SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

JORGE SAY,

Plaintiff,

-against-

MIGUEL LUNA,

Defendants.

Present:

Hon. Charles M. Troia

DECISION AND ORDER

Index No. 150694/18

Motion No. 002

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The following papers numbered 1 to 4 were marked fully submitted January 21, 2021

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant MIGUEL LUNA With Supporting Papers, Exhibits and Memorandum of Law (dated May 5, 2020)	1, 2
Plaintiff's Affirmation in Opposition (dated December 21, 2020)	3
Reply Affirmation by Defendant MIGUEL LUNA (dated January 14, 2021)	4

Upon the foregoing papers, the motion (No. 002) by defendant MIGUEL LUNA for summary judgment dismissing plaintiff's complaint is granted to the extent that the causes of action asserted under Labor Law §§240 and 241(6) are severed and dismissed.

FACTS

JORGE SAY (hereinafter "plaintiff") commenced this action to recover damages for injuries he sustained when he fell from a ladder while painting the outside of MIGUEL LUNA's house (hereinafter "defendant"). It appears that plaintiff had worked as a handyman, performing various jobs for the defendant over the past several years. On the day of the accident, he and the

defendant were both painting the outside of defendant's home when the ladder plaintiff was standing on suddenly slipped out from beneath him, causing him to fall to the ground. It appears that the subject ladder had no rubber feet on the bottom and was either borrowed or rented from plaintiff's friend.

As a result of said accident, plaintiff alleges that he sustained, *inter alia*, a left distal radius fracture with left wrist pain and swelling; loss of motion, function and use of left wrist; a right temporoparietal acute subarachnoid hemorrhage; right lateral parietal subdural hematoma; head trauma; loss of consciousness; laceration to left parietal scalp; left parietal hematoma and swelling; grade 1 acromico-clavicular separation of and sprain of left shoulder with pain; loss of motion, function and use of left shoulder; and tinnitus. All of the above injuries are accompanied by intense pain, soreness, swelling and discomfort, along with headaches, dizziness, vertigo and limitation and restriction of movement. These injuries have also affected the nerves, blood vessels, ligaments, tendons and muscles, soft and cartilage parts, thereof, and other soft tissues in and around the areas of the aforementioned injuries. These injuries are claimed to be permanent in nature; have caused and/or exacerbated any pre-existing injuries and have caused emotional pain and suffering along with stress and anxiety.

In the current application, defendant now moves for summary judgment dismissing the complaint and contends that plaintiff cannot establish a case of negligence against him based on Labor Law §§240(1), 241(6), 200 or common-law negligence.

More particularly, defendant argues that claims asserted by plaintiff under Labor Law §240(1) and 241(6) must be dismissed since these two statutes specifically exempt from liability owners of one and two-family dwellings who contract for, but do not direct or control the work that plaintiff was engaged in. According to defendant, there is no question that he owns the single-family residence where the accident occurred and that he did not direct or control the plaintiff's

work. Defendant explains that the property was occupied by him and his wife and his children only at the time of the occurrence, and that although he currently has a tenant living on the property, this should not impact his entitlement to the exemption since he did not have a tenant at the time of the subject accident.

Defendant further explains that he did not direct or control the work performed by plaintiff. Even though he and the plaintiff were both painting the exterior of the house prior to the accident, he did not exercise any degree of direction or control over the manner in which the work was to be performed. The mere fact that he hired plaintiff to help and was present at the site (since it was his home), does not establish a sufficient level of direction or control over the work necessary to remove him from the homeowners' exemption provided for in these sections of the Labor Law.

Here, defendant argues that proof indicates that plaintiff was a handyman who had performed various work for him during the past eight years on an as-needed basis, including installing sheetrock, plumbing, electric, roofing and painting and he had occasionally worked with the defendant on some jobs. In this particular case, defendant was painting the garage door while plaintiff was painting the upper portion of the house. There is no indication, however, that defendant gave any instruction or direction to plaintiff other than what color to paint the house. In fact, defendant only provided the paint, but plaintiff brought his own paint brushes. In addition, defendant argues that he did not own or supply the subject ladder which plaintiff used, but plaintiff, himself, obtained the ladder from his own friend. In addition, while there is some discrepancy regarding whether plaintiff's friend brought the ladder to defendant's home or whether plaintiff and defendant picked the ladder up from the friend's home, defendant did not set up the ladder for plaintiff's use, but it was plaintiff who took the ladder and set himself up to paint. Both plaintiff and defendant agree that defendant did not instruct plaintiff regarding how or where to set up the ladder. Defendant further argues that plaintiff had gone up and down the ladder several times that

morning, each time repositioning the ladder as he worked, without any input from defendant. Accordingly, defendant argues that he is clearly entitled to the homeowner's exemption under the Labor Law in this case, and the complaint should be dismissed.

