Rossani v American Mgt. Assn.
2018 NY Slip Op 31245(U)
June 18, 2018
Supreme Court, New York County
Docket Number: 156590/13
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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MICHAEL ROSSANI,

Plaintiff,

-against-

AMERICAN MANAGEMENT ASSOCIATION, TIMES SQUARE JV LLC, and INTERCONTINENTAL HOTELS GROUP RESOURCES, INC.,

Defendants.

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Index No. 156590/13
Motion Sequences 04/05

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Motion sequence nos. 004 (MS 004) and 005 (MS 005) are consolidated for disposition herein. In MS 004, plaintiff Michael Rossani (Plaintiff) moves for partial summary judgment on the issue of liability on his Labor Law 240(1) claim. In MS 005, defendants American Management Association (AMA) and Times Square JV LLC (Times Square) (collectively, Defendants) move for summary judgment dismissing Plaintiff's claims against them in their entirety. The motions are decided as set forth below.

BACKGROUND

This Labor Law personal injury action arises from a December 2, 2011 accident. Plaintiff alleges that he was working on the 6th floor of a 46-story building located at 1601 Broadway in Manhattan when the ladder he was using broke, causing him to fall. According to the bill of particulars, the fall caused multiple tears and fractures to Mr. Rossani's right knee, requiring two surgeries to repair. It is undisputed that the building was at all relevant times owned by Times Square and that AMA was leasing the space where the accident occurred. Plaintiff's employer, ADCO Electrical Corporation (ADCO), had been retained by AMA as a contractor to perform electrical renovations throughout its leased space. ADCO also performed routine electrical work, including changing light bulbs, on a weekly basis.

[1]

Plaintiff was deposed on February 5, 2015.[1] He testified that prior to the accident he had been performing electrical work at the subject premises for approximately two weeks. This work included pulling cables, powering light fixtures, and wiring panels. On the morning of the incident he arrived at approximately 7:15AM. He started the morning by splicing data cables into data boxes located within individual cubicles. He was then assigned by "Pat", whom he believed to be employed by AMA, to check a light fixture that was not working. Plaintiff had a 6-foot A-frame ladder that he had taken with him from the ADCO shanty that morning. He set the ladder up, checked to make sure that it was stable, ascended the ladder, and then worked on the light fixture for approximately 10 minutes before he was able to get it to function (Rossani Deposition pp. 44-48, 55-59, 63). At approximately 8:30AM while descending the ladder a rung broke under the weight of his foot, his leg fell inside the ladder, and both he and the ladder fell to the ground (*id.* at 63-65):

Q. And after you spliced the wires did you test to see if it was working?
A. Yes.
Q. How did you do that?
A. The light fixture came on.
Q. Good test. What did you do after the light came on?
A. I descended the ladder, a rung broke causing me to fall. . . .
Q. And as you went down one step from where you were with your right foot, was that the rung that broke?
A. Yes.
Q. So the first step down was the step where the rung broke?
A. Yes.
Q. Did the step fall off?
A. The rung broke causing me to fall. . . .
Q. Was there anybody else present in the room you were working in when the rung broke?
A. No.

[1] Defendants' exhibit E (Rossani Deposition).

Q. When the rung broke, what happened next.

A. I fell.

Q. Did you fall to the side, did you fall backwards, can you describe how it was that you fell from the ladder?

A. I fell backward, down, and tipped over, twisting my right knee.

Mr. Rossani had used the ladder in question over the course of the week without incident. He did not observe anything wrong with the ladder nor did he file any complaints about it with his foreman or the Defendants (*id.* at pp. 56-59).[2]

