Paszek v Covanta Energy
2018 NY Slip Op 31934(U)
August 13, 2018
Supreme Court, Suffolk County
Docket Number: 14-5998
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 14-5998
CAL. No. 17-00942OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-14-17
ADJ. DATE 12-7-17
Mot. Seq. # 001 - MotD

ZBIGNIEW PASZEK,

Plaintiff,

- against -

COVANTA ENERGY, COVANTA ENERGY CORP, HUNTINGTON RESOURCE RECOVERY FACILITY,

Defendants.

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Upon the following papers numbered 1 to 42 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 33; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 34 - 39; Replying Affidavits and supporting papers 40 - 42; Other ___; it is,

ORDERED that the motion by defendants Covanta Energy Corporation and Covanta Huntington, L.P. for summary judgment dismissing the complaint is granted in part and denied in part.

This is an action to recover damages for injuries allegedly sustained by plaintiff Zbigniew Paszek on January 12, 2014, when he fell from a ladder during the course of his employ by Patalan 650 Mechanical Corporation ("Patalan 650") at a construction site operated by defendants Covanta Energy Corporation and Covanta Huntington L.P., improperly sued herein as Covanta Energy Corp. and Huntington Resource Recovery Facility, in Huntington, New York. Plaintiff asserts claims against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6).

Plaintiff testified that he was employed by Patalan 650 as a laborer and welder helper, and was familiar with the Covanta facility, as Patalan 650 employees occasionally worked there. On this particular occasion, plaintiff had been working at Covanta for three or four days prior to his accident. Plaintiff further testified that it rained on the day of the accident, but only drizzled where he was

working. He was wearing gloves, goggles, and a hard hat. After checking in at Covanta, plaintiff received orders from Stefan Kowalewski, his supervisor at Patalan 650, after Mr. Kowaleski received orders from Covanta. Plaintiff then began removing insulation and siding from the "cone" that holds ash from burned garbage in order to later patch a hole in the cone. Plaintiff testified that he was utilizing an 8- or 10-foot red fiberglass or aluminum A-frame ladder with feet made of plastic and in good condition. Plaintiff did not know if the ladder belonged to Patalan 650 or Covanta. Plaintiff stated that he had been working for two or three hours in two or three different spots, removing the insulation and dropping it to the ground before the accident occurred. Plaintiff also stated that he was in the position from which he fell for 15 minutes before the accident occurred. Plaintiff testified that ash fell from the holes of the cone to the ground, but he did not clear it away, because the workers would clean the area at the end of their work. Plaintiff stated that both himself and the top step of the ladder were covered in ash, and that the concrete below the ladder was wet and smooth. Plaintiff explained that he held onto a bracket of pipe with his left hand and removed insulation with his right hand while he right foot was on top of the ladder and his left foot was on a pipe next to the cone. Plaintiff testified that the ash underneath his left hand became wet and he fell down with the ladder.

Plaintiff further testified that there "must have been" ladders longer than the one he was using, "because there [were] a lot of ladders [at Covanta]," but he did not look for a longer ladder. The three Patalan 650 trucks on site were outfitted with 20- or 22-foot extension ladders, but not A-frame ladders longer than six feet. There was an approximately six-foot scaffold with a plywood platform on site owned by Covanta, but plaintiff did not ask to use it. Plaintiff stated that he did not ask to use a scissor lift or man lift, because there was no room for it in the spot he was working. Plaintiff denied making any complaints about the ladder or ash on the ground where he placed the ladder. Plaintiff also denied hearing any complaints about ash on the ground. Plaintiff admitted that he knew harnesses were available that could be tied to a portion of the cone, but that it would require he weld a ring to use such harnesses. He also admitted that he was not using a safety belt or harness at the time of his accident.

Through his deposition testimony, Dermott Carey, fifth shift supervisor and safety coordinator at Covanta, explained that the Huntington Resource Recovery Facility is an energy-from-waste power plant owned by Covanta, and that Patalan 650 is a contractor that handles mostly welding repairs at the facility. Mr. Carey testified that his employment duties included facility safety, scheduling, and special projects. He also issued Patalan 650 employees safety supplies such as work gloves, welding gloves, Tyvek suits, respirator supplies, and safety glasses. Workers were also given fall protection devices such as fully body harnesses, an assortment of lanyards, including retractable lanyards, anchor point straps, and other anchor point equipment. Mr. Carey stated that plaintiff also had his own set of harnesses. He testified that Covanta's policy required harnesses be used when conducting work elevated above four feet, and that it was possible to move a man-lift and scaffold in the area where plaintiff's was working. Mr. Carey answered negatively when asked whether he ever directed plaintiff in the work he performed.

