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

PRESENT : DONNA M. MILLS **PART 58**

Justice

RICHARD FATTORUSSO,

Plaintiff,

-v-

B. BROS. BROADWAY REALTY, LLC,

Defendant.

INDEX NO. 105848/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3
Replying Affidavits	4

CROSS-MOTION: ✓ YES _____ NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 3/14/13

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

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

RICHARD FATTORUSSO,

INDEX NO.
105848/11

Plaintiff,

- against -

B. BROS. BROADWAY REALTY, LLC,
Defendant.

DECISION/ORDER

Donna M. Mills, J.:

In this labor law action, plaintiff Richard Fattorusso moves for an Order for partial summary judgment, pursuant to CPLR § 3212(e), on the issue of Defendant B. Bros. Broadway Realty, LLC's liability under Labor Law § 240(1). Defendant opposes the motion and cross moves for an order dismissing this action in its entirety.

This is an action to recover damages for injuries sustained by the plaintiff on January 11, 2011 while he was performing maintenance work in the boiler room of the office building owned by the defendant. It is undisputed, that plaintiff while at the subject location to repair a non-functioning boiler and its smoke detection system, fell from a height to the concrete floor below after the ladder he was working upon failed when it shifted and tipped over without warning.

Depositions were conducted of plaintiff on June 26, 2012. Plaintiff testified at his deposition that on the date of the accident, he was a boiler mechanic employed by Ace-Atlas and was dispatched to the location to check on the smoke alarm of the inoperative boiler. He further testified that he arrived at the location, checked in with the superintendent of the building, and proceeded to the boiler room, whereby the superintendent unlocked the boiler room and told him which smoke alarm needed to be checked and repaired. Plaintiff stated that he used an extension ladder that was supplied by the defendant and which was located on the side of the boiler, to inspect the smoke alarm. He further stated

that the repair process included replacing a defective cell assembly, as well as changing a broken indicator light. At the time of the accident, plaintiff stated he was working on the ladder when it shifted without warning, causing both he and the ladder to fall to the concrete floor below. As a result of the fall from the ladder to the ground, plaintiff claimed to have suffered, among other injuries, head trauma, subarachnoid hemorrhages over both the frontal lobe of the brain and right middle cerebral artery, traumatic brain injury, spinal disc herniations, and a left shoulder injury.

After the accident, plaintiff stated at his deposition that he remembers the superintendent waking him up and ultimately, another gentleman and assistant superintendent arrived on the scene, called 911, and helped plaintiff upstairs to a conference room where they awaited the arrival of an ambulance. Ultimately, plaintiff was taken by ambulance to Bellevue Hospital where he was admitted for almost a week.

Defendant, by Monico DeLeon was deposed on July 31, 2012. Mr. DeLeon testified that he was employed by Cushman & Wakefield, a property management company hired by defendant, the owners of the subject building where plaintiff's accident occurred. On the date of the accident he stated that he was employed as either a handyman or the superintendent. He stated that on the date of the accident he met the plaintiff at the security desk of the building, explained the problem with the boiler to the plaintiff and escorted him to the boiler room. Mr. DeLeon said he stayed in the boiler room with the plaintiff less than five minutes. He further testified that plaintiff did not ask him for a ladder, that plaintiff just picked one up that had been left in the boiler room. Mr. DeLeon testified that when he returned to the boiler room later, he found plaintiff sitting down on the floor. He stated that plaintiff informed him that he had fallen from the ladder, or that the ladder had given way.

Plaintiff now seeks partial summary judgment pursuant to Labor Law § 240(1) on

the grounds that he was injured when he fell off a ladder while attempting to repair a defective smoke detection system that was part of the boiler in the subject building. Defendant opposes the motion and cross moves for summary judgment dismissing all of the claims because the activity that plaintiff was engaged in at the time of the accident was not the type of work that is entitled to the protection of New York Labor Law §§ 200, 240(1) or (241(6). More specifically, defendant contends that plaintiff's Labor Law § 240(1) claim must be dismissed because the work that plaintiff was performing at the time of the accident was routine maintenance not encompassed by the statute.

Labor Law § 240(1) states that the type of work to which it applies includes "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Activities in the nature of routine maintenance, such as changing a light bulb, which are performed in a nonconstruction, nonrenovation context have been held not to fall within the ambit of the statute (see, Smith v. Shell Oil Co., 85 N.Y.2d 1000, 1002, 630 N.Y.S.2d 962, 654 N.E.2d 1210; Koch v. E.C.H. Holding Corp., 248 A.D.2d 510, 511, 669 N.Y.S.2d 896, lv. denied 92 N.Y.2d 811, 680 N.Y.S.2d 457, 703 N.E.2d 269; Boyd v. Bethlehem Steel Corp., 244 A.D.2d 983, 983–984, 665 N.Y.S.2d 490, lv. denied 92 N.Y.2d 885, 678 N.Y.S.2d 586, 700 N.E.2d 1222; Cosentino v. Long Is. R.R., 201 A.D.2d 528, 529, 607 N.Y.S.2d 720).

