Sheldon v Weinstein Enters., Inc.
2018 NY Slip Op 32459(U)
September 28, 2018
Supreme Court, Kings County
Docket Number: 504941/13
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of September, 2018.

PRESENT:

HON. DEBRA SILBER,
Justice.

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SERGY SHELDON,

Plaintiff,

- against -

WEINSTEIN ENTERPRISES, INC.,

Defendant.

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DECISION / ORDER

Index No. 504941/13
Mot. Seq. # 5 & 6

The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	
Defendant's 2017 Affirmation	8
Other Papers	

Upon the foregoing papers, defendant Weinstein Enterprises, Inc. (defendant) moves, (Motion Seq. # 5) pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Sergy Sheldon (plaintiff). Plaintiff moves, pursuant to CPLR 3212, for summary judgment on his Labor Law § 240 (1) cause of action (Mot. Seq. # 6).

The instant action arises out of a June 25th, 2013 accident on the roof of the second floor of a two-story commercial building owned by defendant, located at 3017 Hempstead Turnpike in Levittown, New York (the subject building), from which plaintiff sustained several injuries. At the time of the accident, the first floor of the building was leased to Old Country Buffet and part of the second floor of the building was leased, or was soon to be leased, to a real estate company called Home Start Exit Realty (Home Start Realty).

On the day of the accident, plaintiff was employed as an air-conditioning technician by a company called Pro Aire Design (Pro Aire), owned by Steve Layton. At approximately 8:30 a.m., plaintiff was given a slip of paper at the Pro Aire office containing the model and serial number of an air conditioner and the address of the subject building, where plaintiff was to perform "[s]ervice, checking on the AC unit" (the unit) with a co-worker also employed by Pro Aire, whom plaintiff had met for the first time that day.

Plaintiff testified that this "service" and "checking" of the unit was "part of the regularly scheduled maintenance with the commercial air-conditioning unit at 3017 Hempstead Turnpike," but then stated that actually he did not know whether Pro Aire had a contract with the owners at 3017 Hempstead Turnpike to perform routine scheduled maintenance; whether Pro Aire was responsible for performing routine maintenance on commercial air conditioning "units" at 3017 Hempstead Turnpike, or whether Pro Aire had ever serviced the air-conditioning unit at the subject building prior to the date of his accident. His employer had sent him to check "what's wrong with the unit" because the new [lessee]

in the building reported that it had a problem with its air conditioning, namely the unit was running but was not cooling the premises.

Plaintiff was also told to clean the coils inside the AC unit with a power washer, namely "to perform power wash coil cleanings, evaporate and condition" to the condenser, and other work as well, albeit verbally. Mr. Layton told plaintiff to "check the compressor." Plaintiff understood that the air conditioner, called a York unit, was not working properly, that there was a problem with it, and that he had to "first . . . find out what's the problem, and then . . . fix it."[1] When asked how he was told that the unit was not working properly, he said: "[t]hat's why we came, because we had complaints from the owners . . ., that someone called Pro Aire saying there was a problem with the unit; and that the unit was running but it was not cooling the inside of the premises."

According to plaintiff, if a commercial air-conditioning unit was used frequently in the summer, its coils were supposed to be cleaned every two to three months. It was necessary to wash the coils of a commercial air-conditioning unit "with some regularity," and Pro Aire had contracts with customers to perform continued maintenance, such as the power washing of the coils. When commercial air-conditioning units are serviced, checking an air compressor is part of the regular maintenance. Pro Aire had contracts with customers to perform "continued maintenance," such as the power washing of the coils.

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[1]Plaintiff also testified that he "was fixing" the unit, and that "[t]he problem was with the AC unit, it wasn't working properly. I had to find out what is the problem with the unit, not how the drainage should work."

At about 10:00 a.m. on the day of the accident, plaintiff arrived at the building, spoke to a woman working for the real estate company on the second floor, and asked her how to access the roof. She did not know how to access the second floor roof, and there seemed to be no way to access it. Plaintiff and his co-worker used a 20-foot ladder to access the first floor roof and then they placed the same ladder on the first floor roof to access the second floor roof, which was approximately 18 feet higher than the first floor roof. The part of the second floor roof where the equipment was located was flat and was approximately 20 feet long by 20 feet wide. However, the unit was installed close to the edge of the roof, not in the center. There was a black circular drainage pipe next to the unit to drain water. The roof near the unit was wet, with a lot of water, more than would be expected to come from a commercial air-conditioning unit. There was only enough space for plaintiff to put one foot near the unit in order to stand and perform his work, which was not enough space to work on the unit without falling off the building.[2]

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[2]In support of his motion and in opposition to those branches of defendant's motion to dismiss plaintiff's Labor Law §§ 240 (1) and 200 causes of action, plaintiff relies on the affidavit of his expert, engineer Scott A. Silberman, P.E., who visited the site of the accident on April 7, 2016. Mr. Silberman states that his opinion (about the accident) is based upon his "understanding that the condition of the roof and area surrounding the subject AC Unit at the time of my site visit fairly and accurately depicted the condition of the roof and area surrounding the subject AC Unit at the time of Mr. Sheldon's accident (Plaintiff's Exh. 14, Affidavit of Scott A. Silberman, P.E., ¶¶ 19-20). He further states that based upon his site visit, "the following conditions are noted: (a) the subject building is located west of a shorter building and the subject AC Unit is located on the east edge of the subject roof; (b) the lower roof (first floor roof) is approximately 16 feet 6 inches (16'-6") below the roof where Mr. Sheldon was performing his work on the AC Unit; and (c) the area where Mr. Sheldon was standing can be seen in the picture" annexed to his affidavit as Exhibit B (*id.* at ¶ 21). He also states that "[a]long the perimeter of the roof, there is a raised and irregular surface (curb) which is also pitched at a

(continued...)

