SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57
Justice

JM

- V -

Spectrum Inc etc

INDEX NO. 113568-00

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross-Motion Answering Affidavits — Exhibits	2, 3 4, 5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted, ~~and~~ cross-motion of plaintiff is granted, and cross-motion of defendant Spectrum is denied as per accompanying decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 1/24/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

FLORENCIO FUENTES,
Plaintiff(s)
against

SPECTRUM, INC. and
SKANSKA (U.S.A), INC., et al.,
Defendant(s)

Index No.: 113568/00

Motion Seq. No.: 002

DECISION/ORDER

Present: Hon. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff sues to recover for personal injuries sustained when he fell off a ladder while performing work in the newly constructed home of defendants Mrinal and Sunil Jhangiani. The complaint alleges causes of action under Labor Law §§ 200, 240(1), and 241(6), as well as common law negligence. Defendants Jhangiani move for summary judgment dismissing the complaint and all cross-claims against them. Defendant Spectrum Skanska, Inc. ("Spectrum") cross-moves for summary judgment dismissing the complaint and all cross-claims against it, or alternatively, for common law indemnification against defendant Concort Drywall Construction Corp. ("Concort"). Plaintiff cross-moves for summary judgment as to liability on his cause of action based on Labor Law § 240(1) against defendants Spectrum, Inc. and Skanska (U.S.A.), Inc., Spectrum, and Concort.

The following facts are substantially undisputed: Defendants Spectrum, Inc. and Skanska **(U.S.A.),**Inc. and Spectrum Skanska, Inc. were the general contractors on a housing development project known as Castle Walk. Defendant Concort was a subcontractor on the project. Plaintiff, a drywall finisher, was hired by Concort to do repair or "warranty work" on the walls in the home of defendants Mrinal and Sunil Jhangiani, the owners of a house in the

development. On August 9, 1999, plaintiff was injured when he fell from a ladder while performing work at the home of the Jhangianis. Plaintiff was standing on an unopened A-frame ladder that was leaned against a wall, when the ladder slipped and fell to the floor causing plaintiff to fall on top of the ladder.

On the date of plaintiff's accident, he was called by Concort to perform drywall work at the Jhangianis' home. It is not disputed that Concort hired plaintiff to do the work, or that plaintiff reported to Spectrum's project manager on the site on the day of the accident. On the instructions of Spectrum's employee, plaintiff went to the subject home to do the work.

Defendants Jhangiani move to dismiss the complaint and all cross-claims against them based on the exemption in Labor Law § 240(1) for owners of single family homes. This motion is unopposed. In its cross-moving papers, in fact, plaintiff seeks to withdraw its claims against the Jhangiani defendants. (Aff. of James Monroe in support of cross-motion, ¶ 3.) Accordingly, the motion of defendants Jhangiani is granted.

Labor Law § 240(1)

Labor Law § 240(1) requires that "[a]ll contractors and owners and their agents * * * in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect * * * scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." "The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Rv. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991].) Thus,

Labor Law § 240(1) " 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed' " (Rocovich, 78 NY2d at 513), and it "imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) Further, it is well established that "the duty under section 240(1) is nondelegable rind that an owner [or contractor] is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control." (Rocovich, 78 NY2d at 513.) Comparative negligence is not a defense to a Labor Law § 240(1) claim. (Gordon, 82 NY2d at 562.) To defeat a § 240(1) claim, a worker's acts must have been the "sole proximate cause" of his injuries. (Weininger v Hagedorn & Co., 91 NY2d 958, 960 [1998], rearg denied 92 NY2d 875.)

In this case, it is not disputed that plaintiff was injured as a result of a fall from an elevated work site, when the ladder on which he was standing slipped from underneath him. Plaintiffs uncontroverted testimony established that he was using a ladder to reach an area of wall about ten feet above the floor when the unsecured ladder slipped. There is no evidence that the ladder was anchored to anything, equipped with any safety device to prevent slipping, or supported by another person. While plaintiff testified that he requested a helper from Spectrum (Fuentes Dep of May 8, 2002 [Fuentes 2d Dep], at 33-34), and Spectrum denies that plaintiff requested help (Dep of John Churyk at 29), it is undisputed that Spectrum did not provide anyone to assist plaintiff.