Whether a worker is engaged in repair or routine maintenance under Labor Law § 240(1) may be a question of fact (see Reger v. Harry's Harbour Place Grille, 5 AD3d 1065). Generally, work is a repair within the purview of Labor Law § 240(1) if it involves fixing something that is malfunctioning (Beehner v. Eckerd Corp., 307 A.D.2d 699, affd 3 NY3d 751; Bruce v. Fashion Square Assoc., 8 AD3d 1053), inoperable (Craft v. Clark Trading Corp., 257 A.D.2d 886), or operating improperly (Izrailev v. Ficarra Furniture of Long Island, 70 N.Y.2d 813; Reger, 5 AD3d at 1065). However, the work is routine

maintenance if it is caused by a common problem (Abbatiello v. Lancaster Studio Associates, 3 NY3d 46), is the result of normal wear and tear, or is done as part of scheduled maintenance (Esposito v. New York City Indus. Dev. Agency, 1 NY3d 526).

In the case at hand, the plaintiff in this case was employed by Ace-Atlas, the company hired to repair a boiler that was inoperable. The evidence established that the smoke alarm system was malfunctioning or inoperable when Ace-Atlas was called, although the cause was unknown. The plaintiff was sent to the subject premises to repair the boiler and was on the ladder in the process of changing the cell in the smoke alarm to repair the boiler when he fell off the ladder and was injured. No evidence was presented that the boiler problem was a common one, regularly corrected as part of a scheduled maintenance program, or the result of normal wear and tear. Because the work involved fixing something that was malfunctioning or operating improperly, the work was not routine maintenance and constituted a repair within the meaning of Labor Law § 240(1).

Additionally, the Court of Appeals of New York has interpreted Labor Law § 240(1) "as imposing absolute liability for a breach which has proximately caused an injury." (Rocovick v Consolidated Edison Co., 78 N.Y.2d 509, 513 1991]). Thus, a "violation of the statute is not enough" to impose absolute liability; instead, plaintiff must "show that the violation was a contributing cause of his fall" or that the violation is the proximate cause of the accident in establishing its prima facie case (Blake v. Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]). Summary judgment should be granted where it is uncontroverted that a ladder collapsed beneath plaintiff, causing the fall (see Panek v County of Albany, 99 NY2d 452, 458 [2003]); Styler v Walter Vita Constr. 174 AD2d 662 [2d Dept 1991]). Applying the facts to the law, it is clear to this Court that defendant breached its nondelegable duty to plaintiff to

supply a safe ladder at their site.

As to Labor Law § 200, it is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998]). Liability under the statute is therefore governed by common-law negligence principles. Ladders fall within the scope of the protection afforded by the statute (see e.g. Sprague v Peckham Materials Corp., 240 AD2d 392, 393 [1997]).

The defendant argues, in support of their summary judgment motion, that they did not supervise or control the plaintiff's work, and hence, cannot be held liable under Labor Law § 200. The defendant's argument presupposes that supervision or control over the plaintiff's work is the proper legal standard against which the defendant's alleged liability is to be measured in this instance. However, Labor Law § 200 has two disjunctive standards for determining a property owner's liability. The first is the authority to supervise the work when a plaintiff's injury arises out of defects or dangers in the methods or materials of the work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]). The second standard is applicable to worker injuries arising out of the condition of the premises rather than the methods or manner of the work. When a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice (see Ortega v Puccia, 57 AD3d 54 [2008]).

Under either liability standard, the common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200 (1), has been extended to include the tools and appliances without which the work cannot be performed and completed (see Hess v Bernheimer & Schwartz Pilsener Brewing Co., 219 NY 415, 418 [1916]).

Here, the plaintiff's accident involved a ladder, allegedly provided to him by the defendants and allegedly defective due to the unexpected shifting of the ladder. If the plaintiff's use of a defective ladder provided by a property owner implicates the methods and manner of the work, then the defendants correctly focus upon whether they had the authority to supervise and control the work. If, on the other hand, the plaintiff's use of a defective ladder provided by the property owner is considered part of the overall condition of the premises, then the focus should not be on supervision and control over the manner of the work, but rather, on whether the defendant created the ladder defect or had actual or constructive notice of the dangerous or defective condition.

The facts alleged here is that the ladder was provided to the plaintiff by the defendant property owner. In addressing the legal standard that is to be applied when a property owner provides a worker with dangerous or defective equipment that causes injury during the course of the work, the imposition of any liability under both Labor Law § 200 and the common law is the authority of the defendant to remedy the dangerous or defective condition at issue (see Guerra v Port Auth. of N.Y. & N.J., 35 AD3d 810, 811 [2006]). Accordingly, when a worker's injury results from his or her employer's own tools or methods, it makes sense that a defendant property owner be liable only if possessed of authority to supervise or control the work, since such defendant is vested with the authority to remedy any dangers in the methods or manner of the work (see Persichilli v Triborough Bridge & Tunnel Auth., 16 NY2d 136 [1965]). Similarly, if a worker's injury results from a dangerous or defective premises condition, it logically follows that a property owner's liability should be predicated upon evidence of the owner's creation of the condition or actual or constructive notice of it, since the property owner in charge of the site has authority to remedy any dangers or defects existing at its own premises (see Rizzuto v L.A. Wenger Constr. Co., 91 NY2d at 352).

