Zybert v Jusiega
2019 NY Slip Op 33391(U)
November 13, 2019
Supreme Court, Suffolk County
Docket Number: 14638/2015
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Jan Zybert,

Plaintiff,

-against-

Arkadiusz Jusiega and Marta Lobaziewicz,

Defendants.

Motion Sequence No.: 001; MOTD
Motion Date: 2/27/19
Submitted: 4/24/19

Index No.: 14638/2015

Attorney for Plaintiff:

Greenberg & Stein, P.C.
360 Lexington Avenue, Suite 1501
New York, NY 10017

Attorney for Defendants:

Sobel Pevzner, LLC
464 New York Avenue, Suite 100
Huntington, NY 11743

Clerk of the Court

Upon the following papers numbered 1 to 25 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 19; Answering Affidavits and supporting papers, 20 - 23; Replying Affidavits and supporting papers, 24 - 25; it is

ORDERED that the motion by defendants for summary judgment dismissing plaintiff's claims for violations of Labor Law §§ 200, 240 (1), and 241 (6), and for failure to procure workers' compensation insurance is granted in part and denied in part; and it is further

ORDERED that the instant action is stayed, and the issue of plaintiff's eligibility for benefits pursuant to the Workers' Compensation Law hereby is referred to the Workers' Compensation Board.

This action was commenced by plaintiff Jan Zybert to recover damages for injuries he allegedly sustained on August 5, 2014, when he fell from a ladder while power washing the siding of a single-family home located at 58 East Beverly Parkway, in Valley Stream, New York. The premises is owned by defendants Arkadiusz Jusiega and Marta Lobaziewicz. Defendant Jusiega allegedly hired plaintiff to power wash the siding of defendants' home. The accident allegedly occurred when plaintiff was stepping down from a ladder provided to him by Jusiega. Plaintiff asserts claims against defendants for common law negligence, violations of Labor Law §§ 200, 240, and 241, and for failure to procure appropriate Workers' compensation insurance.

Defendants now moves for summary judgment dismissing the claims alleging violations of Labor Law §§ 200, 240 (1), and 241 (6), and failure to procure appropriate workers' compensation insurance. Defendants argue they are exempt from liability under Labor Law §§ 240 (1) and 241 (6) based on the homeowners' exemption. Alternatively, they argue plaintiff is precluded from asserting a violation of Labor Law § 241 (6), because he was not preforming work in the context of construction, excavation, or demolition at the time of the accident. Defendants seek dismissal of plaintiff's claim for violation of Labor Law § 200, arguing that they did not supervise or control plaintiff's work. Defendants also argue that plaintiff's claim for failure to procure workers' compensation insurance should be dismissed on the ground that plaintiff was acting as an independent contractor at the time of the accident. In support of their motion, defendants submit, among other things, the parties' deposition testimony.

In opposition, plaintiff argues, among other things, that there are triable issues of fact as to the applicability of the homeowner's exemption on the grounds that Jusiega directed and controlled his work, and that the premises contained a home office. Plaintiff also contends that dismissal of his claim for violation of Labor Law § 200 is improper, as defendants had notice of the allegedly defective ladder. In support of his opposition, plaintiff submits his affidavit.

Plaintiff testified that he first came into contact with Jusiega after responding to an advertisement posted by Jusiega on a website known as Bazarynka. Plaintiff allegedly met with Jusiega to discuss the work to be performed three or four days before the accident occurred. According to plaintiff's testimony, he was to be paid at the rate of $15 per hour, and was hired to power wash the siding, and to paint the columns and the fence of the home. There allegedly was no written contract. Plaintiff testified after he arrived at the subject premises at 10:00 a.m. on the date of the accident, Jusiega provided him with a power washing machine and with an extension ladder. Plaintiff further testified that Jusiega instructed him on how to operate the power washing machine. According to plaintiff's testimony, Jusiega directed him to begin power washing the back of the house. Plaintiff testified that subject ladder lacked safety feet, rope to prevent it from expanding, and warning labels. The subject ladder allegedly was covered with flowers and grass, which required plaintiff to clean it before using it. Plaintiff stated that he transported the subject ladder to the back of the house, and that Jusiega was not outside while he was power washing the house.