Plaintiff "checked on the unit . . . from [the] inside" by turning on the thermostat and checking the filters, because "the unit was first on and then off and on again." In order to check the thermostat in the second floor office, plaintiff had to use the ladder to go from the second floor roof to the first floor roof, and then to the ground floor, which made him and his co-worker "exhausted before [they] had even started." Having checked the thermostat, plaintiff knew "that something was wrong with the unit." Plaintiff and his co-worker then turned off the unit and power-washed the condensing coil and the operating coil with a power-washing machine.

Plaintiff then turned on the unit and began checking the compressors to see if they were running properly. In order to perform this task, plaintiff had to access the unit from the space between the unit and the edge of the roof because the compressors were located behind the first cover on the left side of the unit, which was between the unit and the edge (Plaintiff's Exh. 8 [Defendant's Exh. B], photographs, depicting that from the front of the unit to the extended "vent" in the back of the unit there was only room for one of plaintiff's feet between the side of the unit and the edge of the roof). It was not possible to access that portion of the unit from the front of the unit.

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[2](...continued)
different grade and different directions" (*id.* at ¶ 22); that "[t]he portion of the roof between the side of the AC Unit and the irregularly shaped edging is only about 18 inches (18") (*id.* at ¶ 23); and that "[t]he outside edge of the roof itself is 41 inches (41") away from the side of the AC Unit (*id.* at ¶ 24, citing his Exhibit C "for additional measurements" and his Exhibit D "to show that the slope closest to the AC Unit is 49.7%").

For approximately one hour, plaintiff had to remain in a crouched position in this small space between the unit and the edge of the roof in order to access the compressors. For this work, plaintiff was wearing gloves, and he was holding a gauge in his right hand to check the pressure on the two compressors by switching the gauge from one compressor to the other. To perform this task, plaintiff's co-worker turned the unit off, and then plaintiff switched the gauge to the other compressor, whereupon his co-worker turned the unit back on. The compressors showed "[s]ome ridiculous stuff, not right stuff, not what the compressor is." According to plaintiff, he was "supposed to show that is why it took me a lot of time to figure out what's going on. It actually was two compressors," so I was switching from one compressor to another one."

Sometime between 1:00 p.m. and 2:00 p.m., plaintiff's knee had become tired from crouching, so he attempted to stand up. At that point, one of his feet slipped a little and he lost his balance. According to plaintiff, he did not know why he slipped. He testified: "My knee was really tired and I don't know - I tried - probably I tried to make one of my leg [sic] - how to say feel free, but maybe it didn't did [sic] the right move and it slipped. I can't describe whatever - it all happened in one second. So, I just slipped one leg and then I lost the balance." After a break at his EBT, plaintiff then testified that he "slip[ped] on water when [he was] attempting to get up in the seconds before the accident," and that he "didn't slip at all because [his] legs were tired."

In any event, after plaintiff's right foot slipped, he lost his balance, and fell backward. Aware that he could fall from the roof, plaintiff threw out his left hand to try to grab something.[3] The pinky finger, ring finger and middle finger of his left hand, which still had the glove on it, made contact with the blades of the unit. Plaintiff then jumped to the left side, and tried to "pull [himself] from falling" - i.e. to avoid falling, to get away from the edge, and to find a safe position where there was more room. As a result, plaintiff's left knee hit the corner of the air conditioner. Plaintiff was bleeding from his left hand. He managed to climb down the ladder to the first floor of the building with the assistance of his co-worker, was treated by EMT workers, and was taken to the hospital.

Defendant's witness, Mr. Sal Cappuzzo, testified that he was employed as the corporate treasurer for defendant. Defendant owns and operates mostly commercial real estate in the New York metropolitan area. As corporate treasurer, Mr. Cappuzzo maintains the books and records of defendant, collects rent from defendant's tenants, pays expenses on defendant's properties, and maintains contact with all of defendant's tenants. He also performs physical inspections of the properties having problems and tries to resolve them.

In June of 2013, defendant owned the property located at 3017 Hempstead Turnpike. At that time, the first floor was rented to Old Country Buffet. A real estate office, named Home Start Exit Realty, moved into a portion of the second floor at around that time. Mr. Cappuzzo did not know if the real estate office had moved in by June 2013 but also testified

[3]At that moment, he was still holding the gauge in his right hand.

that Old Country Buffet and Home Start Realty were subject to commercial lease agreements as of June of 2013. The rest of the second floor was empty but defendant was trying to lease it.

The building has multiple roofs. The front side of the building has a peaked roof which is pitched; the back portion of the building has a flat roof, which is located above the second floor real estate tenant. In June 2013, there was a rooftop HVAC air-conditioning unit on the flat portion of the second floor roof, which provided both heat and air conditioning to the entire second floor.

In June 2013, defendant was "trying to get the unit serviced" in anticipation of the real estate tenant moving into the premises. On June 25, 2013, the date of plaintiff's accident, defendant was paying the bills for Pro Aire:

> "in anticipation of Exit Home Start Real Estate [sic] leasing the premises from us. We wanted to make sure that the unit was operational and we serviced it in the beginning of the lease . . . There had been a previous tenant in the space who was also responsible to maintain and service the unit. We had no idea if it had been done right, so as the landlord . . . we want to make sure that we are giving our tenant an operational unit. We are telling them that they are responsible to maintain it going forward so Weinstein Enterprises paid for that initial service."