In Higgins v 1790 Broadway Assoc. (261 AD2d 223 [1st Dept 1999]), the court held that a defendant property owner which owned a ladder used by the plaintiff was not entitled to summary judgment under Labor Law § 200, absent proof that the defendant did not have notice of the alleged unsafe ladder condition (id. at 225).

Additional Appellate authority supports the conclusion that if a defendant property owner loans equipment to a worker, the defendant's ownership of and control over its own equipment, and the concomitant authority to remedy its dangers and defects, is to be governed by the common-law standard that speaks to defect creation or actual or constructive notice of the condition. Thus, in Cruz v Kowal Indus. (267 AD2d 271 [1999]), the Second Department held that a defendant property owner was properly denied summary judgment, where the defendant failed to submit evidence that it did not own the ladder from which the plaintiff fell, as necessary to assess the issue of actual or constructive notice (id. at 272).

Based on the foregoing analysis, that when a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition (see Erdely v Access Direct Sys., Inc., 45 AD3d 724 [2007]).

Applying these principles to the facts at bar, the defendant moved for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action by arguing that they did not supervise or control the plaintiff's work. In doing so, they presented evidence and discussion of the incorrect legal standard. The defendant's motion, rather than being directed to the absence of control over the methods and manner of the work, should have instead been directed to their

noncreation of any alleged ladder defect and the absence of actual or constructive notice of such condition (see Chowdhry v Rodriguez 57 AD3d 121, 130 [2008]).

Since triable issues of fact exist as to whether the defendant loaned the plaintiff the ladder involved in the occurrence and whether, if it was loaned, the defendant had actual or constructive notice of the alleged dangerous condition which caused it to slip or slide causing his accident, the defendant's motion for summary judgment to the extent they seek dismissal of the Labor Law § 200 and common-law negligence claims should be denied.

Defendant also seeks dismissal of plaintiff's Labor Law §241(6) claim on the grounds that the Industrial Code provisions applicable to the facts at bar have not been set forth, and also because neither Labor Law §241(6) nor the Industrial Code is applicable to maintenance work, such as what they claim plaintiff was doing at the time of his accident.

Labor Law § 241(6) establishes that owners and contractors are required "to provide reasonable and adequate protection and safety "for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer, 81 N.Y.2d 494, 501—02 [1993]). Labor Law § 241(6) imposes a nondelegable duty similarly to the one imposed by Labor Law § 240(1). (Id., citing Long v. Forest–Fehlhaber, 55 N.Y.2d 154, 159 (1982).) The plaintiff must establish as its prima facie case under Labor Law § 241(6) that the defendants violated a regulation promulgated by the Commission of the Department of Labor, such as an Industrial Code, (Ross, 81 N.Y.2d at 501—02; Beckford v. 40th Street Associates, 287 A.D.2d 586, 587 (2d Dept 2001)), and "that this violation was the proximate cause of the injured plaintiff's accident" (Id.)

Here, plaintiff alleged a violation in its verified bill of particulars that defendant

failed to comply with inter alia, 12 NYCRR § 23–1.21(b)(1), which provides, in pertinent part: "(b) General requirements for ladders. (1) 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."

According to 12 NYCRR § 23–1.21(b)(1), defendant had a nondelegable duty to provide a ladder that is capable of sustaining without breakage. According to plaintiff's testimony, as he was in the process of changing a cell in the smoke alarm, he was standing on the ladder when it shifted without warning and the ladder went out from underneath him causing him to fall on the floor below.

Here, plaintiff also alleged a violation in its verified bill of particulars that defendant failed to comply with 12 NYCRR § 23–1.21(b)(3), which provides, in pertinent part:

> (3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: (I) If it has a broken member or part. (ii) If it has any insecure joints between members or parts. (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness. (iv) If it has any flaw or defect of material that may cause ladder failure.

Under this provision, defendant had a nondelegable duty to provide a ladder that was maintained in good condition. However, plaintiff contends that defendant breached its nondelegable duty by providing him with a ladder that shifted without warning while he was standing on it causing his accident. Plaintiff argues that this shows that the ladder was not maintained in good condition and in violation of this provision.

Plaintiff's testimony about the ladder's movement creates triable factual issues

whether the ladder violated aforementioned provisions, and proximately caused his accident (see De Oliveira v Little John's Moving Inc., 289 A.D.2d 108, 109 [2001]).

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of Defendant's liability under Labor Law § 240(1) is granted; and it is further

ORDERED that defendant's summary judgment cross motion to dismiss plaintiff's complaint regarding the Labor Law §§ 240(1), 241(6), the common-law negligence and Labor Law § 200 claims is denied.

Dated: 3/14/13

So Ordered

Donna M. Mills, J.S.C.

DONNA M. MILLS, J.S.C.