Similarly, in regard to Labor Law §241(6), defendant argues that said cause of action must also be dismissed based on the aforementioned homeowner's exemption. However, should the Court disagree, then the stated cause of action must be dismissed on the ground that plaintiff failed to cite any relevant or applicable violations of the Industrial Code which proximately caused plaintiff's accident. According to defendant, a plaintiff must plead and prove a specific Industrial Code violation and that such violation was the proximate cause of the accident. Moreover, any general allegations made by plaintiff in regard to whether an owner failed to provide safe or proper equipment is not sufficient to assert a claim under Labor Law §241(6).

More particularly, plaintiff alleges that defendant violated Industrial Code §23-1.7 which refers to protections from general safety hazards. Defendant, however, argues that plaintiff failed to specify which subsection was violated here. Even assuming that plaintiff had cited a specific sub-section, defendant argues that none of these sub-sections are applicable to this case, *e.g.*, the alleged occurrence in this case did not involve an overhead hazard, a falling hazard, a hazardous opening, bridge, or highway underpass. There is also no drowning, slipping or tripping hazard. Thus, §23-1.7 is entirely irrelevant.

Similarly, Industrial Code §23-1.15 provides the minimum standards required for safety railings when such railings are provided. However, said section does not mandate when such safety railings must be used. Accordingly, this section is inapplicable since there were no safety railings provided to plaintiff. The same is true for §23-1.6 relating to safety belts, harnesses, tail lines and lifelines. This section provides guidelines when using said equipment but does not mandate that the equipment be used under any particular circumstances. Accordingly, plaintiff

cannot rely on a section of the Industrial Code which merely sets forth standards for the use of such devices, and cannot rely on said section when said devices were not provided to plaintiff (*see* Phillip v. 525 E. 80th St. Condominium, 93 AD3d 578 ([1st Dept. 2012]).

Insofar as §23-1.21 refers to Ladders and Ladderways, defendant argues that plaintiff has failed to specify which provision of this multi-sectioned Industrial Code is relevant to the claims made herein. While plaintiff has cited all of the subsections, he has failed to identify which section was violated. Thus, the claim made thereunder must be dismissed. Also, Industrial Code §23-2.1 regarding maintenance and housekeeping is irrelevant to the case as bar. According to defendant, there is no proof in this case to suggest that the occurrence involved the storage of building materials.

In regard to plaintiff's claim asserted under Labor Law §200 and common-law negligence, defendant contends that Labor Law §200 is a codification of the common-law duty requiring a property owner or employer to provide their employees with a safe place to work. Defendant further contends that cases involving Labor Law §200 fall into two broad categories, *e.g.*, (1) where workers are injured as a result of a defective or dangerous condition existing on the premises; or (2) those cases where the injury was the result of the means or manner in which the work in performed (*see* Ortega v. Puccia, 57 AD3d 54, 61 [2nd Dept. 2008]).

In regard to the latter category involving cases where a worker is injured due to the means and manner in which the work was performed, liability would be based on whether the property owner had the authority to supervise and control the work being performed. Here, defendant argues that he did not have the requisite authority to control plaintiff's use of the ladder since it was plaintiff who obtained the ladder from a friend and that defendant should not be required to take responsibility for the condition of a ladder he did not own or provide. Notably, plaintiff admitted that he routinely borrowed ladders from his friends if needed for his work.

In addition, defendant argues that plaintiff erected the ladder himself and proceeded to paint the house without any input from defendant regarding the ladder or the work being performed. In fact, plaintiff admitted during his EBT that limited conversation was exchanged between plaintiff and defendant on the date of the accident. Also, defendant gave no instruction to plaintiff nor did he oversee or direct any of his work.

