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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 106667/2011
SORIANO, FRANCISCO
vs.
ST. MARY'S INDIAN
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

DEC 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/21/12

_____, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

FRANCISCO SORIANO,

Plaintiffs,

- against -

ST. MARY'S INDIAN ORTHODOX CHURCH OF ROCKLAND INC.,

Defendants.

----------X

ST. MARY'S INDIAN ORTHODOX CHURCH OF ROCKLAND INC.,

Third-Party Plaintiff,

-against-

COMMERCIAL CONTRACTING COMPANY INC.,

Third-Party Defendant.

----------X

Index No.
106667/11

DECISION and ORDER

Mot. Seq.
001 & 002

HON. EILEEN A. RAKOWER

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Francisco Soriano ("Plaintiff") when he fell, during the course of his employment with Industrial Door and Glass Inc. ("Industrial Door and Glass"), from a ladder at defendant St. Mary's Indian Orthodox Church of Rockland, Inc. ("St. Mary's") or ("The Church"), located at 66 East Maple Avenue, Suffern, New York, on October 5, 2010. Plaintiff commenced this action by service of a Summons and Complaint on The Church on or about June 8, 2011. St. Mary's commenced a third party action against Commercial Contracting Company Inc. ("Commercial

Contracting Company") by the third-party Complaint dated May 30, 2012.

Plaintiff now moves for an Order (Mot. Seq. #1): (1) pursuant to CPLR 3212 granting Plaintiff summary judgment on the issues of liability against St. Mary's on the ground that there is no triable issue of fact with regard to Plaintiff's claims against St. Mary's brought pursuant to Labor Law 240 and (2) pursuant to CPLR 3124 compelling St. Mary's to produce the declaration sheet of the underlying insurance policy as well as an affidavit from a person with knowledge with respect to the existence of any "excessive coverage." St. Mary's opposes.

St. Mary moves for an Order (Mot. Seq. #2), pursuant to CPLR 3212, granting St. Mary's summary judgment on the ground that no triable issue of facts exist with respect to the liability of St. Mary's and dismissing the Plaintiff's Complaint. Plaintiff opposes.[1]

At his EBT on May 1, 2012, Philipose Philip, a member of The Church's managing committee, testified that The Church owned the premises located at 66 East Maples Avenue, Suffern, New York, for approximately ten years prior to his EBT. The tower on the front of The Church was built four to five years prior to Mr. Philio's EBT. The tower was constructed by Commercial Contracting Company. The skylight contained within the tower was built at the same time as the tower construction. Mr. Philip testified that "whenever there is any maintenance coming with the tower, then [he] would call the main contractor who did the work," Commercial Contracting Company. Mr. Philip testified that at some point in 2010, either a side window or the skylight was cracked, and he called Commercial Contracting Company to remedy the condition. Commercial Contracting Company, in turn, called in Industrial Door and Glass to perform the work. Mr. Philip confirmed that The Church paid the invoice, dated October 5, 2012, which had been submitted by Industrial Door and Glass, and was marked at his deposition. The invoice recites the work that was to performed on the date of the accident as the following: "Furnish and install three polished wire glass lights in skylight" and "Furnish and install one insulated clear safety glass unit it tower." Mr. Philip testified that the he did not recall the work being discussed with The Church's managing

[1] Plaintiff agrees to stipulate to discontinue with prejudice any and all claims based on common law negligence. As such, the remaining cause of action is Plaintiff's claim pursuant to Labor Law 240(1).

committee because it was part of maintenance.

Plaintiff testified that the accident occurred on October 5, 2010 while he was performing work in the course of his employment with Industrial Door and Glass, a company in the business of installing and replacing glass. Plaintiff had previously replaced glass at The Church. Plaintiff testified that he had been to this location one year prior in order to replace a broken window pane on the ground floor of The Church. On the date of the accident, Plaintiff and three co-workers replaced one pane of glass (one of four panes in the window) on the tower/steeple of The Church and two or three smaller pieces of glass in the skylight within the tower/steeple which were cracked. In order to remove the glass and replace it with a new piece, Plaintiff was not required to remove anything off the building and or window other than moving the molding with a screwdriver. While in the process of climbing an aluminum extension ladder that had been placed on top of The Church roof which leaned against the top of The Church tower, approximately fifty feet off the ground, the bottom of the ladder on which Plaintiff was standing gave out, kicked out and caused the ladder to fall directly resulting in Plaintiff being seriously injured.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Labor Law §240(1) states:

> 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.

As set forth by the Court of Appeals in *Martinez v. City of New York*, 93 N.Y. 2d 322, 325-26 (1999):

> The statute is thus designed to minimize injuries to employees by placing ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 513; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520). Hence, we have repeatedly indicated that section 240 (1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed" (citations omitted). As the majority below pointed out, however, "'the statutory language must not be strained in order to encompass what the Legislature did not intend to include'" (citations omitted).

Martinez v. City of New York, 93 N.Y. 2d at 325-26.