"It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)." (Schultze v 585 W. 214th St. Owners Corp., 228 AD2d 381 [1st Dept 19961; Wise v 141 McDonald Ave.. LLC, 297

AD2d 515, 516 [1st Dcpt 2002]; Jamil v Concourse Enters., Inc., 393 AD2d 271, 273 [1st Dept 2002]; Camacho v 101 Ellwood Tenants Cop., 289 AD2d 102 [1st Dept 20011.) Thus, plaintiff has established a prima facie case that the ladder was not "so constructed, placed and operated as to give proper protection" to plaintiff. (Labor Law § 240 [1].)

Spectrum argues. however, that plaintiff's actions were the sole proximate cause of his accident. Relying on Weininger v Hagedorn & Co. (91 NY2d 958, supra), Spectrum argues that plaintiff's use of the ladder in a closed position was a misuse constituting the sole proximate cause of his injuries. In Weininger, the Court of Appeals held that a directed verdict in favor of plaintiff was improper where plaintiff fell from a ladder and "a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries." (91 NY2d at 960.) While the Court of Appeals opinion did not recite the facts concerning the plaintiff's use of the ladder, subsequent lower court decisions have explained that the plaintiff in Weininger was standing on the crossbar of a ladder, and reasoned that such an intentional misuse may preclude summary judgment in favor of plaintiff. (Secord v Willow Ridge Stables, Inc., 179 Misc2d 366 [Sup Ct, Monroe County 19991, affd 261 AD2d 965 [4th Dept]; McMahon v 42nd St. Dev. Proiect. Inc., 188 Misc2d 25 [Sup Ct, Bronx County 20011; Mata v Chera and Sons, 2001 NY Misc LEXIS 833 [Sup Ct, Bronx County 20011.) Thus, Weininger is consistent with the precept that "when the circumstances demonstrate that a statutory violation was a contributing factor to a worker's fall from a ladder or scaffold, the worker's comparative negligence (as distinguished from intentional wrongdoing) is factually and legally irrelevant, and should not be used to defeat summary judgment on the pretext or speculation that the accident may have been caused "solely" because of the culpable conduct of the worker." (McMahon, 188 Misc2d at 30

[emphasis in original]: Crespo v City of New York, 2001 NY Misc LEXIS 744 [Sup Ct, Bronx County 2001]. See Kyle v City of New York, 268 AD2d 192 [1st Dept 20001.)

Here, plaintiff testified that he was unable to open the A-frame ladder in the space where he was working. (Fucntes 2d Dcp at 32-33.) More particularly, he testified that he had to work on an area of the wall next to the stairway leading from the first to the second floors: that the wall area that he needed to reach was about ten feet high; and that the bottom of the stairs prevented him from being able to open the ladder to reach the area where he needed to work. (Fuentes Dep of June 6, 2001 [Fuentes 1st Dep], at 87-90; Fuentes 2d Dep at 32-33.) He also testified that he leaned the ladder against the wall (Fuentes 2d Dep at 32-33), and that there were three to four feet to open the ladder but he needed six. (Id. at 36-37.)

Spectrum asserts that the testimony of defendant Mrinal Jhangiani and photographs and drawings of the foyer area show that there was sufficient room to open the ladder. Ms. Jhangiani testified that the foyer area in which plaintiff was working was a "huge open space" with room to open an A-frame ladder. (M. Jhangiani Dep at 28.) She also testified that the stairs in the foyer were against the wall (id. at 19), and that the area that needed drywall work was in a corner of the wall next to the stairs about ten feet high. (Id. at 25-26.) Her testimony, however, did not address whether a ladder could be opened in the foyer and still used to reach the upper level of the wall where plaintiff needed to work. In contrast. plaintiff's testimonv. discussed above, was that he could not open the ladder to reach the area where he had to work. Thus, plaintiff's specific testimony is not refuted by Ms. Jhangiani's general testimony that there was room in the foyer to open a ladder. Nor do the photographs or drawings of the foyer show, or raise a factual issue **as** to whether, plaintiff had room to open the ladder at the location where the work was

performed.

Spectrum has thus failed to demonstrate, or to raise a triable issue of fact as to whether, plaintiff's use of the ladder in the closed position. under the physical circumstances with which hc was prcscntcd. was a misuse of the ladder. Absent such a showing, plaintiff's act in using the closed ladder cannot be said to be the "sole proximate cause of his injuries," thereby relieving defendant from liability under Labor Law § 240(1). (See Weininger, 91 NY2d at 960, (Wasilewski v Museum of Modern Art, 260 AD2d 271 [1st Dept 19991. See also Jamil v Concourse Enters., Inc., 293 AD2d 271, supra.)