Moreover, plaintiff testified during his EBT that he climbed up and down the ladder several times on the day of accident prior to his fall in order to move the location of the ladder to continue painting without any input from defendant. Thus, it cannot be that defendant controlled the activities employed by plaintiff in regard to his use of the ladder or in the painting of the house. Accordingly, the proof in this case clearly establishes that defendant did not control the activity that brought about the injury. While plaintiff alleges that defendant apparently expressed some concern about condition of the ladder, defendant denies this. Defendant argues that regardless of the truth of this statement, plaintiff had obviously ignored these concerns and proceeded to use the ladder anyway.

Secondly, if this Court were to find that the accident occurred as a result of a defective or dangerous condition existing on the property, then liability would turn on whether defendant created the dangerous condition or had actual or constructive notice thereof. Here, defendant argues that there is no proof that he created the condition since the ladder did not belong to him but was borrowed from plaintiff's friend. In addition, there is no proof that defendant had notice of any defective condition. Even though plaintiff alleges that defendant made comments regarding the stability of the ladder or that he "should have known" that the ladder did not have rubber feet, defendant denies making any comments regarding the condition of the ladder and that he never even noticed the condition of the ladder. In this regard, defendant testified during his EBT that he drove plaintiff to his friend's house to pick up the ladder and that defendant stayed in the car while

plaintiff attached the ladder to the roof of the car. Also, when they arrived back at defendant's home, while defendant helped plaintiff remove the ladder from the roof of the car, he did not notice any defect existing on the ladder and did not help plaintiff set up the ladder to paint. According to defendant, any allegations regarding whether defendant knew that the ladder did not have rubber feet is based on pure speculation and insufficient to establish notice and defeat the summary judgment motion. Thus, defendant's motion must be granted.

In opposition, plaintiff contends that the motion must be denied based on the existence of triable issues of fact regarding whether (1) defendant allegedly "rented" the subject ladder from a third-party and then supplied it to plaintiff and allowed him to perform his work with said ladder; and (2) defendant was aware that the ladder was defective, *i.e.*, that it lacked rubber feet on the bottom, yet allowed plaintiff to use the ladder in spite of said condition.

According to plaintiff, Labor Law §200 imposes liability upon an owner who had the authority to supervise the work being performed on the property. In regard to this section, further inquiry is required regarding whether the plaintiff's injuries arose out of a defect or danger in the methods or materials used by plaintiff in performing the work, or whether the injuries arise out of a defective or dangerous condition existing on the premises. If the injury arose from a defective or dangerous condition, plaintiff contends that an owner will be liable under Labor Law §200 when the owner created the dangerous condition or when the owner had notice of the condition but failed to remedy said condition. In addition, under either standard, the duty to provide a safe workplace includes the tools and appliances provided by the owner, such as the ladder in this case, without which the work cannot be performed and completed.

According to plaintiff, there are triable issues of fact regarding whether defendant can be charged with providing a defective ladder to plaintiff. Plaintiff contends that proof indicates that defendant "rented" the ladder from plaintiff's acquaintance "Pedro". More particularly, plaintiff

testified during his EBT that Pedro delivered the ladder to defendant's home and that he observed defendant pay Pedro for the use of the ladder. Thus, it can be said that defendant "provided" the ladder to him and, therefore, is liable for injuries resulting from its poor condition.

In addition, plaintiff testified that defendant noticed that the ladder did not have rubber feet on its bottom and had expressed some concern about the safety of the ladder. In this regard, defendant, however, testified that he did not notice whether the ladder had rubber feet on the bottom, nor did he recall if he had examined the bottom of the ladder either before or after the accident. Defendant also denies that he expressed any concern to plaintiff over the safety of the ladder. Based on this conflicting EBT testimony, plaintiff argues that the motion seeking dismissal of the plaintiff's Labor Law §200 and common-law negligence claims must be denied since triable issues of fact exist regarding defendant's notice of the ladder's condition.

