SHORT FORM ORDER

COPY

INDEX No. 15-18703
CAL. No. 17-01690OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 1-5-18
ADJ. DATE 1-12-18
Mot. Seq. # 001 - MotD

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ANGEL PERALTA,

Plaintiff,

- against -

377 JOBS LANE LLC and SAGAPONACK BUILDERS LLC,

Defendants.

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 30 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 31 - 32 ; Replying Affidavits and supporting papers 33 - 34 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Angel Peralta for partial summary judgment in his favor on the issue of liability is granted in part and denied in part.

This is an action to recover damages for injuries allegedly sustained by plaintiff Angel Peralta on October 31, 2014, when he fell from a ladder at a construction site owned by defendant 377 Jobs Lane LLC. The accident occurred during plaintiff's employ as an HVAC laborer by non-party Kolb Mechanical Corp., a subcontractor for defendant Sagaponack Builders LLC. Plaintiff asserts claims against defendants for common law negligence, and violations of Labor Law §§200, 240 (1), and 241 (6).

Plaintiff testified that he had been working at the 377 Jobs Lane construction site installing heating and air-conditioning ducts for approximately ten days prior to his accident. David Coriano, a Kolb Mechanical foreman, gave plaintiff instructions on how to do his work a few days before the accident. Plaintiff further testified that at the time of the accident, he was working on the second floor of the construction site, in a large living room, connecting pieces of flexible air-conditioning ducts in the ceiling. Plaintiff stated that he was utilizing a six-foot A-frame ladder, which was in good condition and not in need of any repairs. The plywood floor was level, clean, and free from debris. In addition, there were 4-inch by 12-inch openings in the floor where ducts were to be installed.

Plaintiff testified that while standing with both feet on the fourth step of the ladder, he would pull the duct towards himself while a coworker pushed it towards him. Plaintiff explained that while pulling the duct above his head, "the ladder would tilt because of all of the force [he] was using to pull, then [he] would push [his] body back." Such movement would cause the ladder to rock off two of its feet. The accident occurred when the left front leg of the ladder slid into a duct opening on the floor four to six inches away from the ladder, causing plaintiff to fall to the floor. Plaintiff stated that he was aware of the opening and that no pieces of plywood were nearby that could have been put over it. Plaintiff admitted that nothing prevented him from placing the ladder further from the opening.

Plaintiff now moves for partial summary judgment in his favor on the issue of liability on the ground that defendants' failure to maintain a safe work environment caused his injuries. Plaintiff submits, in support of the motion, copies of the pleadings, the bill of particulars, a building permit, a property deed, and the transcripts of the deposition testimony of himself and Karin Pedersen Adelman, the project manager for Sagaponack Builders LLC. In opposition, defendants argue that plaintiff's actions were the sole proximate cause of his fall.

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, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it is shown that he, she, or it 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 he, she, or 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]).

To the extent plaintiff's Labor Law §200 claim is based on the allegedly defective condition or inadequacy of the ladder, plaintiff failed to meet his prima facie burden, as he did not demonstrate that defendants had the authority to supervise or control the performance of his work (*see* ***LaGiudice v Sleepy's Inc.***, *supra*; ***Ortega v Puccia***, *supra*). To the extent plaintiff's Labor Law §200 claim is based on the allegedly defective condition of the opening in the floor, plaintiff failed to meet his *prima facie* burden, as he did not demonstrate that defendants either created the condition, or had actual or constructive notice of its existence (*see* ***Ortega v Puccia***, *supra*).

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]).

Plaintiff failed to establish a prima facie case of entitlement to summary judgment in his favor on his Labor Law §241(6) claim, as the Industrial Code provisions cited by plaintiff are inapplicable to the case at bar. 12 NYCRR 23-1.3 and NYCRR 23-1.5, which merely set 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]; ***Weinberg v Alpine Improvements, LLC***, 48 AD3d 915, 851 NYS2d 692 [3d Dept 2008]). 12 NYCRR 23-1.15 and 12 NYCRR 23-1.16 regulate the manner and construction of various safety devices which may be used on construction sites, if required, when a worker is performing his or her duties at a height. As no safety devices are alleged to have been in use, those sections are not applicable here (*see* ***Kwang Ho Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]). 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 specify any ladder defect that caused him to fall (*compare* ***Melchor v Singh***, *supra*; ***Kozlowski v Ripin***, 60 AD3d 638, 874 NYS2d 241 [2d Dept 2009]).

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.***, *supra*; ***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.***, *supra*, at 514; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*). 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]; ***Yao Zong Wu v Zhen Jia Yang***, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; ***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* ***Yao Zong Wu v Zhen Jia Yang***, *supra*; ***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]).

Plaintiff made a *prima facie* case of entitlement to summary judgment in his favor on his Labor Law §240 claim. His submissions demonstrate that he fell from an unsecured ladder when one of its legs slid into an opening in the floor, and that the failure to secure the ladder or provide safety devices proximately caused his injuries (*see* ***Poalacin v Mall Props., Inc.***, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; ***Baugh v New York City Sch. Constr. Auth.***, 140 AD3d 1104, 33 NYS3d 472 [2d Dept 2016]; ***Ronbinson v Bond St. Levy, LLC***, 115 AD3d 928, 983 NYS2d 66 [2d Dept 2014]; ***Canas v Harbour at Blue Point Home Owners Assn., Inc.***, 99 AD3d 962, 953 NYS2d 150 [2d Dept 2012]). In opposition, defendant failed to raise a triable issue of fact as to whether plaintiff's conduct was the sole proximate cause of the accident (*see* ***Poalacin v Mall Props., Inc.***, *supra*; ***Baugh v New York City Sch. Constr. Auth.***, *supra*; ***Canas v Harbour at Blue Point Home Owners Assn., Inc.***, *supra*).

Accordingly, plaintiff's motion for summary judgment in his favor on the issue of liability is granted in part and denied in part.

This shall constitute the decision and Order of the Court.

Dated: September 10, 2018

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**