 NY2d 311, 317 [1981])

As re-stated by the Second Department in Ortega v. Puccia, 57 AD3d 54, 61-62 [2008], concerning , as here, a claim against a property owner,

> . when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under § 200. A defendant has the authority to supervise or control the work for purposes of § 200 when that defendant bears the responsibility for the manner in which the work is performed.

Discussion and Conclusions

Workers' Compensation Defense

Upon review of the record , it is submitted that the Anton defendants, as well as co-defendants HMS Host Corporation ("HMS Host"), Autogrill Group, Inc, AAI/Terminal 7, Inc. have shouldered their burden to prove that in 2007, plaintiff was employed by Host International , Inc.,("Host International") and that on the date of the accident the concessions in Terminal 7 including Latutudes Restaurant, were operated by Host Services of New York, Inc., by the terms of the sublease with British Air.. By the affidavit

of a corporate secretary of HMS Host it is established further that pursuant to the corporate structure existing at the time of the accident as well as now, HMS Host was the parent company of Host International. In addition, it is attested that defendant Autogrill Group, Inc, owns both HMS Host Corporation. and AA1 Investments, Inc., the parent company of Anton Airfoods, Inc. As such, it is the finding of this court that the "Anton" defendants[3] and the parent company Autogrill Group, Inc., ("Autogrill") and its HMS Host affiliated companies are entitled to summary judgment dismissal based on the workers' compensation defense asserted.

Plaintiff fails to come forward with probative evidence to rebut this showing.

Labor Law § 240(1) Claim

Covered Activity

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that defendants have failed to demonstrate as a mater of law that plaintiff, who was engaged in commercial cleaning of the restaurant's exhaust system at the time of the accident, may not be afforded the protection of 240(1) because the cleaning was performed in a non-construction, non-renovation context.

Applying the criteria set forth in Broggy, op.cit., which the court finds to be controlling here, the contextual analysis for 240(1) liability does not "turn on" whether plaintiff's cleaning was performed as part of a construction , demolition, or repair project, or in conjunction with the other denominated activities set forth in the statute, but on whether

[3] It is noted that defendants Anton Airfoods, Anton's Airfood of JFK, and Anton Enterprises did not exist as corporate entities at the time of the accident, nor do they now.

the cleaning "creates an elevation-risk of the kind that the safety devices listed in 240 (1) protect against." (Id. at 681; see also, Swiderska v. New York University , 10 N.Y.3d 792 [2008]). It is the further finding of this court that in the circumstances here and upon application of the above decisional law, plaintiff's cleaning of the restaurant's exhaust system did create such a risk , and as such, is a covered activity under 240(1) (see, Fischetto v. LB 745 LLC, 43 A.D. 3d 810 [1st Dept. 2007]; DeKenipp v. Rockefeller Center, Inc., 60 A.D.3d 550 [1st Dept. 2009]).

Owner

Section 240(1) of the Labor Law provides that the statutory duty, as applicable here to an owner[4] is" nondelegable", and "does not require that the owner exercise supervision or control over the worksite before liability attaches (see, Ross v. Curtis-Palmer Hydro-Elec. Co., op.cit. at 501-502; Gordon v. Eastern Railway Supply, Inc., op. cit. at 555).

It is also settled that defendant City of New York "may be liable under Labor Law § 240 (1) as the fee owner of the premises where the plaintiff's injury occurred, even though it leased the premises to the Port Authority, which in turn leased the premises to American Airlines, Inc. (see , Sanatass v Consolidated Inv. Co., Inc., 10 NY3d 333, 340-341, 887 NE2d 1125, 858 NYS2d 67 [2008]; Coleman v City of New York, 91 NY2d 821, 823, 689 NE2d 523, 666 NYS2d 553 [1997]; Gordon v Eastern Ry. Supply, 82 NY2d 555, 560, 626 NE2d 912, 606 NYS2d 127 [1993])." (Wong v. City of New York, 65 A.D.3d 1000,1001 [2d

[4] This accident occurred in a non-construction, non-renovation context, and as a result, there is no "contractor" liability alleged.

Dept. 2009]). The record is not supported by any affidavit of the City defendant with respect to this issue.

Moreover, while the defendant Port Authority leased the airport from the City and subleased the terminal to British Air , and there is no issue that either the Port Authority or British Air hired plaintiff , there are at least arguable issues of fact as to whether British Air and the Port Authority could be considered an "owner" under the statute as the work being performed by plaintiff was in connection with the operation of a concession/restaurant from which each derived a pecuniary benefit (see, Murphy v. WFP 245 Park Co., L.P., 8 A.D.3d 161 [1st Dept. 2004]).

Sole Proximate Cause/Recalcitrant Worker Defenses

As set forth in Cherry v. Time Warner, op. cit, the issue to be first addressed upon consideration of the asserted defense is "whether adequate safety devices were provided 'furnished' or 'placed ' for the worker's use on the work site." Cherry, at 236

On this record, this issue is unresolved.