For the same reasons, plaintiff contends that there are triable issues of fact regarding the application of Labor Law §240. According to plaintiff, it is unclear as to whether defendant provided plaintiff with a defective piece of equipment; whether he had knowledge of the condition of the ladder; whether he exercised any authority and control over the work being performed, or had the ability to remedy any dangerous or defective condition existing on the premises. Plaintiff also contends that triable issues of fact exist regarding defendant's liability under Labor Law §241(6), and whether defendant violated the cited Industrial Codes by providing plaintiff with a defective piece of equipment, and whether defendant, as the property owner, had the authority to remedy the condition, but failed to do so. Accordingly, these issues require that the motion be denied

DISCUSSION

The drastic remedy of summary judgment should be granted only where there are no triable issues of fact (*see* Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The

moving party on a motion for summary judgment has the burden of demonstrating *prima facie* a right to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*see* Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form to establish that material issues of fact exist which required a trial (*see* Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Consequently, the court's only role in deciding a motion for summary judgment is to determine whether any triable issues of fact exist. "[I]ssue-finding, rather than issue-determination, is the key to the procedure" (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d at 404 [internal quotation marks omitted]). However, mere conclusions, expressions of hope or unsubstantiated allegations of fact are insufficient to defeat the motion (*see* Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Because summary judgment is the procedural equivalent of a trial, the presence of any significant doubt as to whether there is a material issues of fact, or where an issue of fact is "arguable", the motion must be denied (*see* Phillips v. Kantor & Co., 31 NY2d 307, 311 [1972]).

Here, it is the opinion of this Court that defendant has established his *prima facie* right to judgment as a matter of law, dismissing plaintiff's Labor Law §§240 and 241(6) claims based on the homeowners' exemption created under the Labor Law. In opposition, plaintiff has failed to raise a triable issue of fact.

It is well-established that Labor Law §240, also known as the "scaffold law", was designed specifically to protect construction workers against the exceptional risk of injury from the unique hazards imposed by gravity upon labors when the work itself is either elevated, or is positioned before the level where materials or loads are hosted or secured (*see* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500-501 [1993]). The duty imposed under this section is non-delegable and renders owners or contractors strictly liable regardless if they exercised supervision or control

over the workers or activities performed on site (*see* Rocovich v. Consolidated Edison Co., 78 NY2d 509, 513 [1991]).

Similarly, in regard to Labor Law §241(6), both owners and general contractors are subject to absolute liability for any injury proximately caused by the breach of a specific safety provision of the Industrial Code without reference to their ability to control or supervise the work site (*see* Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 348-349 [1998]). Thus, in order to state a viable cause of action under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by the violation of a specific Industrial Code provision setting forth a concrete standard of conduct applicable to the circumstances of the accident, rather than a mere reiteration of common-law principles (*see* Ross v. Curtis-Palmer Hydro-Elec Co., 81 NY2d 494, 501-502 [1993]).

However, in order to ameliorate the harsh standards imposed under these sections of the Labor Law upon owners of one- and two-family dwellings, the Legislature enacted the "homeowners' exemption" which specifically exempts such property owners from statutory liability for injuries occurring as a result of the work being performed on their property (*see* Ortega v. Puccia, 57 AD3d 54 [2nd Dept. 2008]). In order to avail him or herself of the homeowners' exemption, a defendant must demonstrate not only that the property was a one- or two-family residence, but also that he or she did not direct or control the work being performed (*see* Arama Fruchter, 39 AD3d 678, 679 [2009]). In accordance with the legislative intent, the phrase "direct or control" is to be strictly construed (*see* Kolakowski v. Feeney, 204 AD2d 693 [2nd Dept. 1994]), and in analyzing whether an owner's action amounted to direction or control, the relevant inquiry is the degree to which the owner supervised the method and manner of the work being performed (*see* Jonchuk v. Weafer, 199 AD2d 591, 592 [3nd Dept. 1993]). The owner must significantly participate in the project before he or she will be deemed to have crossed the line from being a

legitimately concerned homeowner to a *de factor* supervisor (see Douglas v. Beckstein, 210 AD2d 680 [3rd Dept. 1994]).

Here, in the opinion of this Court, defendant has made a *prima facie* showing of his entitlement to the homeowners' exemption under Labor Law §§240 and 241(6). In opposition, plaintiff has failed to raise a triable issue of fact. First, it is uncontested that the subject property was a one- or two-family residence. Secondly, there is no proof that defendant directed or controlled the plaintiff's work in order to exclude him from exemption status under the Labor Law (*see* McGlone v. Johnson, 27 AD3d 702 [2nd Dept. 2006]). Although defendant may have requested that he needed plaintiff to paint the upper, exterior of his home, and explained what needed to be done, such explanation has been held insufficient to establish the necessary direction and control to allow a claim to be asserted under the Labor Law (*see* Stamboulis v. Stefatos, 256 AD2d 328 [2nd Dept. 1998]). In addition, even though defendant may have performed some of the work himself, (he was painting the garage door), there is no indication that he made any suggestions or otherwise instructed or controlled the manner in which plaintiff was to perform his job. Moreover, proof indicates that plaintiff was in control of the ladder and basically working on his own in order to complete the painting, and there is no proof that defendant instructed plaintiff on how to use the ladder or to paint (*see* Jumawan v. Schnitt, 35 AD3d 382, 383 [2nd Dept. 2006]). In fact, the EBT testimony of both parties confirms that there was very little communication between plaintiff and defendant on the day of the occurrence.