Initial service really meant "initial maintenance." Once Home Start Realty moved in, Mr. Cappuzzo was clear that the responsibility for the care and maintenance of the unit would be the tenant's. According to Mr. Cappuzzo, he had "no "idea" what "was involved in that maintenance" but also testified that "the service company comes in and they change belts,

they adjust things, they change filters, they have to make sure it's running to peak performance," and they "perform some type of special service to clean [the coils] so [the air conditioner] performs better." As of June 25, 2013, there had not been any complaints regarding the unit, he stated.

Mr. Cappuzzo did not know if the air-conditioning unit leaked. He was familiar with the second floor flat portion of the roof because he had visited that area. When asked whether he was familiar with the drainage [of the unit], he replied that he was familiar with it "by looking out the window on the back of the space," but (contradicting his earlier answer) he had never "been out on the roof itself," although the window in the back kitchen area "offered a view of [the subject] air-conditioning unit." He had never seen water collecting under the unit. When asked how frequently he looked out that window in June 2013, he replied: "If I happened to glance out the window." He was at the premises of the second floor tenant every three to four months but did not know if he looked out the window at the unit when there. In June of 2013, he said he was at the subject building, meaning "the entire premises" once a month.

Mr. Cappuzzo did not know what repairs had been done to the second floor portion of the roof where the unit was located in the two years before June 2013. Defendant and Mr. Cappuzzo were never notified that there was a maintenance issue on the second floor of the roof that housed the unit; prior to June 2013, Mr. Cappuzzo did not know when the air conditioner was last serviced; and he thought the air conditioner was working, but then said

"I don't know." Defendant wanted to give the new tenant "a good operational unit," and defendant and Mr. Cappuzzo did not know if the unit was operational, but "want[ed] to make sure that th[ere] is service before we give them to our tenants." Mr. Cappuzzo did not observe the servicing, was not advised what was going to be done, did not get any "specific indications as to what was going to be done," and except for calling Pro Aire and asking them to service the unit, he and defendant had no involvement with it. Pro Aire "check[s] the unit and make[s] sure it's working and service[s] the unit if it needs any servicing." Defendant did not request that Pro Aire power wash the unit or clean the coils. "Pro Aire . . . would tell us what the unit needs, we are not experts in HVAC service." Mr. Cappuzzo had a general idea that defendant asked Pro Aire to service the unit and make sure it was operational.

The second floor roof is approximately 30-35 feet high, and in June 2013 and before then, there were no railings around the unit. No nets or safety devices were provided in connection with the servicing of the unit. The distance from the unit to the edge of the roof was three to four feet as depicted in a photograph of that area (plaintiff's motion, Exh. 8, photographs). Mr. Cappuzzo had never seen "water forming" in that area prior to June 2013.

Prior to June 2013, Mr. Cappuzzo did not receive any complaints nor was there any litigation about the second floor roof that housed the HVAC unit. No one from Weinstein Enterprises supervised or inspected the work that was done by Pro Aire. Before June 2013, the second floor roofing area had never been inspected; the unit would be serviced yearly by

the previous tenant, but Mr. Cappuzzo did not know how frequently that previous tenant had serviced the unit; and Mr. Cappuzzo was not aware of any problems with the unit when the previous tenant occupied that space.

A quote for the work performed by Pro Aire reflected the work Pro Aire actually performed, namely "power wash and coil cleaning" which was recommended by Pro Aire and needed to be done to service the unit. The quote also states "Homestart Realty Unit #3 Oil Burner Repairs A/C 6634" (Plaintiff's Exh. 9).

On or about August 20, 2013, plaintiff commenced the instant action sounding in common-law negligence against Rock Ridge Farm LLC, seeking damages for the personal injuries he sustained on June 25, 2013 at the subject building. On or about November 7, 2013, plaintiff served a supplemental summons and amended complaint adding Weinstein Enterprises, Inc. as a defendant. On or about December 2, 2013, defendant Weinstein interposed its answer, generally denying the allegations of the complaint.

On or about January 28, 2014, the action was discontinued without prejudice as against Rock Ridge Farm LLC. On January 30, 2014, plaintiff served a verified bill of particulars in response to defendant Weinstein's demand. On January 31, 2014, plaintiff served combined demands on defendant Weinstein, to which plaintiff had not received a response as of the date of his motion. On February 26, 2014 and April 17, 2014, plaintiff served supplemental verified bills of particulars. On or about May 29, 2014, defendant Weinstein served its response to a preliminary conference order stating that it was not aware

of any witnesses to the accident and that it did not have an accident report. On August 6, 2014, plaintiff appeared for his deposition. On August 19, 2015, Mr. Sal Cappuzzo appeared for a deposition on behalf of defendant Weinstein. On September 28, 2015, plaintiff served a demand on defendant Weinstein for the lease for the second floor of the subject building in effect at or near the date of the accident. On or about November 10, 2015, defendant Weinstein produced a copy of a five-year lease for a portion of the second floor of the subject building for its tenant non-party Home Start Realty, dated February 1, 2013.

By order dated March 17, 2016, plaintiff's motion to extend his time to file his note of issue and to amend the caption to reflect the discontinuation of the action against Rock Ridge Farm LLC was granted. On May 13, 2016, plaintiff served a supplemental verified bill of particulars. On October 4, 2016, the parties signed a stipulation permitting plaintiff to withdraw the note of issue and to file amended pleadings. On or about November 2, 2016, plaintiff filed and served a second supplemental summons and second amended verified complaint against defendant Weinstein alleging common-law negligence and violations of Labor Law §§ 240 (1), 241 (6) and 200. Plaintiff also asserted a separate cause of action alleging violations of the New York Industrial Code 12 NYCRR 23 *et seq*. On or about December 8, 2016, defendant interposed its answer to the second amended complaint.