Plaintiff testified that the ladder provided by her employer could not be used in the space adjacent to the stove due to the lack of space, so "there was no other option " but to stand on top of the stove to clean the vent/hood of the exhaust system located above it. [NUNEZ EBT: 36:18-19;30-33]. Though not instructed specifically to do so, "as a rule" this is how plaintiff performed the task [EBT: 32:21-22]. Routinely, she would clean the top of the stove only after she finished cleaning the vent [Id. 48-51]. On the day of the accident, plaintiff used the ladder to get up on the stove, and then remained standing there for about an hour cleaning the vent"when [she] went to move [her] foot to clean the other

side, [she] fell backwards." [Id. 43:2-3]. She did not know what caused her to fall [Id. 51:23].

In his affidavit, plaintiff's husband and co-worker , Alejo Reyes , attests that the location of a wall near the stove "create[d] a very tight work space ", and that it was impossible to gain access to the ventilation system by setting up the sole A-frame ladder provided , which measured 10-12 feet [Affidavit of Alejo Reyes¶ ¶ 9-10].

Plaintiff's supervisor , Raul Tovar, testified not only that the task of cleaning the "daily grease" from the inside of the exhaust hood was performed with the use of a ladder stored in the kitchen, but that he had observed plaintiff use the ladder when doing so , "two steps up the ladder and cleaning the stainless steel, the normal way." [TOVAR EBT: 37; 40; 54:9-11] With respect to the issue of the working space , Tovar testified as follows.

Q. How much space was there between the stove where the hood was and this unit that was behind the stove?

A. Pretty wide.

Q. How may feet ?

A. Four, five.

Q. Was there enough space to completely open the A-frame ladder if a cleaner wanted to use the A-frame to clean the hood?

A. Yes.

EBT: 43:22-44:8

In light of the discordant versions of the facts surrounding the crucial issue of whether a safety device , i.e., a ladder adequate to the assigned task , was provided to plaintiff at the work site , the respective motions for dispostive relief on the 240(1) cause of action must be denied .

Finally, while plaintiff alleges that dispositive relief should be granted on the grounds of spoliation because Mr. Tovar testified that after the accident, the ladder stored in the kitchen for plaintiff's use was thrown out because "it got old", and was replaced by another [TOVAR EBT: 53:20-24]. Plaintiff does not move for affirmative relief [CPLR 3126] or establish a basis for such sanctions by coming forward with a showing that defendants failed to comply with notice or orders of discovery. Moreover on this record, it would appear that the existence of the ladder in and of itself, would not be "essential" to plaintiff's case, as the crucial issue here does not concern the integrity of the ladder, itself, but whether an A-frame ladder of the size described by the parties was capable of being fully opened and operational in the subject working space.

Labor Law § 241(6) claim

It is the further finding of this court that defendants have sustained their burden of proof for summary judgment dismissal of the 241(6) claim as it is predicated upon an allegation of a violation of 12 NYCRR 23-1. 7(d) applicable to construction and demolition work not at issue here.

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Labor Law § 200 Claim /Common Law Negligence Claims

Plaintiff's claim devolves from the allegation that she was required to perform her work involving an elevation - related risk without the use of any of the designated safety devices. As such, the claim arises from the allegedly unsafe method by which the work was being performed. In these circumstances, it is settled that an owner cannot be held liable under § 200 or the common law unless that owner exercised supervisory control over the work activity (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). Delaney v. City of New York, 78 A.D.3d 540 [1st Dept. 2010]; Paz v. City of New York , 85 A.D.3d 519 [1st Dept. 2011]).

Upon review of the record, defendants have sustained their burden to prove as a matter of law that they did not exercise sufficient supervisory control over the work being performed by plaintiff to support her § 200 claim (see, Bednarczyk v. Vornado Realty Trust, 63 A.D.3d 427, 428 [1st Dept. 2009]).

In opposition, plaintiff fails to come forward with any evidence to raise an issue of fact to rebut this showing.

Accordingly, for the reasons set forth above, it is ORDERED that branch of defendants' motion seeking an award of summary judgment dismissing as against defendants Anton's Airfood Inc., Anton Airfood Inc., Anton Airfoods, Anton's Airfood JFK Inc., Anton's Airfoods of JFK ,Anton Enterprises, HMS Host USA ,Inc.,Autogrill Group, Inc., AA1/Termonal 7, Inc., the complaint and all cross-claims asserted against them , be and hereby is granted , and it is further ORDERED that the branch of defendants' motion seeking an award of summary judgment dismissing the Labor Law §§ 241(6) and 200

claims as well as the common law negligence claims be and hereby is granted and the remainder of the motion seeking summary judgment dismissing the Labor Law § 240(1) claim asserted be and hereby is denied.

It is further ORDERED that plaintiff's cross- motion for an award of summary judgment on the 240(1) claim be denied and the remainder of the cross-motion seeking an award of summary judgment on the Labor Law 241(6) claim be and hereby is denied as moot.

This constitutes the decision and order of this court.

Dated: October 7, 2011

Howard H. Sherman