Turning to plaintiff's claims under Labor Law §200 and common-law negligence, it is familiar law that the former represents a statutory codification of the common-law negligence standard, and that together they impose a duty upon an owner, contractor and their agents to provide construction workers with a safe place to work (*see* Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Cases involving Labor Law §200 fall into two broad

categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the methods and manner in which the work is performed (*see* Ortega v. Puccia, 57 AD3d 54, 61 [2nd Dept. 2008]). " '[W]hen the manner and method of work is at issue in a Labor Law §200 analysis, the issue is whether the defendant had the authority to supervise or control the work'" (Poalacin v. Mall Props., Inc., 155 AD3d 900, 908 [2nd Dept. 2017], *quoting* Ortega v. Puccia, 57 AD3d at 62 n2). However, when a claim arises out of an alleged dangerous premises condition, a property owner or general contractor (or subcontractor) may be held liable in common-law negligence and under Labor Law §200 when the owner or general contractor has control over the work site and/or he either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it (*see* Abelleira v. City of New York, 120 AD3d 1163, 1164 [2nd Dept. 2014]).

Here, it has already been established to the satisfaction of this Court that defendant did not have sufficient supervision or control over the plaintiff's work. Thus, there can be no claim against defendant under Labor law §200 in regard to the manner and methods used at the site. Nevertheless, according to the complaint and bill of particulars, plaintiff has also alleged, *inter alia*, that he was injured as a result of a certain dangerous condition at the premises, *i.e*, the defective ladder. Thus, defendant, as the property owner, can be held liable herein if he had either created or had actual or constructive notice of the purported hazard irrespective of whether he supervised or directed plaintiff's work (*see* Chowdhury v. Rodriguez, 57 AD3d 121, 123 [2008]).

In regard to creating the condition, unless there is some proof in this case establishing that defendant somehow had control of, used or altered a ladder that did not belong to him by, *e.g*., removing the rubber feet, defendant cannot be held liable for creating the alleged defective or dangerous condition of the ladder. However, with regard to the issue of notice, while defendant

has established his *prima facie* right to judgment as a matter of law by his own EBT testimony indicating that he (1) did not notice the condition of the ladder, including its lack of rubber feet; (2) he never inspected the ladder before or after the subject incident; and (3) he never had any conversation with plaintiff regarding the condition and/or safety of the ladder, plaintiff, nevertheless, has responded sufficiently in opposition, by submitting his own EBT testimony which directly contradicts defendant's testimony in regard to conversations between the two parties and serves to raise triable issues of fact regarding defendant's notice of the alleged defective condition of the ladder.

More specifically, plaintiff testified that defendant had expressed some concern over the safety of the ladder and he allegedly told him several times that he did not see this a being a good ladder and that he did not trust the ladder (*see* Plaintiff's EBT transcript, pg. 46). On the other hand, defendant's EBT testimony indicates that he had no conversations with plaintiff about the ladder and made no complaints to plaintiff regarding the ladder (*see* Defendant's EBT transcript, pg. 42). Since it is not the function of this Court in deciding a motion for summary judgment to make credibility determinations, the motion in this regard must be denied (*see* Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [9957]). Also relevant here is testimony indicating that defendant helped plaintiff remove the ladder from the roof of his vehicle and, therefore, had the opportunity to notice any existing defect, *e.g.*, the fact that the rubber feet were missing from the bottom of the ladder. Thus, the motion seeking dismissal of plaintiff's claims brought under Labor Law §200 and common-law negligence must be denied.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion (No. 002) for summary judgment is granted to the extent that the causes of action asserted under Labor Law §§240 and 241(6) are hereby severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that Clerk enter judgment accordingly.

ENTER,

Hon. Charles M. Troia

DATED: March 26, 2021