Patricia Alvino from AMA was deposed on January 19, 2016.[3] Her duties at 1601 Broadway included handling security and coordinating with contractors like ADCO. Ms. Alvino testified that ADCO was first retained in 2006 to perform routine maintenance work like changing light bulbs. In 2011, AMA began to relocate its staff from the building's 11th floor to the 6th floor. As part of that relocation AMA contracted with ADCO to perform more substantial electrical work. Ms. Alvino testified that ADCO completed that work by the end of November of 2011 and that no major electrical work was being performed on the date of Plaintiff's accident. Ms. Alvino did not recall any ADCO employee performing any work on December 2, 2011 other than Danny Perez, who changed the light bulbs each Friday (Alvino Deposition pp. 15-22). Ms. Alvino testified that she coordinated ADCO's work but stressed that she neither supervised ADCO's employees nor provided them with any equipment or materials. She also did not instruct them as to the manner or method they were to perform their duties (*id.* at 61, 78-81):

Q. Did the ADCO work involve pulling cable from electrical closets to any location on the sixth and ninth floor?

A. I don't know what they do. They do their job. I just coordinate it. . . .

Q. It would be fair to [say] you don't have any knowledge of the specific day-to-day tasks that ADCO would perform on the sixth and ninth floor; is that correct?

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[2] Plaintiff has also submitted an affidavit which essentially mirrors his deposition testimony.

[3] Defendants' exhibit F (Alvino Deposition).

A. Correct, the foreman does.

* * * *

Q. Did the American Management Association provide any tools or equipment to the ADCO electricians for them to perform their work?

A. They are not allowed, no. . . .

Q. Did AMA provide ADCO [electricians] with any ladders to perform their work at 1601 Broadway?

A. No. . . .

Q. So you said earlier that you would take the ADCO electricians after they received their assignments off site, you would take them to the location that they were working and show them where they needed to work, correct?

A. Yes.

Q. But you wouldn't give them any instructions as to what they needed to do, correct?

A. They would say this is what has to be done, and I would say yes, and then I go back to my seat and I say if you need anything call me.

Q. Would you perform any type of inspections of their work or go to the area that they were working at any time throughout the day to see how they were progressing?

A. No.

Q. Was there anyone from American Management Association that would check in on the ADCO workers to see how they were progressing?

A. No.

Mr. Rossani's and Ms. Alvino's testimonies diverge in one significant respect. While Mr. Rossani claims to have had several interactions with Ms. Alvino both before and after his accident, Ms. Alvino has no recollection of meeting Mr. Rossani and, more importantly, has no recollection of his accident whatsoever (Alvino Deposition pp. 84, 94):

Q. Are you familiar with the plaintiff, Michael Rossani; do you know what he looks like?

A. No. . . .

Q. When did you first learn about an accident involving an ADCO electrician named Michael Rossani?

A. From my attorney.

* * * *

Q. Is it fair to say that you do not know one way or the other whether Mr. Rossani's accident happened at all? . . .

A. I don't know what happened.

Where Mr. Rossani and Ms. Alvino did agree is that AMA's supervisory role over ADCO was limited (Rossani Deposition pp. 60-61):

Q. Did Pat tell you to use the ladder, to use the splicing?
A. No.
Q. Did Pat tell you to do the splicing?
A. She just said please get this light working.
Q. But she didn't tell you how to get the light working?
A. No.
Q. And the decision on what was needed to get the light working was yours? . . .
A. Yes.

Matthew McAvoy was deposed on behalf of Times Square on June 16, 2016.[4] Mr. McAvoy testified that AMA was responsible for maintaining its leased space and that Times Square was only responsible for capital improvement work on the building's façade and for major systems necessary to the normal operation of the building. Mr. McAvoy had no personal knowledge of Plaintiff's accident other than that he was aware of the instant lawsuit (McAvoy Deposition pp. 28-32, 41).

Two incident reports were created shortly after the accident by Plaintiff's foreman, Michael Loreto.[5] The "Foreman's 24 Hour Incident Report" describes Plaintiff's accident as: "working on ladder, coming down ladder, twisted leg, hurt knee." The "ADR C-2" report describes the accident as: "working on ladder, coming down ladder, twisted leg hurt knee." Defendants emphasize that neither report makes any reference to a ladder defect or broken rung.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the

[4] Defendants' exhibit H (McAvoy Deposition).