Plaintiff testified that he was in the process of power washing the front of the house before the accident occurred. Plaintiff testified that the base of the ladder was placed on a step, which was

composed of tiles, leading to the front door, and that the top of the ladder was leaning against the roof, above the front door, prior to the incident. Plaintiff stated that the step was flat, and that the tile appeared to be polished and slippery. He could not recall whether the surface of the step was wet at the time of the accident. According to plaintiff's testimony, prior to the incident, he stopped the water from running from the machine, dropped the pistol with the hose, and decided to step down from the ladder, because he was to unable to reach a portion of the house from the position that he was in. Plaintiff stated that the ladder began to slide away from the house when he was approximately five to six feet above the ground, and that the portion of the ladder which extended began to "automatically close." Although plaintiff could not recall which step of the ladder he was on when it began to slip, he testified that he descended one step when it began to slip. He further testified that he attempted to jump off of the ladder, but could not because one of his legs and his left foot were caught in the rungs of the ladder, causing him to fall backwards with the ladder. The back of his body allegedly landed on top of the ladder.

According to Jusiega's testimony, he and his wife owned the home at the time of the accident, and the home was classified as a one-family residence. Jusiega stated that he hired plaintiff to power wash his home, and that he agreed to pay plaintiff at the rate of $15 per hour. He stated that he could not recall whether he had any discussions with plaintiff regarding painting, and that "nothing was decided about the fence."

Jusiega testified that he provided plaintiff with a power washing machine and with an aluminum extension ladder on the date of the accident. He further testified that he did not warn plaintiff about the ladder, and that he did not provide any instructions regarding how to use the power washing machine. According to his testimony, Jusiega had used the subject ladder to power wash the house approximately five years before the incident occurred. Jusiega testified that on the date of the accident, the subject ladder had rubber safety feet and a warning label, and that plaintiff removed the ladder from the garage and set it up. He further testified that after showing plaintiff where the power washing services were to be performed, he went inside of the house to his home office, and that he returned outside one time for approximately two minutes before the accident occurred. Jusiega allegedly returned outside, approximately 40 minutes after he went inside of the home, and observed that the bottom safety devices were placed on the stoop. Jusiega testified that although he could not recall when the subject ladder was last used before the accident, it was "most likely" used in 2014, and that he did not have any problem with it moving. He stated that when he went outside and saw plaintiff on the ground, the tile on the porch appeared to be wet.

Lobaziewicz testified that she was aware that plaintiff was on the premises to perform power washing on the date of the incident. Lobaziewicz further testified that her interaction with plaintiff was limited to greeting him. Lobaziewicz allegedly left the house periodically while plaintiff was working, and was not present in the house when the accident occurred. According to her testimony, she did not know how old the subject ladder was or its condition at the time of the accident.

In plaintiff's affidavit, he alleges that he responded to an advertisement seeking to hire an individual to wash the siding and to paint columns and the fence. Plaintiff states that when he

arrived on the premises, Jusiega showed him a power washing machine and an extension ladder, which he instructed plaintiff to use. The subject ladder allegedly was the only ladder available for plaintiff to use. Plaintiff avers that the subject ladder did not have any warning stickers or rubber safety feet. He contends that the accident occurred between approximately 1:15 p.m. and 1:30 p.m. Plaintiff further contends that he set up the subject ladder on a tile step or area of the stoop. Plaintiff allegedly power washed the siding near this area, and lowered the hose of the power washing machine to the ground before the accident occurred. Plaintiff avers that when he began to descend the steps of the ladder, the ladder slipped and began to slide and fall. According to his affidavit, plaintiff was holding on with both hands, and both of his feet were still on it, when the ladder moved, causing him to fall five to six feet to the ground.

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, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***New York City Asbestos Litig. v Chevron Corp.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