Between November 9, 2017 and May 12, 2017, plaintiff served amended and supplemental bills of particulars. The new note of issue was filed on May 13, 2017. On or

about June 6, 2017, defendant filed the instant motion for summary judgment. Plaintiff subsequently filed his motion for summary judgment on July 10, 2017.

Discussion

Labor Law § 240(1)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) cause of action, arguing that he was engaged in the protected activities of cleaning and repairing the HVAC unit, that he was exposed to the elevation-related risk of falling from the edge of the second floor roof, that defendant failed to provide him with any safety devices to prevent his fall, and that this failure was the proximate cause of his injuries.

Plaintiff's expert opines that plaintiff was engaged in cleaning and repairing the subject unit for purposes of Labor Law § 240 (1), that plaintiff was exposed to the gravity-related risk of falling from the roof because he was required to work in an 18-inch space between the unit and the unguarded edge of the roof, that a guard rail, safety harness or fall arrest system should have been provided to plaintiff as per certain OSHA regulations and 12 NYCRR § 23-5.1 (j) (1), and that plaintiff's injuries were a direct result of the effects of gravity and the failure to provide him with safety devices in violation of the statute (Plaintiff's Exh. 14, Affidavit of Scott A. Silberman, P.E., ¶¶ 36-59, 61).

In support of that branch of its own motion to dismiss this cause of action, and in opposition to plaintiff's motion, defendant contends that the work performed by plaintiff at the time of the accident constituted routine maintenance rather than cleaning and repairing,

and that plaintiff therefore was not performing a covered activity at the time of the accident. Alternatively, defendant argues that the statute is inapplicable because plaintiff did not fall from a height and was not hit by a falling object, but merely slipped and lost his balance.

"Labor Law § 240 (1) imposes a nondelegable duty upon owners and contractors to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Collymore v 1895 WWA, LLC*, 113 AD3d 720, 721 [2d Dept 2014]). In particular, "[t]o recover, the plaintiff must have been engaged in a covered activity—'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*id.*, quoting Labor Law § 240 (1)). "To establish liability pursuant to Labor Law § 240 (1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries" (*Marulanda v Vance Assocs., LLC*, 160 AD3d 711, 712 [2d Dept 2018] [internal citations and quotation marks omitted]).

"In determining whether a particular activity constitutes 'repairing,' courts are careful to distinguish between repairs and routine maintenance, the latter falling outside the scope of section 240 (1)" (*Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 [2d Dept 2017]). In this regard, "courts have held that work constitutes routine maintenance where the work involves 'replacing components that require replacement in the course of normal wear and tear'" (*id.*, quoting *Esposito v NY City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003], citing *Mammone v T.G. Nickel & Assoc. LLC*, 144 AD3d 761, 761 [2d Dept 2016] [replacement of filters on air conditioners on roof of school which had stopped

working not repair under statute]). Accordingly, the statute "does not cover routine maintenance in a non-construction, non-renovation context" (*Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008] [internal citations and quotation marks omitted]). "The question of whether a particular activity constitutes a 'repair' or 'routine maintenance' must be determined on a case-by-case basis" (*id.*). "The critical inquiry in determining coverage under the statute is what type of work the plaintiff was performing at the time of injury" (*Panek v County of Albany*, 99 NY2d 452, 457 [2002] [internal citations and quotation marks omitted]).

"The determination of whether an activity may be considered 'cleaning' within the meaning of Labor Law § 240 (1), as opposed to routine maintenance, has been held to depend on four factors, considered as a whole" (*Holguin v Barton*, 160 AD3d 819, 820 [2d Dept 2018]). In particular,

> "[a]n activity will not be considered 'cleaning' under the statute (1) if it is 'routine,' that is, it is performed on a daily, weekly, or other relatively frequent recurring basis as part of ordinary maintenance; (2) if it does not require specialized equipment or expertise, nor unusual deployment of labor; (3) if it involves insignificant elevation risks comparable to those encountered during typical domestic or household cleaning, and (4) if it is unrelated to any ongoing construction, renovation, painting, alteration, or repair project" (*id.*, citing *Soto v J. Crew Inc.*, 21 NY3d 562, 568-569 [2013]).

"Whether the activity is 'cleaning' is an issue for the court to decide after reviewing all of the factors [and] [t]he presence or absence of any one is not necessarily dispositive if, viewed

in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*Soto*, 21 NY3d at 568-569).

Plaintiff has made a *prima facie* showing that he was engaged in cleaning and repairing the air-conditioning unit when the accident occurred, as those terms are defined under Labor Law § 240 (1). First, with respect to repairing, plaintiff testified that he was assigned to perform "[s]ervice, checking on the AC unit," elaborating that his employer had instructed him to check "what's wrong with the unit" because the new "owner" [lessee] in the building reported that it had a problem with its air conditioning because it was running but not cooling; that he understood that the air conditioner was not working properly, that there was a problem with it, and that he had to "first . . . find out what's the problem, and then . . . fix it"; and that he "was fixing" the unit, i.e., "[t]he problem was with the AC unit, it wasn't working properly. I had to find out what is the problem with the unit." Although defendant's witness, Sal Capuzzo, testified that Pro Aire would change belts and filters, clean coils, and make sure the unit was running to peak performance, he also testified that he had no idea what was involved in the maintenance of the unit; that he did not tell Pro Aire what to do, except to service the unit; that he did not know if the unit was working; that he did not know when the unit was last serviced; and most significantly that defendant hired Pro Aire to make sure the unit was *operational* for the new tenant, Home Start Realty. Thus, plaintiff has made a prima facie showing that he was sent to fix (i.e.) repair the unit and make it operational because it was malfunctioning, i.e., because it was running but not cooling the