[5] Plaintiff's exhibit G.

existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Defendants argue that summary judgment is warranted because Plaintiff was not engaged in the kind of construction work that is protected under the provisions of the Labor Law at the time of this accident. Defendants further argue - assuming the work does fall under the scope of the Labor Law - that summary judgment is necessary because AMA never instructed Plaintiff on how to perform his work and no one complained about the ladder before his accident. Times Square denies any knowledge or control over the work being performed by ADCO at the premises. It asserts that Plaintiff was not even authorized to be inside 1601 Broadway on the date in question.

In opposition Plaintiff argues that ADCO was performing major renovation work at 1601 Broadway throughout November and December, which would place Mr. Rossani's work squarely within the purview of the Labor Law. Plaintiff moves for summary judgment on his claim under Labor Law 240(1) based upon his testimony that the ladder he was using broke, causing him to fall. Plaintiff also contends that the testimony raises an issue of fact with respect to Defendants' liability under Labor Law 241(6) in that Mr. Rossani may not have been injured had the ladder been properly secured and footed as mandated by New York City's Industrial Codes.

I. Application of the Labor Law[6]

To prevail on a cause of action under Labor Law 240(1), Plaintiff must first establish that he was injured during the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." In determining whether a particular activity is covered under the statute, courts must distinguish between repairs, which fall within the scope of the Labor Law, and routine maintenance, which falls outside of the scope of the Labor Law. *See Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 (1st Dept 2014); *Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511, 512 (1st Dept 2012); *Monaghan v 540 Inv. Land Co. LLC*, 66 AD3d 605, 605 (1st Dept 2009); *Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 555 (1st Dept 2009). Among other factors, courts should consider "whether the work in question was occasioned by an isolated event as opposed to a recurring condition" (*Dos Santos v Consolidated Edison of N.Y.*, 104 AD3d 606, 607 [1st Dept 2013]), whether the object being replaced was "a worn-out component" from an otherwise operable object (*Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 697 [2d Dept 2012]), and "whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement." *Soriano*, 118 AD3d at 526 (citing *Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511, 512 [1st Dept 2012]). "Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering." *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 (2003); *see also Esposito v NY City Indus. Dev. Agency*, 1 NY3d

[6] Labor Law 240(1) provides in relevant part that "[a]ll 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."

523, 528 (2003) (work constitutes routine maintenance where the work involves "replacing components that require replacement in the course of normal wear and tear.")

Defendants attempt to downplay the scope of ADCO's project, but there can be no question that ADCO was hired as part of a significant renovation that involved substantial electrical work. Mr. Rossani testified that in the two weeks prior to his accident he had been installing electrical piping and boxes, drilling, pulling cables, splicing cables, and providing power to light fixtures, among other tasks (Rossani Deposition pp. 30-31). The real question is whether this Labor Law protected work had ended by the time Mr. Rossani was injured. Defendants claim that it had in fact ended, relying upon Ms. Alvino's testimony that the renovation ended a few days earlier, as well as a December 2, 2011 work authorization for changing light bulbs.[7] Mr. Rossani testified that he was sent to finish up the work ADCO was hired to do as part of AMA's renovation project (Rossani Deposition pp. 43-44):

Q. When you had left the site on the day before your accident, did you know what job had to be done the next morning?

A. Yes. To complete the major renovation that we were doing at the building.

Q. What work had you been doing when you left the site on the day before?

A. I was pulling cable, putting up boxes, completing the piping into the panel, pulling cable, renovating the cubicles for power and data.

Q. Did you do each one of those tasks on the day before your accident?

A. It was to basically just to finish up – I mean during the week, like I said, some days the other journeymen were there and we were all completing the renovation. I was just sent there the final day by myself to finish up whatever was not completed.

This work required a certain degree of electrical expertise. Mr. Rossani was not, as Defendants contend, simply changing a lightbulb (*id.* at 57-58):

Q. So after you were asked about the light fixture not working, what did you do?

A. I spliced the power to the light, I went up the ladder and the wires looked new, the fixtures looked new, I just connected the wire to the light.