Labor Law § 240 (1) imposes a nondelegable duty on owners and general contractors, and their agents, to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Roblero v Bais Ruchel High School, Inc.***, 175 AD3d 1446, 2019 NY Slip Op 06638 [2d Dept 2019]; ***Graziano v Source Bldrs. & Consultants, LLC***, 175 AD3d 1253, 2019 NY Slip Op 06477 [2d Dept 2019]). 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* ***Barreto v Metropolitan Transp. Auth.***, 25 NY3d 426, 13 NYS3d 305 [2015]; ***Graziano v Source Bldrs. & Consultants, LLC***, *supra*; ***Luna v 4300 Crescent, LLC***, 174 AD3d 881, 107 NYS3d 115 [2d Dept 2019]). In general, the question of whether a particular safety device provided proper protection within the meaning of Labor Law § 240 (1) is a question of fact for the jury (*see* ***Lozada v St. Patrick's RC Church***, 174 AD3d 879, 106 NYS3d 325 [2d Dept 2019]; ***Karwowski v Grolier Club of City of New York***, 144 AD3d 865, 41 NYS3d 261 [2d Dept 2016]; ***Carrion v City of New York***, 111 AD3d 872, 976

NYS2d 126 [2d Dept 2013]). A fall from a ladder, by itself, is insufficient to establish that proper protection was not provided (*see* ***Lozada v St. Patrick's RC Church***, *supra*; ***Yao Zong Wu v Zhen Jia Yang***, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; ***Carrion v City***, *supra*). Rather, there must be evidence demonstrating that "the 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" (***Matter of Nadler v City of New York***, 166 AD3d 618, 620, 87 NYS3d 335 [2d Dept 2018], quoting ***Artoglou v Gene Scappy Realty Corp.***, 57 AD3d 460, 461, 869 NYS2d 172 [2d Dept 2008]; ***Xidias v Morris Park Contr. Corp.***, 35 AD3d 850, 828 NYS2d 432 [2d Dept 2006]). Recovery under Labor Law § 240 (1) is precluded when the plaintiff's actions were the sole proximate cause of the accident (*see* ***Orellana v 7 W. 34th St., LLC***, 173 AD3d 886, 103 NYS3d 496 [2d Dept 2019]; ***Saavedra v 64 Annfield Ct. Corp.***, 137 AD3d 771, 26 NYS3d 346 [2d Dept 2016]; ***Corchado v 5030 Broadway Props., LLC***, 103 AD3d 768, 962 NYS2d 185 [2d Dept 2013]).

Labor Law §§ 240 (1) and 241 (6) specifically exempt "owners of one or two-family dwellings who contract for but do not direct or control the work" from liability thereunder (*see* ***Rodriguez v Mendlovits***, 153 AD3d 566, 60 NYS3d 87 [2d Dept 2017]; ***Wadlowski v Cohen***, 150 AD3d 930, 55 NYS3d 279 [2d Dept 2017]; ***Ramirez v I.G.C. Wall Sys., Inc.***, 140 AD3d 1047, 35 NYS3d 159 [2d Dept 2016]). In order for a defendant to receive the protection of the homeowner's exemption, such a defendant must show that the premises consisted of a one- or two-family residence, and that the owner did not direct or control the work being performed (*see* ***Marquez v Mascioscia***, 165 AD3d 912, 86 NYS3d 180 [2d Dept 2018]; ***Rodriguez v Mendlovits***, *supra*; ***Abdou v Rampaul***, 147 AD3d 885, 47 NYS3d 430 [2d Dept 2017]). In determining whether a homeowner is entitled to the exemption, the phrase "direct or control" is to be strictly construed, and "in ascertaining whether a particular homeowner's actions amount to direction or control of a project, the relevant inquiry is the degree to which the owner supervised the method and manner of the actual work being performed by the injured employee" (***Rajkumar v Lal***, 170 AD3d 761, 762, 95 NYS3d 267 [2d Dept 2019], quoting ***Jenkins v Jones***, 255 AD2d 805, 805-806, 680 NYS2d 307 [3d Dept 1998]; *see* ***Wadlowski v Cohen***, *supra*). Involvement which is "merely a retention of the limited power of general supervision," and "no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home" does not constitute the kind of direction or control necessary to overcome the homeowner's exemption from liability (***DiMaggio v Cataletto***, 117 AD3d 984, 985-986, 986 NYS2d 536 [2d Dept 2014], quoting ***Orellana v Dutcher Ave. Bldrs., Inc.***, 58 AD3d 612, 614, 871 NYS2d 352 [2d Dept 2009]; *see* ***Nai Ren Jiang v Yeh***, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]; ***Ruiz v Walker***, 93 AD3d 838, 940 NYS2d 896 [2d Dept 2012]). Accordingly, the statutory exemption cannot be overcome by evidence of the homeowner instructing the worker on aesthetic design matters (*see* ***Arama v Fruchter***, 39 AD3d 678, 833 NYS2d 665 [2d Dept 2007]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Edgar v Montechiari***, 271 AD2d 396, 706 NYS2d 117 [2d Dept 2000]), or on what work should be performed (*see* ***Byrd v Roneker***, 90 AD3d 1648, 936 NYS2d 434 [4th Dept 2011]; ***Gambee v Dunford***, 270 AD2d 809, 705 NYS2d 755 [4d Dept 2000]). Rather, evidence of the homeowner instructing the worker on how the work should be performed constitutes direction and control (*see* ***Byrd v Roneker***, *supra*; ***Gambee v Dunford***, *supra*).