Moreover, there is substantial authority that a fall from an unsecured, closed ladder is an accident within the scope of Labor Law § 240(1). (See Mannes v Kamber Mgt., 284 AD2d 310 [2d Dept 20011, lv dismissed 97 NY2d 638; Carlos v W.H.P. 19 L.L.C., 280 AD2d 419 [1st Dept 2001]; Dennis v Bcltrone Constr. Co., 195 AD2d 688 [3d Dept 19931. See also Avner v 93rd St. Assn., 147 AD2d 414 [1st Dept 1989].) As it is undisputed that the ladder on which plaintiff was working was unsecured, plaintiff is entitled to partial summary judgment as to liability on his section 240(1) claim.

Spectrum also argues that, at the time of his accident, plaintiff was engaged in routine maintenance work not covered by Labor Law § 240(1). The testimony of defendants' witnesses, as well as of plaintiff, shows that plaintiff's work consisted of repairs to the walls of the Jhangianis' home performed pursuant to Spectrum's warranty on the construction of the house. Ms. Jhangiani testified that Spectrum agreed to do repair work on the house for a year after the closing date (M. Jhangiani Dep at 34), and that in August 1999 she contacted Spectrum about drywall problems. (Id. at 6, 7.) Plaintiff testified that the work he was doing was repair work

covered under the warranty on the house (Fuentes 1st Dep at 70-71; Fuentes 2d Dep at 15, 137), and that on the day of his accident, he was assigned to "fix water damage in the living room and the dining room and some stress damage in the foyer." (Fuentes 2d Dep at 14.) According to plaintiff's uncontroverted testimony, this work was more than mere patchwork, as it consisted of cutting, hanging, taping and finishing sheet rock, also called drywall and metal framing. (Id. at 135-136; Fuentes 1st Dep at 82-83.) Plaintiff explained at his deposition that he had to climb the ladder with a keyhole saw and knife to cut the sheetrock (Fuentes 2d Dep at 40-41), and then cut the sheetrock out, put a new piece in, tape and spackle the wall. (Fuentes 1st Dep at 82-83.)

" 'Repairing' is one of the specifically enumerated categories of work covered by the statute." (Izrailev v Ficarra Furniture of Long Is.. Inc., 70 NY2d 813, 815 [1987].) Further, while not specifically addressed by the statute, drywall work – installation, finishing or taping – has been treated by the courts in numerous cases as activity covered by Labor Law § 240(1). (See, e.g., Haulotte v Prudential Ins. Co., 266 AD2d 38 [1st Dept 19991; Chura v Baruzzi, 192 AD2d 918 [3d Dept 1993]; McDaniel v Fischione Constr. Co., 292 AD2d 759 [4th Dept 20021; Norton v Bell & Sons, 237 AD2d 928 [4th Dept 19971.) The drywall repair work performed by plaintiff, which included the cutting and replacement of sheetrock, was more than routine maintenance. The court thus holds that plaintiff's work was activity covered by Labor Law § 240(1).

Labor Law § 200 and common law negligence

Spectrum cross-moves to dismiss plaintiff's Labor Law § 200 and common law negligence claims on the ground that it was "not the genera1 contractor for the work that plaintiff was performing at the time of the accident," and did not control or supervise plaintiff's work.

Spectrum also claims that plaintiff has not alleged "any particular negligence" on the part of Spectrum with respect to plaintiff's accident.

Labor **Law** § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. (Rizzuto v **L.A.** Wenger Contr. Co., 91 NY2d 343, 352 [1998].) It applies to owners, contractors, or their agents who " 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.' [citation omitted]." (Id [emphasis in original].) Thus, ''[~]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." (Comes v New York State Elec. & Gas Corn., 82 NY2d 876, 877 [19931.)

It is undisputed that Spectrum was the general contractor for the Castle Walk housing development in which the subject premises was located. It is also undisputed that the project was still underway at the time of plaintiff's accident; that Spectrum was constructing other houses in the development; that its project manager maintained an office at the site; and that it retained responsibility for completion of the project, including directing and performing warranty work on the Jhangianis' newly built house. It is also not contested that Spectrum contracted with Concort to do the drywall repairs, and that Spectrum directed **plaintiff** to do the necessary **work.**

There is a factual dispute as to whether Spectrum supplied the ladder used **by** plaintiff. Plaintiff testified that the ladder he was using was provided by Spectrum, whereas Spectrum's project manager and construction supervisor testified that Spectrum did not provide a ladder to plaintiff, This conflicting testimony **raises issues** of credibility not properly **resolved** on **a** motion for summary judgment. (See Capelin **Assocs.** v Globe Mfg. Corn., **34** NY2d 338 [1974].)

Accordingly, as issues of fact exist as to whether Spectrum provided the ladder or otherwise directed and controlled plaintiff's work, Spectrum has not established that it is entitled to summary judgment on the common law negligence and Labor Law $200 claims.

Labor Law § 241(6)

It is well settled that Labor Law § 241(6) requires owners and contractors "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) This duty is nondelegable, and a plaintiff need not show that the defendant exercised supervision or control over the worksite in order to recover under this section. (Id. at 502.) In order to maintain a viable claim under Labor Law § 241(6), however, the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards.'' '' The former give rise to a nondelegable duty, while the latter do not." (Id. at 505.)

Spectrum moves to dismiss plaintiff's Labor Law § 241(6) claim on the ground that the code violations cited by plaintiff *are* not applicable. In support of his Labor Law § 241(6) claim, plaintiff alleges violations of various Industrial Code Regulations (12 NYCRR part 23), including 23-1.7(b), 23-1.7(b)(1), 23-1.7(d), 23-1.21(b)(1), 23-1.21(b)(4)(i), 23-1.21(b)(4)(ii), 23-1.21(e)(3), and 23-2.1. Spectrum addresses only two of the alleged violations, sections 23-1.7 and 23-1.21. As to 23-1.7, Spectrum argues that it has to do with hazardous openings and slipping hazards and is not applicable. Plaintiff does not contest that § 23-1.7 is inapplicable. As to 23-1.21, Spectrum incorrectly asserts that "plaintiff has not claimed any specific section

therein." Plaintiff has alleged violations of §§ 23-1.21(b)(4)(i)(requirements relating to securing ladders), 23-1.21(b)(4)(ii)(requirements relating to ladder footings), and 23-1.21(e)(3)(requirements relating to securing stepladders), which state specific standards that appear to apply to the facts of this case. (See Sprague v Peckham Materials Corp., 240 AD2d 392 [2d Dept 1997]; Sopha v Ccmbustion Eng'g, Inc., 261 AD2d 911 [4th Dept 1999].) As Spectrum does not move to dismiss the 241(6) claim based on the other sections cited by plaintiff, the court does not reach the issue of their applicability. Accordingly, Spectrum's motion to dismiss plaintiff's § 241(6) claim is granted only to the extent that the claim is based on an alleged violation of Code § 23-1.7.

Indemnification

Defendant Spectrum also seeks summary judgment on its cross-claim for common law indemnification against defendant Concort. Spectrum asserts that it is entitled to summary judgment because Concort "directed and controlled" plaintiff's work.

However, it is undisputed that Spectrum contacted Concort to obtain a worker to do drywall work covered by Spectrum's warranty on its construction work at the Jhangianis' home. It is also undisputed that Spectrum's project manager was at the housing development site, both to supervise ongoing construction of new homes and to direct **work** to be done under the warranties on the already constructed homes. There is no evidence that Concort supervised or controlled plaintiff's work on the day of his accident. The testimony of plaintiff and defendants is consistent that, after Concort contacted plaintiff and assigned him to the job, he reported to Spectrum at the construction site and was directed by Spectrum to the work location. Moreover, there is a factual dispute as to whether Spectrum provided plaintiff with the ladder in question.

Thus, on this record, Spectrum has not established that it is entitled to summary judgment on its common law indemnification claim against Concort.

Accordingly, it is

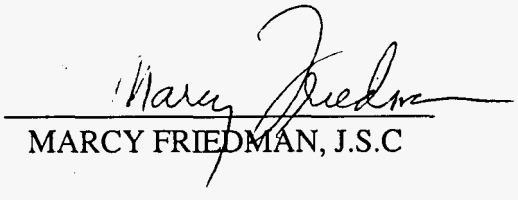
ORDERED that the motion of defendants Jhangiani is granted without opposition to the extent that the complaint and all cross-claims against defendants Mrinal and Sunil Jhangiani are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion of defendant Spectrum for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent that plaintiff is granted summary judgment against defendants Spectrum, Inc. and Skanska **(U.S.A.),** Inc., Spectrum, and Concort, as to liability on his Labor Law § 240(1) claim, and the issue of the amount of damages shall be determined at the trial of the action.

This constitutes the decision and order of the court.

Dated: New York, New York
January 24,2003



MARCY FRIEDMAN, J.S.C