[7] Defendants' exhibit P.

Q. So was it that the light wasn't working because the connections from the wiring hadn't been attached to the light itself, to the fixture itself?

A. Yes. It hasn't been spliced in yet.

Caselaw is clear that this kind of work is considered "repair" work for Labor Law purposes, not routine maintenance. *See Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 (2d Dept 2017); *Eisenstein v Board of Mgrs. of Oaks*, 43 AD3d 987, 988 (2d Dept 2007).[8]

Defendants' attempt to isolate Plaintiff's specific task at the very moment of his accident is contrary to several opinions from the Court of Appeals. *See Saint v Syracuse Supply Co.*, 25 NY3d 117, 125 (2015); *Prats v Port Auth.*, 100 NY2d 878, 882 (2003) ("it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work"). Also misplaced is Defendants' reliance on *Gdanski v 5822 Broadway Assoc., LLC*, 116 AD3d 658 (2d Dept 2014) for the proposition that Plaintiff was injured after his enumerated activity ended. In *Gdanski*, the plaintiff was called to a building to "check out" an air conditioning unit that his company had previously installed to determine why one of the rooms in the building was not receiving cool air. This work took place after the air conditioning unit was installed, and was neither part of nor ancillary to the original renovation project. Mr. Rossani, on the other hand, was injured immediately upon completing his task.

Ms. Alvino's testimony that ADCO's renovation project had been completed a few days earlier is based on pure speculation. As Ms. Alvino herself admitted, her involvement in the methods and means of ADCO's work was extremely limited, and she had absolutely no recollection of meeting Mr. Rossani, much less of the details of his accident. Records produced by Defendants

[8] This case should not be compared with *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430 (1st Dept 2007), a case from the First Department. In *Rhodes*, the court dismissed the Labor Law claims of a field technician who was assigned the isolated task of splicing a fiber optic cable located in a parking garage in order to provide telephone service to a single tenant located in the building. Mr. Rossani's injury-causing work was part of ADCO's larger renovation project as opposed to an isolated task.

after Ms. Alvino's deposition confirm that ADCO's renovation work continued into December of 2011 and perhaps into January of 2012.[9] Accordingly, her testimony that Mr. Rossani must have been changing lightbulbs as opposed to performing more significant electrical work does not raise an issue of fact. The December 2, 2011 work authorization is equally unavailing. On its face this authorization was for work to be performed by Mr. Perez, ADCO's "house" electrician, not Mr. Rossani.

Finally, Defendants devote significant time in their papers to the building's key card access records to corroborate their claim that the renovation project had ended in November and that the only work ADCO was performing on the date of Mr. Rossani's accident was routine maintenance. Yet the key card records actually support Plaintiff's version of events, revealing ADCO's daily on-site presence for more than just routine maintenance until the end of December. As set forth above, Plaintiff testified that he was injured on December 2, 2011 on the building's 6th floor at approximately 8:30AM while completing repair work.

In this regard, counsel for Defendants asserts that the "key card entries for December 2, 2011, from 4:50am to 10:32pm reflects no use of Card Key #2270."[10] That is incorrect. The records show that ADCO key card #2270, which was assigned to an ADCO foreman, was used to enter the 6th floor on December 2, 2011 at 8:48:41am. (See NYSCEF Doc. 65, p. 23, entry 2). This is important because it shows that ADCO had a construction foreman on site on the day of the accident on the specific floor where Plaintiff was allegedly injured. The records also show that key card #2270 was used to enter the 6th floor in the weeks prior to the accident and in the weeks after the accident. The routine maintenance work was performed by Mr. Perez, who used key card #1750 to access the building's various work areas, including on the day of the accident (See NYSCEF

[9] See, e.g., Plaintiff's exhibit H.

[10] See Defendants' reply affirmation (MS 005), p. 3.

[10]

Doc. 65, p. 13). Together these records show that both routine maintenance and major construction work was being performed by ADCO during the relevant time period. This is consistent with Plaintiff's testimony, contrary to Ms. Alvino's testimony, and most importantly, directly contradicts Defendants' argument that the major construction work had ended by the time Mr. Rossani was injured.

In sum, it is undisputed that ADCO was hired to perform substantial electrical work on the 6th floor during the relevant time period. Records confirm that this work did not end at the end of November as Ms. Alvino believed. The only person deposed with first-hand knowledge of the accident is Mr. Rossani, whose unrefuted description of his work in the days leading up to his accident and on the date in question is that he was performing repair work as part of a larger renovation project, not routine maintenance. I therefore find that Plaintiff's accident is covered by the Labor Law. Defendants' motion for summary judgment on Plaintiff's Labor Law claims on this ground is therefore denied.

II. Labor Law 200

Labor Law 200 codifies the common law duty imposed upon owners and general contractors to provide a safe workplace.[11] *See Rizzuto v L.A. Wenger Contr. Co., Inc.,* 91 NY2d 343, 352 (1998). Labor Law 200 claims are generally predicated upon a two-pronged showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the

[11] Labor Law 200 provides in relevant part that "[a]ll 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."

plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

Here, Plaintiff does not argue, and there is no evidence to show, that Defendants can be held liable under either theory. The testimony is clear that Defendants did not exercise any control over the means and methods of Plaintiff's work. *See Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 (1st Dept 2014); *Fiorentino v Atlas Park LLC*, 95 AD3d 424 (1st Dept 2012); *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 (1st Dept 2011); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007). Plaintiff also admitted that the ladder in question belonged to his employer, that he had used it all week without incident, and that he did not complain to anyone about its condition. As such there is nothing to show that Defendants knew or should have known the ladder was defective. Accordingly, Plaintiff's Labor Law 200 claims are dismissed.

III. Labor Law 241(6)

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers:

> 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 [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and 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.

To recover damages on a Labor Law 241(6) cause of action, Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

In opposing Defendants' motion, Plaintiff relies upon 12 NYCRR 23-1.21 (ladders and ladderways), specifically §§ (b)(1), (b)(3), and (b)(4) thereof.[12] Of these, 12 NYCRR 23-1.21(b)(1), which is sufficiently specific to support a Labor Law 241(6) claim (*see Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008]), is the only one that appears relevant given Plaintiff's testimony that the ladder rung broke while he was descending.

Plaintiff argues that his testimony is enough to show the accident was caused by an insufficiency in the strength of the ladder. For example, in *Soodin v Fragakis*, 91 AD3d 535 (1st Dept 2012), a worker sustained injuries after falling from an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery floor. The First Department held that "[t]he evidence that the ladder collapsed or malfunctioned for no apparent reason raises the presumption that the

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[12] 12 NYCRR 23-1.21(b), entitled "General requirements for ladders", provides, in relevant part:

- (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. . . .
- (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.
- (4) Installation and use.
  - (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.
  - (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
  - (iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.
  - (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used. . . ."

ladder 'was not good enough to afford proper protection' under the statute." *Id.* at 536. However, courts have also dismissed cases predicated upon section 23-1.21(b)(1) where the ladder was in good condition and where the plaintiff had previously used the ladder without incident. In *Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593 (1st Dept 2014), a worker fell off of an A-frame ladder while sanding a closet. The court dismissed his claims, holding "[t]here is no evidence that the ladder was unable to sustain plaintiff's weight, or was not in good condition, or that the floor underneath it was slippery. Plaintiff testified that he had used the ladder in question without incident before the accident . . ." *Id.* at 594. The facts of this case, in particular Plaintiff's testimony that the ladder rung collapsed under his weight, brings this case in line with *Soodin* as opposed to *Campos*.

Defendants contend that Plaintiff's claim must fail, notwithstanding Mr. Rossani's testimony, because the accident reports do not explicitly state that the ladder fell over or suffered a broken rung. The court disagrees. Plaintiff's testimony that the ladder rung broke is enough to withstand summary judgment. At most the accident reports present a credibility issue for the jury to consider at trial. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, I find there is a triable issue of fact whether the ladder was "capable of sustaining [Plaintiff] without breakage" as required by the Industrial Code. Plaintiff's Labor Law 241(6) predicated upon a violation of 12 NYCRR 23-1.21(b)(1) may therefore proceed to trial.