premises on the second floor (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007], *lv denied* 10 NY3d 706 [2008] [plaintiff not engaged in repair because he "was not retained to repair the gutter pipe because it was inoperable, but because an animal had used the holes in the pipe, which had developed in the course of normal wear and tear, to enter the building"], citing, among other decisions, *Kirk v Outokumpu Am. Brass, Inc.*, 33 AD3d 1136, 1138 [3d Dept 2006] [internal citations and quotation marks omitted] ["In the absence of proof that the machine or object being worked upon was inoperable or not functioning properly Supreme Court properly concluded that the work performed by plaintiff was in the nature of routine maintenance"]; *Papapietro v Rock-Time, Inc.*, 265 AD2d 174, 174 [1st Dept 1999], quoting *Craft v Clark Trading Corp.*, 257 AD2d 886, 887 [3d Dept 1999] ["Plaintiff's replacement of the roller guards on the elevator counterweights cannot be viewed as a 'repair' since plaintiff presented no evidence that the elevator was 'inoperable or malfunctioning prior to the commencement of the work'"]; *Craft*, 257 AD2d at 887 [worker was performing repairs as opposed to routine maintenance of malfunctioning ice cream freezer in supermarket where he was called at 3:00 a.m., was told that the ice cream freezer case was malfunctioning and that someone was needed immediately to repair the problem, and thus efforts were in furtherance of his investigation regarding the cause of an undisputed malfunction - issue of repair as opposed to routine maintenance was dependent upon "whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work"]).

Stated otherwise, the testing plaintiff was performing to determine why the unit was not functioning constituted "the first step[s] in effectuating repairs to the [unit]," and thus the provisions of Labor Law § 240 (1) are applicable (*De Jesus v Metro-N. Commuter R.R.*, 159 AD3d 951, 952 [2d Dept 2018] [Although 'tree cutting and removal, in and of themselves, are not activities subject to Labor Law § 240 (1)' . . . where, as here, the plaintiff's tree removal work constituted the first step in effectuating repairs to the catenary wires [situated above the railroad tracks]," and it was "undisputed that the catenary wires could not be repaired and train service restored without first removing the tree," "the provisions of Labor Law § 240(1) [were] applicable"]).

Plaintiff has also made a *prima facie* showing that he was engaged in cleaning as that term is defined by the statute. First, plaintiff testified that he power-washed the coils of the unit for two hours (*Soto,* 21 NY3d at 568-569) in an attempt to find out why the unit was malfunctioning, not while he was performing a routine task done on a daily, weekly, or other frequently recurring basis (*id.*). As noted above, plaintiff first checked the thermostat, found that the unit was "first on then off and on again," and then proceeded to check the filters, perform the power washing, and then progressed to checking the compressors. Notably, plaintiff testified that he understood that the air conditioner was not working properly when he arrived at the scene, stating: "I just didn't figure out what was the problem, *I didn't make it*" (emphasis added); that he was checking the compressors to see if they were running properly, switching from one compressor to another; and that: "I'm supposed to show that

is why it took me a lot of time to figure out what's going on." Second, plaintiff used his specialized expertise as an air-conditioning technician to perform his work, as well as specialized equipment, including a gauge, to ascertain why the unit was malfunctioning. In this regard, plaintiff testified that he had previously worked as an air-conditioning technician for a company in California for seven to eight years, which was more residential in nature; and that while initially a beginner with commercial units at Pro Aire, he was trained on the job with a senior technician, and had worked on 50 commercial air-conditioning units with Pro Aire before the accident occurred. Third, plaintiff was subject to a significant elevation-related risk because he was required to work on the narrow edge of the roof which was 35-40 feet high (*id.*). Finally, cleaning the coils was related to plaintiff's attempts to repair the unit, which was interrupted by his accident (*id.*).

In its motion, defendant argues that Mr. Cappuzzo's deposition testimony and affidavit establish that Pro Aire was retained on the day of the accident solely to conduct routine maintenance on the unit. As an initial matter, defendant does not cite any deposition testimony of Mr. Cappuzzo. As for his affidavit, dated one year after Mr. Cappuzzo was deposed, Mr. Cappuzzo avers, in pertinent part, that Pro Aire was called to conduct routine maintenance on the unit; that after Pro Aire conducted a routine maintenance call, it also "recommended a power wash of coils, part of the periodic maintenance on such a unit to optimize performance"; that Pro Aire was not retained to conduct any repairs on the unit; that had Pro Aire recommended a repair, it was required to obtain his approval beforehand; that

Pro Aire did not recommend any repairs to the unit in June 2013, and did not request any authority, verbal or written, to make any such repairs; and that defendant did not have any problems with the unit before it called Pro Aire, nor since that time.

However, as plaintiff argues, Mr. Cappuzzo's affidavit contradicts his deposition testimony that he did not tell Pro Aire what to do, except to service the unit; that he was not advised what was going to be done, that he did not give any "specific indications as to what was going to be done," except for calling Pro Aire and asking them to service the unit, and that he and defendant had no involvement with it (Pro Aire "check[s] the unit and make[s] sure it's working and service[s] the unit if it needs any servicing"; "Pro Aire . . . would tell us what the unit needs, we are not experts in HVAC service").