As to Lobaziewicz, defendants made a prima facie showing that she was exempt from liability under the homeowner's exemption of Labor Law §§ 240 and 241. Defendants established, prima facie, that the premises qualified as a single-family residence within the scope of the statutory exemption (*see* ***Rashid v Hartke***, 171 AD3d 1226, 98 NYS3d 609 [2d Dept 2019]; ***Banegas v Farr***, 122 AD3d 783, 996 NYS2d 691 [2d Dept 2014]; ***Nai Ren Jiang v Shane Yeh***, *supra*). Defendants' submissions also established that Lobaziewicz did not direct or control the manner in which plaintiff performed his work (*see* ***Dasilva v Nussdorf***, 146 AD3d 859, 45 NYS3d 531 [2d Dept 2017]; ***Kosinski v Brendan Moran Custom Carpentry, Inc.***, 138 AD3d 935, 30 NYS3d 237 [2d Dept 2016]; ***Gittins v Barbaria Const. Corp.***, 74 AD3d 744, 902 NYS2d 613 [2d Dept 2010]). Her interactions with plaintiff allegedly were limited to exchanging greetings before the accident occurred (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Ferrero v Best Modular Homes, Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]). In opposition, plaintiff failed to raise a triable issue of fact as to Lobaziewicz's exemption from liability under Labor Law §§ 240 and 241 (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Contrary to plaintiff's assertion, the use of a portion of defendants' residence as a home office does not automatically cause them to lose protection of the exemption (*see* ***Levy v Baumgarten***, 147 AD3d 823, 46 NYS3d 664 [2d Dept 2017]; ***DeSabato v 674 Carroll St. Corp.***, 55 AD3d 656, 868 NYS2d 209 [2d Dept 2008]).

As to Jusiega, defendants failed to make a prima facie showing that he was exempt from liability under the homeowner's exemption of Labor Law §§ 240 and 241 because triable issues of fact remain as to whether he exercised the requisite degree of direction and control over plaintiff's work (*see* ***Rajkumar v Lal***, *supra*; ***Wadlowski v Cohen***, *supra*; ***Szczepanski v Dandrea Constr. Corp.***, 90 AD3d 642, 934 NYS2d 432 [2d Dept 2011]). Although Jusiega did not lose the protection of the statutory exemption by merely providing the ladder from which plaintiff fell (*see* ***Nicholas v Phillips***, 151 AD3d 731, 54 NYS3d 675 [2d Dept 2017]; ***DiMaggio v Cataletto***, *supra*; ***Miller v Trudeau***, 270 AD2d 683, 704 NYS2d 727 [3d Dept 2000]), defendants' submissions contain conflicting testimony regarding whether he provided specific instructions on aspects of the work that plaintiff was to perform (*see* ***Wadlowski v Cohen***, *supra*; ***Garcia v Martin***, *supra*; ***Gambee v Dunford***, *supra*; ***Young v Krawczyk***, *supra*). Although Jusiega testified that the did not instruct plaintiff on how to use the power washing machine, plaintiff testified that he did provide instructions on how to operate it.

