To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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JOHN A. WOLF, Trustee in Bankruptcy for the Bankrupt JORGE FLORES, and LORENA FLORES, individually,

Plaintiffs,

Index No. 65929/2016

– against –

DECISION & ORDER

THORNWOOD LDT, LLC, THORNWOOD RX DEVELOPMENT, LLC, DLC MANAGEMENT CORPORATION, and WALGREEN EASTERN CO., INC.,

Defendants.

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In this action to recover damages for personal injuries, etc., the plaintiffs move for summary judgment on the issue of liability pursuant to Labor Law 240(1) and 241(6):

Papers Considered

1. Notice of Motion/Affirmation of Liza Milgrim, Esq./Exhibits A-Q;
2. Affirmation of Raymond M. Rufat, Esq. in Opposition;
3. Reply Affirmation of Liza Milgrim, Esq.

Factual and Procedural Background

Plaintiff commenced this action against the defendants with the filing of a summons and complaint asserting causes of action for violations of Labor Law 200, 240(1) and 241(6), as well as common law negligence. In support of his Labor Law 241(6) cause of action, plaintiff alleged a violation of Industrial Code Regulations 23-1.7, 23.1.21, 23-1.16, and 23-1.24.[1]

On October 18, 2011, plaintiff, Jorge Flores, alleges that he fell six feet while descending a ladder during the construction of a new building that was going to be

[1] In a decision and order dated October 13, 2016, this Court dismissed plaintiff's first action arising out of the same accident based upon lack of standing to continue the action after Mr. Flores had filed for bankruptcy and had not listed the personal injury action as an asset.

occupied by Walgreens. The accident occurred at 35 Kensico Avenue, Thornwood, New York. At the time of the accident, plaintiff was employed by the non-party Nation Roof who contracted with defendant Thornwood RX Development, LLC to install the roof at the site.

On the day of the accident, there were three Nation Roof employees on the job site. The main roof to the building was already completed. Plaintiff's foreman instructed him to install shingles on a dormered roof that was being erected on top of the main roof, over the entrance to the building. Plaintiff used two scaffolds to access the sides of the roof where he was performing his work. Plaintiff testified that no scaffolds were constructed at the rear of the dormered roof so he used a 12-foot aluminum ladder.

Plaintiff placed the ladder himself and used the ladder to install shingles to the rear portion of the roof. While plaintiff was using the ladder, it was tied to brackets. After his work was completed, plaintiff's foreman instructed him to remove the plank that he was using to install the shingles. Plaintiff was carrying the plank over his left shoulder when the ladder slid out from under him and he fell approximately six feet to the main roof. The ladder was no longer tied at the time because the work on the roof was completed and everything had to be removed. Although plaintiff was wearing a harness with a six-foot lanyard at the time of the accident, he testified that there was no place to tie off.

Plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law 240(1) and 241(6) predicated upon violations of 12 NYCRR 23-1.16(b) and 1.21(b)(4) (iv).

In opposition, defendants argue that issues of fact exist as to whether plaintiff's actions were the sole proximate cause of his injuries.

Discussion

Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 803 [2d Dept 2013]). "To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012]; *see Alvarez v Vingsan L.P.*, 150 AD3d 1177 [2d Dept 2017]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476 [2d Dept 2012]).

"A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Melchor v Singh*, 90 AD3d 866, 868 [citation omitted] [2d Dept 2011]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744 [2d Dept 2016]).

In support of his motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1), the plaintiff made a prima facie showing of entitlement to judgment as a matter of law by submitting his deposition testimony that he was standing on a rung of an inadequately secured ladder when the ladder fell out from under him, causing him to fall and sustain injuries (*see Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747; *Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1106 [2d Dept 2016]). In opposition, defendants failed to raise an issue of fact that plaintiff's actions were the sole proximate cause of his injuries (*see Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747; *Baugh v. New York City Sch. Constr. Auth.*, 140 AD3d 1104).

Plaintiff seeks summary judgment on its cause of action pursuant to Labor Law 241(6) based upon violations of Industrial Code Regulations 1.16 (b) and 1.21(iv).

In order to sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]). Plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see Grabowski v Board of Mgrs. of Avonova Condominium*, 147 AD3d 913 [2d Dept 2017]).

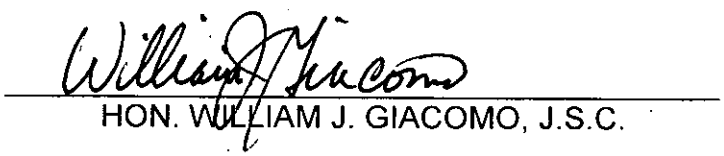
The plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on this cause of action with evidence of a violation of Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv), and that such violation was a proximate cause of his injuries. There is no dispute that no one was holding the bottom of the ladder and that the top of the ladder was not secured in any way (*see Melchor v Singh*, 90 AD3d 866). In opposition, the defendants failed to raise a triable issue of fact (*see Melchor v Singh*, 90 AD3d at 870; *Grant v City of New York*, 109 AD3d 961 [2d Dept 2013]).

Industrial Code 12 NYCRR 23-1.16(b), applies to the proper use, instruction, maintenance and measurements for safety belts, harnesses, tail lines and life lines. Specifically, NYCRR 23-1.16(b) provides: "(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet". Although plaintiff was provided with a safety harness, he was not provided with a proper place to tie off the harness. Therefore, plaintiff is entitled to summary judgment as to liability on the Labor Law § 241(6) claim predicated on a violation of NYCRR 23-1.16(b) (*see Anderson v MSG Holdings, L.P.*, 146 AD3d 401 [1st Dept 2017]).

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law 240(1) and 241(6) based upon violations of Industrial Code Regulations 12 NYCRR 23-1.16(b) and 1.21(b (4) (iv) is GRANTED.

The parties are directed to appear in the Compliance Part on **September 28, 2017**, at 9:30 a.m. as previously scheduled.

Dated: White Plains, New York
September 1, 2017



HON. WILLIAM J. GIACOMO, J.S.C.