Moreover, a quote for the work performed by Pro Aire indicates that Pro Aire would perform "power wash and coil cleaning" and also states: "Homestart Realty Unit #3 Oil Burner Repairs A/C 6634" (Plaintiff's Exh. 9). Accordingly, the court finds that the affidavit was specifically tailored "to raise a triable issue of fact, and merely raised a feigned factual issue which [is] insufficient to defeat the [plaintiff's] motion for summary judgment" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011] [internal citations and quotation marks omitted]). "Moreover, the affidavit was designed to avoid the consequences of [the defendant's] deposition testimony" (*id.*).

Defendant's counsel also argues in defendant's motion and in counsel's 2017 affirmation that plaintiff admitted that his work was part of routine maintenance because he

testified that his assignment was to service and check on the unit, and also admitted that at the time of the accident he was checking on the compressors, which was part of the routine service on commercial air-conditioning units. Although plaintiff testified that this "service" and "checking" of the unit was "part of the regularly scheduled maintenance with the commercial air-conditioning unit at 3017 Hempstead Turnpike," he then testified, as defendant's attorney concedes in his reply affirmation, that he did not know if Pro Aire had a contract with the owners at 3017 Hempstead Turnpike to perform routine scheduled maintenance or if it was responsible for performing routine maintenance on any commercial air-conditioning units at 3017 Hempstead Turnpike. Further, defendant concedes that it did not in fact have a maintenance contract for the unit. Moreover, although defendant's counsel posits in his 2017 affirmation that plaintiff's actual testimony demonstrates that plaintiff did not know what the arrangements were for Pro Aire, even defendant concedes that plaintiff "was talking generally [about] what usually happens." Further, while defendant's counsel argues in his 2017 affirmation that plaintiff did not testify that he was told that there was a problem with the unit or that he had to repair anything, plaintiff repeatedly testified that he was there to fix the unit because it was running but not cooling.

In addition, Mr. Cappuzzo testified that he did not know if power washing and cleaning had not been done regularly, stating that he had no idea whether the unit was functional or when it was last serviced. Moreover, with respect to the compressors, plaintiff only testified that usually if a commercial air-conditioning unit was used a lot in the summer,

its coils were supposed to be cleaned every two to three months; and that when commercial air-conditioning units are serviced, checking an air compressor is part of the regular maintenance. In any event, plaintiff explained that in this instance, the compressors were not working properly. Thus, while some of tasks plaintiff performed, when viewed in isolation, might be considered routine maintenance, the testimony of plaintiff, as well as the testimony of Mr. Cappuzzo, establishes that "the overall scope of the entire job which [plaintiff] was engaged to perform" constituted a repair (*Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 890 [2d Dept 2011]). Accordingly, plaintiff has made a *prima facie* showing that he was engaged in cleaning and repairing as those terms are defined under Labor Law § 240 (1), which defendant has failed to rebut.

Further, it is undisputed that the air-conditioning unit, which was installed on the roof, was a structure for purposes of Labor Law § 240 (1) (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 393 [2d Dept 1997]).

In addition, plaintiff was subject to an elevation-related risk because he was required to work in a narrow space between the side of the HVAC unit and the unprotected edge of the second floor roof, and he was injured when he tried to prevent himself from falling off the roof (*Striegel v Hillcrest Heights Dev. Corp.*, 100 NY2d 974, 978 [2003] [plaintiff subject to elevation-related risk when he sustained injuries from sliding from frost-covered roof to eaves, despite not falling to ground]; *Ienco v RFD Second Ave., LLC*, 41 AD3d 537, 539 [2d Dept 2007], quoting *Ortiz v Turner Constr. Co.*, 28 AD3d 627, 628 [2d Dept 2006]

["'it is of no consequence that plaintiff allegedly sustained injuries as he prevented himself from falling further'"]; *Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561, 563 [1st Dept 2011] [statute applicable where plaintiff did not actually sustain his injury by falling into the trench, but rather by attempting to prevent himself from falling]).

Defendant argues that because plaintiff merely slipped or lost his balance and did not fall at or from an elevated work surface, Labor Law § 240 (1) does not apply. However, the evidence demonstrates otherwise. Immediately before the accident, plaintiff attempted to stand up in the narrow space between the unit and the unprotected edge of the roof, that he slipped, that he lost his balance, and that he sustained injuries to his fingers and knee while attempting to prevent himself from falling off the roof.

In sum, plaintiff has made a *prima facie* showing that he was engaged in cleaning and repairing as those terms are defined under Labor Law § 240 (1), that he was subject to an elevation-related risk while working on the roof, that he was not provided with any safety devices, and that defendant's failure to provide plaintiff any safety devices was a proximate cause of his injuries, which defendant has failed to rebut. Thus, plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action is granted, and the branch of defendant's motion to dismiss this cause of action is denied.[4]

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[4]To the extent plaintiff relies upon OSHA regulations to establish his § 240 (1) cause of action, "OSHA governs employee/employer relationships, and thus OSHA regulations do not impose a specific statutory duty on parties other than a plaintiff's employer" (*Gallagher v 109-02 Dev., LLC*, 137 AD3d 1073, 1075 [2d Dept 2016]). It is undisputed that defendant is not plaintiff's employer.

Labor Law § 241(6)

Defendant moves to dismiss plaintiff's Labor Law § 241 (6) cause of action, arguing that plaintiff was not involved in construction, excavation or demolition, and alternatively that the violations alleged by plaintiff are not applicable to the accident and/or are not sufficiently specific to support a § 241(6) claim. Plaintiff does not oppose this branch of defendant's motion. As none of the Industrial Code sections cited by plaintiff are applicable, this branch of defendant's motion is granted.