The parties do not dispute that the ladder gave out and Plaintiff fell or that the ladder was unsecured and lacked any safety devices as contemplated by Labor Law 240(1). At issue is whether the Plaintiff's work at The Church constitutes a protected activity under Labor Law 240(1). While Plaintiff characterizes the work performed as "repair" of a building or structure under Labor Law 240(1), Defendants characterize the work as "routine maintenance" to panes of glass outside the scope of the statute.

As to whether the Plaintiff's work constitutes a protected activity under Labor Law 240(1), the Court of Appeals has held that any determination whether particular work falls within the scope of construction, demolition, or excavation protected by the Labor Law must be determined on a case-by-case basis, and depends on a "confluence of factors" and the full "context of the work" (*Prats v. Port Auth. of NY & NJ*, 100 N.Y. 2d 878, 883 [2003]). "The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury.'" (*Panel v. County of Albany*, 99 N.Y. 2d 452, 457 [2003] (citations omitted)). Section 240(1) "does not cover routine maintenance done outside the context of

construction work." (*Prats*, 100 N.Y. 2d at 882).

As stated in *Owens v. City of New York*, 24 Misc. 3d 1204A (N.Y. Sup. Ct. 2009):

> There is no "bright line" rule regarding what tasks constitute repair work covered under Labor Law § 240 (1), and what activities are deemed to be "routine maintenance," which is not covered. Rather, "the question of whether a particular activity constitutes a repair or routine maintenance must be determined on a case-by-case basis" (Riccio v NHT Owners, LLC., 51 AD3d 897, 899, 858 N.Y.S.2d 363 [2d Dept 2008]). In making such determinations, courts must weigh various factors including the complexity and scope of the work . . . Another factor which must be weighed is whether or not the job involves the replacement of a missing, malfunctioning, or worn out component. Such work is ordinarily deemed to be routine maintenance (citations omitted).

Owens v. City of New York, 24 Misc. 3d 1204A (N.Y. Sup. Ct. 2009).

Here, based on the record, the Court finds that at the time Plaintiff was injured he was not engaged in work protected and covered under Labor Law 240(1), but rather routine maintenance in a nonconstruction, nonrenovation context. The facts show that Commercial Contracting Company, the Company that had originally constructed the tower and performed maintenance on it thereafter, had hired Plaintiff's employer Industrial Glass and Door to do the work. Plaintiff testified that he had previously replaced a broken window pane on the ground floor of The Church. The entire scope of Plaintiff's project on the date of the accident involved the replacement of one pane of glass (out of four panes in the window) in the tower/steeple of The Church and two or smaller pieces of glass in the skylight within the tower/steeple which were cracked. Plaintiff was not replacing the windows or skylight structure, but only the panes of glass. In order to perform the job, Plaintiff was not required to remove anything off the building and or window other than moving the molding with a screwdriver. *See Esposito v. N.Y.C. Indus. Dev. Agency*, 1 N.Y. 3d 526, 528; *Chizh v. Hillside Campus Meadows Associates*, LLC, 3 N.Y. 3d 664 (2004) (finding that the replacement of a torn window screen is neither "altering" nor "repairing" under Labor Law 240(1)); *Cullen v. Uptown Storage Co., Inc.*, 268 A.D. 2d 327 (1st Dept 2000)("The replacement of ceiling tiles in a school building by the plaintiffs . . . was routine maintenance, and not part of the renovation work that

had previously been performed by various contractors and subcontractors or that was ongoing in other parts of the building, and therefore plaintiffs' claims under Labor Law 240(1) were properly dismissed."); See *Anderson v. Olympia & York Tower B. Company*, 14 A.D. 3d 520, 521 (2d Dept 2005) (where "plaintiff an air-conditioning technician, who was injured when he hit his hip against air-handling unit as he attempted to climb on top of it in order to replace worn-out bearings,," the work did not constitute repair or construction for the purposes of Labor Law § 240 (1) and 240(6) since "[t]he work performed by the plaintiff at the time of the accident involved the replacement of worn-out parts in a nonconstruction and nonrenovation context."); *Jani v. City of New York*, 284 A.D. 2d 304, 304 (2nd Dept 2001)("mere replacement of a worn-out component part in a nonconstruction, nonrenovation context . . . did not constitute 'erection, demolition, repairing, altering, painting, cleaning or painting of a building' within the meaning of Labor Law 240(1)"). The case relied upon by Plaintiff, *Enright v. Buffalo Technology Building "B" Partnership, et al.*, 278 A.D.2d 927 (4th Dept. 2000), is inapposite, as there, the Court concluded that work being performed by the plaintiff involved the "altering" of the building under Labor Law 240(1).

For the foregoing reasons, it is hereby,

ORDERED that plaintiff Francisco Soriano's motion for summary judgment and to compel defendant St. Mary's Indian Orthodox Church of Rockland, Inc.'s to produce the declaration sheet of the underlying insurance policy as well as an affidavit from a person with knowledge with respect to the existence of any "excessive coverage" is denied; and it is further

ORDERED that defendant St. Mary's Indian Orthodox Church of Rockland, Inc.'s motion for summary judgment is granted and the Complaint is dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the Third Party Action is severed.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: 12/21/12

EILEEN A. RAKOWER, J.S.C.