Alternatively, defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the claim against Jusiega for violation of Labor Law § 241 (6) on the ground that plaintiff was not performing work in the context of construction, excavation, or demolition. 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]; ***Wass v County of Nassau***, 173 AD3d 933, 103 NYS3d 478 [2d Dept 2019]). Courts generally have held that the scope of this section of Labor Law is governed by 12 NYCRR 23–1.4(b)(13) (*see* ***Wass v County of Nassau***, *supra*; ***De Jesus v Metro-North Commuter R.R.***, 159 AD3d 951, 73 NYS3d 581 [2d Dept 2018]), which sets forth that "construction work" includes all work "performed in the

construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (12 NYCRR 23–1.4(b)(13)). Although routine maintenance performed in a non-construction, non-renovation context is not within the ambit of Labor Law § 241 (6) (*see* ***Byrnes v Nursing Sisters of Sick Poor, Inc.***, 170 AD3d 796, 93 NYS3d 902 [2d Dept 2019]; ***Garcia-Rosales v Bais Rochel Resort***, 100 AD3d 687, 954 NYS2d 148 [2d Dept 2012]), painting is a specifically enumerated activity under 12 NYCRR 23–1.4(b)(13) (*see* ***Piotrowski v McGuire Manor, Inc.***, 117 AD3d 1390, 986 NYS2d 718 [4th Dept 2014]; ***Dixson v Waterways at Bay Pointe Home Owners Assn., Inc.***, 112 AD3d 884, 978 NYS2d 85 [2d Dept 2013]). Here, defendants failed to eliminate triable issues of fact as to whether plaintiff was engaged in a specifically enumerated activity under this section of the Industrial Code (*see* ***Perez v 286 Scholes St. Corp.***, 134 AD3d 1085, 22 NYS3d 545 [2d Dept 2015]; ***Dixson v Waterways at Bay Pointe Home Owners Assn., Inc.***, *supra*). Specifically, triable issues of fact remain as to whether the power washing was in preparation for, and a contractual part of, the painting work, rather than routine maintenance (*see* ***Dixson v Waterways at Bay Pointe Home Owners Assn.***, *supra*). Although Jusiega testified that he could not recall whether he had any discussions with plaintiff regarding painting, plaintiff testified that he was hired to power wash the siding and to paint the columns and the fence of the house.

Labor Law § 200 codifies the common-law duty of owners or of general contractors to maintain a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Lombardi v City of New York***, 175 AD3d 1521, 2019 NY Slip Op 06763 [2d Dept 2019]). Under this section of Labor Law, when a defendant lends allegedly dangerous or defective equipment to a worker that causes injury during its use, such a defendant must establish, prima facie, that it did not create the alleged danger or defect in the instrumentality, and that it did not have actual or constructive notice of its existence to be entitled to summary judgment in his or her favor (*see* ***Gonzalez v Perkan Concrete Corp.***, 110 AD3d 955, 975 NYS2d 65 [2d Dept 2013]; ***Murillo v Porteus***, 108 AD3d 753, 970 NYS2d 235 [2d Dept 2013]; ***Navarro v City of New York***, 75 AD3d 590, 905 NYS2d 258 [2d Dept 2010]). A defendant has constructive notice when the defect is visible and apparent, and has existed for a sufficient length of time prior to the accident that it could have been discovered and corrected (*see* ***Koutsiaftis v Alliance Parking Servs., LLC***, 175 AD3d 1519, 2019 NY Slip Op 06762 [2d Dept 2019]; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]; ***McDermott v Santos***, 171 AD3d 1158, 98 NYS3d 646 [2d Dept 2019]). Accordingly, evidence of the absence of rubber shoes on a ladder is such a visible and apparent defect, which may be sufficient to raise a triable issue of fact on the issue of constructive notice (*see* ***Sochan v Mueller***, 162 AD3d 1621, 78 NYS3d 608 [4th Dept 2018]; ***Jaycoxe v VNO Bruckner Plaza, LLC***, 146 AD3d 411, 44 NYS3d 395 [1st Dept 2017]; ***Patrikis v Arniotis***, 129 AD3d 928, 12 NYS3d 174 [2d Dept 2015]). Here, defendants failed to make a prima facie showing that Jusiega neither created the alleged dangerous condition by providing plaintiff with a ladder that was missing safety feet, or that they lacked notice that the ladder was no so equipped (*see* ***Gonzalez v Perkan Concrete Corp.***, *supra*; ***Navarro v City of New York***, *supra*). As previously indicated, defendant's submissions included the conflicting deposition testimony of plaintiff and Jusiega. Plaintiff testified that the subject ladder lacked safety feet, while Jusiega testified that it had rubber safety feet. As conflicting inferences may be drawn based on the evidence and issues of credibility exist, summary judgment dismissing plaintiff's claim for violation

of Labor Law § 200 may not be properly granted (*see* ***Singletary v Alhalal Rest., Inc.***, 163 AD3d 738, 80 NYS3d 41 [2d Dept 2018]; ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]).