"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" (*De Jesus,* 159 AD3d at 953 [internal citation and internal quotation marks omitted]). In this regard, "[t]he courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4 (b) (13), which defines construction work expansively" (*id.* [internal citations and quotation marks omitted]). "Under that regulation, construction work consists of '[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures'" (*id.*, quoting 12 NYCRR 23-1.4 [b] [13]).

Here, inasmuch as plaintiff was engaged in activities that were ancillary to the repair of the unit, namely testing the unit to determine why it was malfunctioning so he could repair

it, the provisions of Labor Law § 241(6) are applicable to this case (*De Jesus*, 159 AD3d at 953).

With respect to the Industrial Code violations alleged by plaintiff, defendant correctly asserts that 12 NYCRR 23-1.5 (c) (2) is not sufficiently specific to support a Labor Law § 241 (6) cause of action (*Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995]), and is also inapplicable to the facts of this case because plaintiff's accident did not involve any load-carrying equipment. Next, although sufficiently specific (*Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [2d Dept 2017]), 12 NYCRR 23-1.5 (c) (3), "which require[s] employers to provide equipment and power tools that are in good repair, [it has] no application here, since there is no allegation that [plaintiff] was using a tool that was defective or in need of repair" (*McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 875 [2d Dept 2010]). As for 12 NYCRR 23-1.5 (j) (1), the Industrial Code does not contain a regulation with this number.[5] With respect to 12 NYCRR 23-1.7 (d), that regulation states:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold,

[5]Plaintiff was apparently relying upon § 23-5.1 (j) (1) but transposed the 5 and the 1. This regulation states: "Safety railings. (1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule)." However, since plaintiff was not provided with a scaffold, this regulation is inapplicable (*see e.g. Varona v Brooks Shopping Ctrs. LLC*, 151 AD3d 459, 460 [1st Dept 2017]) ["As plaintiff did not fall from the scaffold, a missing rail, in violation of 12 NYCRR 23-5.1(j)(1), was not a proximate cause of his injuries"]; *cf. Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013] ["section 23-5.1 (c) and (d) are inapplicable because plaintiff was not working on a scaffold at the time of his accident"]). Moreover, neither plaintiff nor his expert provides any authority for the expert's claim that the roof is the functional equivalent of a scaffold.

> platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Defendant argues that this regulation does not apply because water was an integral part of plaintiff's work, as plaintiff testified that prior to his accident, he spent two hours power-washing the coils of the HVAC unit. In any event, defendant contends that it did not have notice of any such condition on the roof because plaintiff did not recall what the weather conditions were on the day of the accident, did not know if the roof was wet because of rain or something else, and did not know how long the roof had been wet.

Contrary to defendant's latter argument, its failure to have actual or constructive notice of the water condition is not a requirement under this statute (*Wrighten v ZHN Contracting Corp.*, 32 AD3d 1019, 1021 [2d Dept 2006], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998] ["(s)ince an owner or general contractor's vicarious liability under section 241 (6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law § 241 (6) liability"]). However, defendant has made a prima facie showing that this regulation is inapplicable because water near the unit was an integral part of plaintiff's work inasmuch as plaintiff testified that he spent two hours before the accident power washing the coils in the unit (*Stafford v Viacom, Inc.*, 32 AD3d 388, 390 [2d Dept 2006]).

As for 12 NYCRR 23-1.8 (c) (2), which requires employees working in wet conditions to be provided with proper footwear, defendant's argument that it did not have notice that plaintiff would be working in "wet footing," is not a requirement of this regulation. In any event, this regulation is not applicable because there is no claim and no evidence that the accident occurred due to the lack of proper footwear.

Lastly, 12 NYCRR 23-5.1 (c) (2) states that "[e]very scaffold shall be provided with adequate horizontal and diagonal bracing to prevent any lateral movement." Defendant correctly argues that, inasmuch as there was no scaffold in use at the time of the accident, this regulation is inapplicable (*cf. Clavijo v Universal Baptist Church*, 76 AD3d 990, 991 [2d Dept 2010] [regulation which sets standards for safety belts not applicable because plaintiff was not provided with any safety belts]; *Masullo v 1199 Hous. Corp.*, 63 AD3d 430, 433 [1st Dept 2009] ["to the extent plaintiffs allege violation of Industrial Code sections pertaining to scaffolds, no liability exists because the gravamen of their claim is that no safety device was provided, not that an inadequate scaffold provided by either defendant led to this accident"]).

Labor Law § 200

Defendant also moves to dismiss plaintiff's Labor Law § 200 and common-law negligence claims, arguing that water on an outdoor surface is not a dangerous condition. Alternatively, defendant maintains that it did not create the water condition or have notice of it, that it did not supervise or control plaintiff's work, that if there were any risks in

working on the wet roof, plaintiff was the sole proximate cause of his accident because the water was readily observable, and plaintiff voluntarily assumed the alleged risk of the water condition.

In opposition, plaintiff argues that he fell due a different dangerous premises condition, one which defendant had notice of, namely the narrow one foot wide area in which he was required to work at the edge of the second floor roof, and that it is therefore irrelevant that defendant did not supervise his work. Moreover, relying primarily on *Urban v No. 5 Times Sq. Dev. Corp.* (62 AD3d 553 [1st Dept 2009], plaintiff asserts that a duty to provide a safe place to work encompasses the duty to make reasonable inspections to detect unsafe conditions, and that constructive notice of a defect is imputed to an owner, like defendant, which has failed to do so. Plaintiff also argues that constructive notice may be imputed to defendant as an out-of-possession landlord since the subject lease reserves defendant's right to enter the premises for the purposes of inspection, maintenance or repair. Finally, plaintiff contends that an open and obvious condition does not preclude a finding of liability against defendant for failure to maintain its property in a safe condition. Plaintiff's expert opines that defendant violated Labor Law § 200 because defendant required plaintiff to work in an inherently dangerous place, namely within close proximity to the edge of a roof, where there was a fall hazard of more than 16 feet, of which defendant was aware, and which was discoverable upon reasonable inspection (Plaintiff's Exh. 14, Affidavit of Scott A. Silberman, P.E., ¶¶ 31-35).

"Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work" (*Grasso v N.Y. State Thruway Auth.*, 159 AD3d 674, 678 [2018], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 127 [2d Dept 2008]). "Thus, liability under this statute is governed by common-law negligence principles" (*id.*, citing *Chowdhury* at 128). Specifically, "[t]here are two broad categories of actions that implicate the provisions of Labor Law § 200" (*id.* [internal citations and quotation marks omitted]). "The first involves worker injuries arising out of alleged dangerous or defective conditions of the premises where the work is performed" (*id.*). In this regard, "[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" (*id.* [internal citations and quotation marks omitted]).

The second category involves claims arising out of the means or methods of the work, where "'recovery against the owner or general contractor cannot be had . . . unless it is shown that the party to be charged had the authority to supervise or control the performance of the work'" (*Rodriguez v Mendlovits*, 153 AD3d 566, 569 [2d Dept 2017], quoting *Ortega v Puccia*, 57 AD3d 54, 58 [2008]). Finally, "[a]n out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord has a duty imposed by statute or assumed by contract or a course of conduct" (*Quituizaca v Tucchiarone*, 115 AD3d 924, 925 [2d Dept 2014] [internal citations and quotation marks omitted]).

As plaintiff argues, it is not necessary to show defendant's supervision and control over his work because he alleges that his injuries arose from the condition of the work place created by or known to defendant, namely installing the HVAC unit so close to the edge of the roof that in order to service the unit, plaintiff was required to work in a very narrow space at the edge of the roof. In any event, inasmuch as defendant analyzes the dangerous condition as water near the unit, it has failed to address - let alone make a prima facie showing- that it did not create the premises condition alleged by plaintiff, the location of the HVAC unit only one foot from the edge of the second floor roof. Nor does defendant mention whether or not it had actual or constructive notice of that particular condition, but the location of the unit was, as testified by Mr. Cappuzzo, visible from the window in the kitchen on the second floor.

Even assuming defendant had made a prima facie showing that it did not create the condition or have notice of it, the evidence demonstrates that Mr. Cappazzo testified that he had, in fact, visited the second floor flat portion of the roof, albeit he then testified that he had not, but he nevertheless conceded that he was familiar with the drainage of the unit "by looking out of the window on the back of the space," and that the window in the back kitchen area of the second floor premises "offered a view of [the subject] air-conditioning unit." While he then testified that he was at the premises of the second floor tenant every three to four months, but did not know if he looked out the window at the unit when there, his testimony is sufficient to raise a triable issue of fact as to whether he was aware of and thus

had actual notice of the location of the HVAC unit only one foot from the edge of the second floor roof. Moreover, as plaintiff argues, Mr. Cappuzzo was aware that there were no railings on the roof, that the roof was approximately 30 feet high, and that there were no safety nets or safety devices on the roof.

Further, as plaintiff argues, defendant assumed a duty to keep the roof safe by virtue of its lease with the second floor tenant, Home Start Realty. In particular, the lease provides that "Owner shall maintain in good working order and repair the exterior and the structural portions of the building . . ." (Maintenance and Repairs, ¶ 4); that Owner or Owner's agent shall have the right . . . to enter the demised premises in an emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements, and improvements as Owner may deem necessary and reasonably desirable to the demised premises *or to any other portion of the building or which Owner may elect to perform* (Access to Premises, ¶ 13); and that while the tenant was responsible to maintain the HVAC unit, defendant retained the right to maintain and repair the roof itself ("Tenant's repairs shall exclude repairs to the roof except if such roof repairs [were caused by the tenant] [Repairs and Maintenance, Rider ¶ 45]). Thus, the evidence clearly demonstrates that defendant had a duty to keep the roof safe, and that a triable issue of fact exists as to whether it violated this duty. Finally, contrary to defendant's claim, given that plaintiff was not provided with any

safety devices, defendant has failed to make a prima facie showing that plaintiff was the sole proximate cause of the accident.[5]

Conclusion

The plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is granted. The branch of defendant's motion to dismiss plaintiff's Labor Law § 241 (6) cause of action is granted, and the other branches of its motion are denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court

[5]To the extent defendant relies upon the water near the unit as the dangerous condition, arguing that it was open and obvious, it would not bar a finding of liability against defendant as a property owner, but would go to the issue of comparative negligence (*Cupo v Karfunkel*, 1 AD3d 48, 49 [2d Dept 2003]). Also, the doctrine of assumption of the risk does not exculpate a landowner for liability for ordinary negligence in maintaining its premises (*Sykes v Cty. of Erie*, 94 NY2d 912, 913 [2000]). Plaintiff's reliance upon *Urban* (62 AD3d 553) to demonstrate that a duty to provide a safe place to work encompasses the duty to make reasonable inspections to detect unsafe conditions has not been followed by the Appellate Division, Second Department. Rather, the Second Department holds that "[a]n out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord has a duty imposed by statute or assumed by contract or a course of conduct" (*Quituizaca*, 115 AD3d at 925 [internal citations and quotation marks omitted] [*supra*]).