Mr. Carey further testified that Eugene Maldoon, the shift supervisor on-duty at the time of plaintiff's accident, called him to the scene of the accident and that he arrived within minutes to find plaintiff bleeding on the ground in the air pollution control ("APC") area. Mr. Carey observed the ground was dry and that there was ash where plaintiff was lying. He also observed that the nearest

ladder was an 8- or 10-foot A-frame ladder owned by Covanta hanging on a hook at the APC ladder station. Mr. Carey later learned that plaintiff had been working on a spray dryer hopper to repair a hole, which would involve removing panels and insulation, but was unsure if plaintiff had been working on a ladder.

Stefan Kowalewski, plaintiff's supervisor at Patalan 650, testified that plaintiff had a 10-hour "OSHA card" at the time of the accident, which included classes for fall protection. Mr. Kowaleski stated that safety meetings were conducted every three months at Covanta and that at the last Covanta safety meeting before the accident, Mr. Carey discussed ladders and fall protection. He further testified that plaintiff was installing installation at an elevation of eight feet using a Covanta ladder, about which plaintiff never complained. Mr. Kowalewski stated that plaintiff could have utilized a Covanta scaffold, but could not have utilized Patalan 650's extension ladder, because he was supposed to use Covanta's ladders. Mr. Kowalewski testified that he observed one 6-foot A-frame and one 8-foot A-frame ladder provided by Covanta on site.

Bobby Patalan, owner and president of Patalan 650 Mechanical Corporation, testified that although Covanta provided a list of the work that needed to be done, Mr. Kowalewski instructed the Patalan 650 workers what to do and how to do it. Mr. Patalan stated that each Patalan 650 truck on site was outfitted with three ladders: a 26-foot extension ladder, an 8-foot A-frame ladder, and a 6-foot A-frame ladder. Covanta had A-frame ladders and scaffolds on site, and also had safety equipment and harnesses available in addition to the harness Patalan 650 provided to plaintiff. Mr. Patalan testified that he learned from another Patalan 650 employee that plaintiff had not been wearing his safety harness as he was standing on a ladder removing tin using a screw gun. Mr. Patalan further testified that when he arrived at the hospital following the accident, he believed plaintiff was drunk.

Defendants Covanta Energy and Covanta Huntington now move for summary judgment dismissing the complaint on the grounds that they had no authority to supervise or control plaintiff's work and that plaintiff's own actions were the sole proximate cause of his alleged injuries. Defendants submit, in support of the motion, copies of the pleadings, the bill of particulars, the note of issue, photographs, the Covanta Energy 24-hour report, an accident report form, the Covanta Energy incident classification document, the affidavit of Martin Bruno, and the transcripts of the deposition testimony of plaintiff, Dermott Carey, Bobby Patalan, and Stefan Kowalewski. In opposition, plaintiff argues that he was not provided adequate safety devices to perform his work in violation of the Labor Law. Plaintiff submits, in opposition, his affidavit and the affidavit of Kathleen Hopkins.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary

judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law § 200 is a codification of the common law duty of owners or general contractors to maintain a safe construction site (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work rather than a defective premises condition, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that he or she had the authority to supervise or control the performance of the work (*see* ***La Giudice v Sleepy's Inc.***, 67 AD3d 969, 890 NYS2d 564 [2d Dept 2009]; ***McFadden v Lee***, 62 AD3d 966, 880 NYS2d 311 [2d Dept 2009]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (***Ortega v Puccia***, *supra*, at 62). In the alternative, where a defective premises condition is alleged, a property owner may only be held liable for violation of Labor Law § 200 if it either created the dangerous condition, or had actual or constructive notice of its existence (*see* ***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***La Giudice v Sleepy's Inc.***, *supra*; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, *supra*; ***Azad v 270 5th Realty Corp.***, 848 NYS2d 688 [2d Dept 2007]).

Defendants established their *prima facie* entitlement to summary judgment dismissing plaintiff's claims in common law negligence and Labor Law § 200 through evidence that plaintiff's accident stemmed from the manner of his work rather than a dangerous condition or defect in the ladder, and that they did not have the authority to control or supervise the performance of plaintiff's work (*see* ***La Giudice v Sleepy's Inc.***, *supra*; ***McFadden v Lee***, *supra*; ***Ortega v Puccia***, *supra*; ***Kwang Ho Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]). Significantly, while testifying that there was wet ash on the ground beneath the ladder, plaintiff did not testify that such condition caused the ground to be slippery, or that it contributed to his accident. In addition, plaintiff did not testify that the ladder in question was defective (*cf.* ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). Further, the testimony submitted established that defendants neither directed nor controlled the manner of plaintiff's work (*see* ***La Giudice v Sleepy's Inc.***, *supra*; ***McFadden v Lee***, *supra*; ***Ortega v Puccia***, *supra*). Covanta's right to generally supervise the work performed did not amount to supervision and control of the work site (***Ferreira v City of New York***, 85 AD3d 1103, 927 NYS2d 100 [2d Dept 2011]; ***Ortega v Puccia***, *supra*; ***Dennis v City of New York***, 304 AD2d 611, 758 NYS2d 661 [2d Dept 2003]; ***Warnitz v Liro Group***, 254 AD2d 411, 678 NYS2d 910 [2d Dept 1998]).

Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see* ***Saint v Syracuse Supply Co.***, 25 NY3d 117, 8 NYS3d 229 [2015]; ***Misseritti v Mark IV Constr. Co., Inc.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]). The hazards intended to be mitigated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a

difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240 (1) requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). The question of whether the safety device at issue provided protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact for the jury (*see* ***Garhartt v Niagara Mohawk Power Corp.***, 192 AD2d 1027, 596 NYS2d 946 [3d Dept 1993]; ***Plass v Solotoff***, 283 AD2d 474, 724 NYS2d 887 [2d Dept 2001]). Moreover, "[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1)" (***Xidias v Morris Park Contr. Corp.***, 35 AD3d 850, 851, 828 NYS2d 432 [2d Dept 2006]; *see* ***Hugo v Sarantakos***, 108 AD3d 744, 970 NYS2d 245 [2d Dept 2013]; ***Gaspar v Pace Univ.***, 101 AD3d 1073, 957 NYS2d 393 [2d Dept 2012]). Rather, 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 (*see* ***Xidias v Morris Park Contr. Corp.***, *supra*, at 851; *see* ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; ***Artoglou v Gene Scappy Realty Corp.***, 57 AD3d 460, 461, 869 NYS2d 172 [2d Dept 2008]). However, a plaintiff cannot prevail on a Labor Law § 240 (1) claim if "his or her actions were the sole proximate cause of the accident" (***Saavedra v 64 Annfield Ct. Corp.***, 137 AD3d 771, 772, 26 NYS3d 346 [2d Dept 2016]; *see* ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 814 NYS2d 589 [2006]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 771 NYS2d 484 [2003]; ***Plass v Solotoff***, 5 AD3d 365, 773 NYS2d 84 [2d Dept 2004]).

Defendants failed to establish their *prima facie* entitlement to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, as the submissions did not demonstrate that plaintiff's actions were the sole proximate cause of his fall (*cf.* ***Saavedra v 64 Annfield Ct. Corp.***, *supra*; ***Plass v Solotoff***, *supra*). While a defendant may escape liability under Labor Law § 240 (1) when the submissions show that the plaintiff refused to use the safety devices provided by the employer, "the mere presence of alleged safety devices somewhere on the job site . . . nor the mere fact that generalized safety instructions were given at some point in the past" will not defeat liability (***Palacio v Lake Carmel Fire Dept., Inc.***, 15 AD3d 461, 463, 790 NYS2d 185 [2d Dept 2005] [internal quotations omitted]; ***Marin v Levin Props., LP***, 28 AD3d 525, 812 NYS2d 645 [2d Dept 2006]). Defendants' showing that plaintiff had access to safety devices such as harnesses is insufficient to meet their *prima facie* burden (*see* ***D'Angelo v Builders Group***, 45 AD3d 522, 845 NYS2d 814 [2d Dept 2007]). In addition, a triable issue of fact exists as to whether there were longer ladders or scaffolds available in the immediate vicinity that could fit in the area of plaintiff's work site (*cf.* ***Montgomery v Federal Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]; ***Saavedra v 64 Annfield Ct. Corp.***, *supra*; ***Plass v Solotoff***, *supra*). Further, defendants' evidence failed to establish whether the ladder plaintiff used was an adequate safety device (*see* ***Santo v Scro***, 43 AD3d 897, 841 NYS2d 627 [2d Dept 2007]).

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]). A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code, which gives a specific, positive command, and is applicable to the facts of the case" (***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 958, 951 NYS2d 54 [2d Dept 2012]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Furthermore, a plaintiff must show that the violation of the regulation was a proximate cause of his or her accident (*see* ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]).