The Court now turns to that branch of defendants' motion seeking to dismiss plaintiff's claim for failure to procure workers' compensation insurance. Workers' compensation is intended to be the exclusive remedy for unintentional injuries sustained during the course of employment (Workers' Compensation Law §§ 11, 29 [6]; *see* ***Macchirole v Giamboi***, 97 NY2d 147, 736 NYS2d 660 [2001]; ***Eshonkulov v Rafiqul***, — AD3d — , 2019 NY Slip Op 07236 [2d Dept 2019]; ***Zielinski v New Jersey Tr. Corp.***, 170 AD3d 927, 96 NYS3d 78 [2d Dept 2019]). Where the issue of the applicability of the Workers' Compensation Law is in dispute, and a plaintiff fails to litigate that issue before the Workers' Compensation Board (the Board), a court should not express an opinion as to the availability of compensation, but should refer the matter to the Board because its disposition of the plaintiff's compensation claim is a jurisdictional predicate to the civil action (*see* ***Narro v MMC Holding of Brooklyn, Inc.***, 120 AD3d 1321, 992 NYS2d 561 [2d Dept 2014]; ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, 114 AD3d 905, 981 NYS2d 140 [2d Dept 2014]). The question of whether a particular person is an employee within the meaning of Workers' Compensation Law is usually a question of fact to be resolved by the Board (*see* ***Findlater v Catering by Michael Schick, Inc.***, 166 AD3d 727, 86 NYS3d 505 [2d Dept 2018]; ***Nunes v Window Network, LLC***, 54 AD3d 834, 863 NYS2d 815 [2d Dept 2008]). In making that determination, relevant factors for the Board to consider include, but are not limited to, the right to control the work, the method of payment, the right to discharge, and the relative nature of the work, with no single factor being dispositive (*see* ***Mauro v American Red Cross***, — AD3d — , 108 NYS3d 560 [3d Dept 2019]; ***Matter of Lai Pock Lew v Younger, 69 A.D.3d 1161***, 893 N.Y.S.2d 367 [3d Dept 2010]).

Defendants' motion presented factual questions as to plaintiff's status as an independent contractor, as they claim, or as an employee, as plaintiff claims (*see* ***Dunn v American Transit Ins. Co.***, 71 AD3d 629, 894 NYS2d 895 [2d Dept 2010]; ***Nunes v Window Network, LLC***, *supra*). Here, it is undisputed that Jusiega provided a power washing machine and the subject ladder to plaintiff to perform his work. However, there is conflicting evidence regarding whether plaintiff was instructed on how to perform certain aspects of his work, and whether plaintiff was hired to perform painting services as well. Accordingly, prior to the rendering a determination on this motion, this action is referred to the Board for a hearing as to whether plaintiff is relegated to benefits under the Workers' Compensation Law (*see* ***Narro v MMC Holding of Brooklyn, Inc.***, *supra*; ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, *supra*; ***Dunn v American Transit Ins. Co.***, *supra*). The Court notes, without deciding whether tolling provisions may apply, that pursuant to Workers' Compensation Law § 28, the two-year period in which a party may apply for Workers' Compensation benefits has since elapsed. Thus, should any party produce evidence from the Board that either a hearing has been held previously and a decision rendered, or proof that the Board has declined to hear this case, the Court will then decide the remaining portion of the motion on the merits (*see* ***Monteiro v Rasraj Foods & Catering, Inc.***, 114 AD3d 735, 980 NYS2d 142 [2d Dept 2014]). If no final determination of the Board has been made heretofore, then plaintiff is directed to make an application for such formal determination within 60 days of the date of this decision.

Accordingly, the branches of defendants' motion for summary judgment dismissing plaintiff's claims for violations of Labor Law §§ 200, 240 (1), and 241 (6), are granted to the extent set forth therein, and are otherwise denied, and the branch of defendants' motion dismissing plaintiff's claim for failure to procure workers' compensation insurance is denied, without prejudice to renew within 45 days of a determination by the Board as to plaintiff's eligibility for workers' compensation benefits.

Dated: 11/13/2019

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**