IV. Labor Law 240

Like Labor Law 241(6), Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they had actually exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Specifically, "[t]he purpose of this statute is to protect workers and to impose the responsibility for safety

practices on those best suited to bear that responsibility . . . ." *Ross,* 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. A violation of this duty that proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or agent strictly liable for such injuries. *See Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 (1st Dept 2008).

Defendants' argument on this issue is that there was no evidence that the ladder Mr. Rossani used was defective. To be sure, Mr. Rossani did testify that he had used the ladder without incident and that he checked to make sure it was secure before he ascended. However, the law is clear that Plaintiff need not demonstrate that the ladder was defective before he used it. *Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 290-291 (1st Dept 2002) ("contention that plaintiff was required to show that the ladder from which he fell was defective . . . is not the law"). Where a ladder "collapse[s] or malfunction[s] for no apparent reason", the Court of Appeals has "continued to aid plaintiffs with a presumption that the ladder . . . was not good enough to afford proper protection. . . . Once the plaintiff makes a prime facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, n.8 (2003); *see also Thompson v St. Charles Condos.*, 303 AD2d 152, 154 (1st Dept 2003) ("where a safety device has been furnished, and it collapses, a prima facie case of liability under Labor Law § 240(1) is established.").

Here, the uncontroverted testimony is that the ladder rung broke while Mr. Rossani was descending, causing him to sustain injuries when he fell to the ground. This is sufficient to *prima facie* impose liability upon the Defendants. *See Weber v Baccarat, Inc.*, 70 AD3d 487, 487-488 (1st

Dept 2010) (worker's testimony that the ladder on which he was standing broke established prima facie violation of Labor Law 240(1)); *Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 415 (1st Dept 2009), aff'd 14 NY3d 751 (2010) ("Plaintiff made a prima facie showing of proximate cause under section 240(1) with his unrefuted testimony that the ladder collapsed beneath him causing him to fall"); *Spose v Ragu Foods, Inc.*, 124 AD2d 980, 980 (4th Dept 1986) (error to deny summary judgment under Labor Law 240 where evidence showed ladder rung broke while plaintiff was ascending). Nothing in Defendants' papers raises an issue of fact that there was either no statutory violation or that Plaintiff was the sole proximate cause of his accident.

Defendants' insistence that Plaintiff is lying because the accident reports do not mention the ladder breaking is unavailing. Had the foreman who created them (Mr. Loreto) testified as such things might be different, but there is no evidence that he was in fact deposed. There is also no evidence that Defendants preserved the ladder itself for an inspection. In addition, the reports' narrative sections are each comprised of about ten words. It would be unreasonable to assume that they encompass every detail of the accident. This is precisely why the individuals who complete such reports are usually deposed.

Accordingly, Defendants' motion for summary judgment on Plaintiff's Labor Law 240(1) claims is denied, and Plaintiff's motion for partial summary judgment on his Labor Law 240(1) claim is granted.

CONCLUSION

The court has considered Defendants' remaining contentions and finds them to be without merit. In light of all of the foregoing, it is hereby

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

ORDERED that Defendants' motion for summary judgment is granted with respect to Plaintiff's common-law negligence, Labor Law 200, and Labor Law 241(6) claims, except for those Labor Law 241(6) claims predicated upon a violation of 12 NYCRR 23-1.21(b)(1); and it further

ORDERED that Defendants' summary judgment motion is otherwise denied.

The Clerk of the Court shall mark his records accordingly.

Counsel for all parties are directed to appear for a pre-trial settlement conference in Part 30 on Monday, August 13, at 10:00AM.

This constitutes the decision and order of the court.

ENTER:

DATED: June 18, 2018

SHERRY KLEIN HEITLER, J.S.C.