Defendants, however, made a *prima facie* case of entitlement to summary judgment dismissing the Labor Law § 241 (6) cause of action by establishing that the Industrial Code provisions cited by plaintiff are inapplicable to the case at bar (*see* ***Palacios v 29th Street Apts, LLC***, 110 AD3d 698, 972 NYS2d 615 [2d Dept 2013]; ***Paladino v Society of New York Hosp.***, 307 AD2d 343, 762 NYS2d 637 [2d Dept 2003]). 12 NYCRR 23-1.5, which merely sets forth a general standard of care for employers, cannot serve as a predicate for liability pursuant to Labor Law § 241 (6) (*see* ***Honeyman v Curiosity Works, Inc.***, 154 Ad3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Ulrich v Motor Parkway Props., LLC.***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Pereira v Quogue Field Club of Quogue, Long Is.***, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]). 12 NYCRR 23-1.21 (b) sets forth physical requirements for ladders used in industrial settings providing, in relevant part, that "[e]very 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," and that "[a]ll ladders shall be maintained in good condition [and] shall not be used if . . . it has a broken member or part, [i]f it has any insecure joints between members or parts, [or] [i]f it has any flaw or defect of material that may cause ladder failure." As to the use of ladders, 12 NYCRR 23-1.21 (b) (4) requires that "[a]ll ladder footings shall be firm," that "[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings," that "[a] leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions," and that "[t]he upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder." Here, plaintiff testified that the ladder in question had feet in good condition, and did not state that any ladder defect caused him to fall (*see* ***Yao Zong Wu v Zhen Jia Yang***, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]). Despite noting the presence of water and ash on the ground near the cone, plaintiff did not testify that such water and ash rendered the ground slippery. 12 NYCRR 23-2.1, which sets forth requirements for material or equipment storage and disposal of debris, is not applicable under the circumstances of this case (*see* ***Gargan v Palatella Saros Builders Group, Inc.***, __ NYS3d __, 2018 NY Slip Op 04701 [2d Dept 2018]; ***Thompson v BFP 300 Madison II, LLC***, 95 AD3d 543, 943 NYS2d 515 [1st Dept 2012]; ***Zamajtys v Cholewa***, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]). 12 NYCRR 23-1.32 concerns a contractor's responsibility to prevent the entry of its workers into unsafe areas to which the contractor has been given written notice of their danger. As there is no evidence that defendants received any manner of written notice of potential dangers extant in the area of the cone or relating to the subject ladder, this provision is irrelevant (*see* ***Mancini v Pedra Const.***, 293 AD2d 453, 740 NYS2d 387 [2d Dept 2002]).

In addition, 12 NYCRR 23-1.7 (a) through (c) are inapplicable, as these provisions relate to overhead, falling, and drowning hazards, respectively. Further, any claims made under 12 NYCRR 23-1.7 (f) through (h) are similarly devoid of merit, since they regulate the use of vertical passages as a means of entering or exiting work areas above or below ground level, work areas that are oxygen deficient or contaminated, and the storage of corrosive substances, respectively. 12 NYCRR 23-1.7 (d), regarding slippery conditions of elevated working surfaces and foreign substances which may cause slippery footing, does not apply to the facts of this case, as plaintiff testified that the feet of the ladder were in good condition, and plaintiff does not attribute his accident to a slippery condition on the ground (*see* ***Cross v Noble Ellenberg Windpark, LLC***, 157 AD3d 457, 68 NYS3d 456 [1st Dept 2018]; ***Croussett v Chen***, 102 AD3d 448, 958 NYS2d 105 [1st Dept 2013]). Moreover, the ash on the ground was not a "foreign substance," as it naturally resulted from plaintiff's work (*see* ***Kowalik v Lipschutz***, 81 AD3d 782, 917 NYS2d 251 [2d Dept 2011]). 12 NYCRR 23-1.7 (e), regarding tripping hazards, is inapplicable where, as here, the submissions indicate that plaintiff did not fall as a result of an accumulation of dirt or debris (*see* ***Varona v Brooks Shopping Ctrs. LLC***, 151 AD3d 459, 56 NYS3d 87 [1st Dept 2017]). Rather, plaintiff testified that he fell as a result of his hand slipping from the pipe, which he was holding onto, not a tripping hazard (*see* ***Purcell v Metlife, Inc.***, 108 AD3d 431, 969 NYS2d 43 [1st Dept 2013]). As the submissions demonstrate that plaintiff was provided with adequate protection to prevent him from falling, but chose not to utilize such protection, defendants did not violate 12 NYCRR 23-1.16 (*cf.* ***Yaucan v Hawthorne Village, LLC***, 155 AD3d 924, 63 NYS3d 721 [2d Dept 2017]; ***Giordano v Tishman Const. Corp.***, 152 AD3d 470, 59 NYS3d 28 [1st Dept 2017]).

In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). CPLR 2101 (b) provides that if "an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." Plaintiff failed to submit his original affidavit in Polish, the full name of the translator, and the translator's sworn statement that the translation is accurate (*see* ***Saavedra v 64 Annfield Ct. Corp.***, *supra*; ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]). The affidavit of plaintiff's expert, which was conclusory and unsupported by empirical data or relevant industry standards, is insufficient to defeat defendants' *prima facie* showing (*see* ***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 951 NYS2d 54 [2d Dept 2012]).

Accordingly, the motion by defendants for summary judgment dismissing the complaint is granted in part and denied in part.

Dated: August 13, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION