At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of November, 2024.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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NOEL LIVINGSTON,

Plaintiff,

-against-

108 DUNKIRK STREET, LLC, FHA CONTRACTING CORP., JAMAICA PROPERTY MANAGEMENT, LLC, and ELIZABETH FARREL, ADMISTRATRIX CTA OF THE ESTATE OF FRED STARK,

Defendants.

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Index No.: 524111/2019

DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	99-120, 124-137, 151-152
Opposing Affidavits (Affirmations)	138-144,145-146-154-156
Affidavits/ Affirmations in Reply	148-149, 150, 158-159
Other Papers:	

Upon the foregoing papers, defendants 108 Dunkirk Street, LLC (Dunkirk) and Elizabeth Farrell, administratrix CTA of the estate of Fred Stark (Estate) move (Seq. 03), for an order, pursuant to CPLR § 3212, granting them summary judgment dismissing plaintiff Noel Livingston's (plaintiff) complaint as against them. Plaintiff moves (Seq. 04) for an order, pursuant to CPLR § 3212, granting summary judgment against Dunkirk and

defendant Jamaica Avenue Property Management, LLC (Jamaica) under the Labor Law §§ 240 (1) and 241 (6) causes of action. Jamaica and defendant FHA Contracting Corp. (FHA) move (Seq. 05), for an order, pursuant to CPLR § 3212, granting them summary judgment dismissing plaintiff's complaint as against them. Opposition to all the foregoing motions have been filed, except where indicated differently herein below.

Background Facts and Procedural History

In a written agreement dated May 23, 2017, Estate hired Jamaica to serve as the property manager of the one-story warehouse building located at 108-40 Dunkirk Street in Queens, New York (the building). At the time the parties entered into this agreement, Estate owned the building. On or about June 19, 2017, Estate transferred ownership of the building to Dunkirk. Pursuant to a January 2, 2019 construction contract, Jamaica hired FHA to perform demolition, electrical, plumbing, concrete, and roofing work at the building. Non-party Harold Stark Industrial Development (Development) also was hired by Jamaica in connection with the demolition. Development allegedly was plaintiff's employer.

On May 9, 2019, plaintiff was performing demolition work on the building. When plaintiff arrived, he was directed by his supervisor "Larry" to remove certain pipes in the exposed ceiling of the building, by cutting the clamps supporting the pipes with an electric Sawzall reciprocating saw. To reach the pipes, plaintiff set up a 12-foot A-frame ladder on a level concrete platform that had a ramp leading up to it. According to plaintiff's deposition testimony, he wanted to use a scissor lift in order to perform this work but there was too much debris on the ramp to move the scissor lift to the platform.

Plaintiff's coworker held the ladder when he initially climbed up, but, at some point, the coworker stopped holding the ladder. Plaintiff climbed to the tenth step of the ladder, and began cutting clamps with the Sawzall. As plaintiff cut one of the clamps, a pipe in the ceiling swung out and struck the ladder. As a result, the ladder fell over on its side, causing plaintiff to fall to the floor below, sustaining the alleged injuries.

By summons and complaint dated October 31, 2019, plaintiff commenced the instant action against Dunkirk, FHA, and Estate. Among other things, the complaint alleged that plaintiff's injuries were caused by the defendants' negligence as well as their violation of Labor Law §§ 200, 240 (1), and 241 (6). Thereafter, plaintiff filed an amended complaint in which he added Jamaica as a party defendant. After being served with the summons and complaint, the defendants all filed answers in which they generally denied the allegations in the complaint and asserted various cross-claims against each other.

On December 9, 2021, Jamaica and FHA moved for summary judgment dismissing plaintiff's complaint against FHA. In this regard, the moving defendants argued that plaintiff was employed by FHA at the time of the accident and therefore, his claims against FHA were barred by the exclusive remedy provisions set forth in Workers' Compensation Law § 11 and 29 (6). In a decision and order dated June 10, 2022, this Court denied the motion, as there was conflicting evidence regarding whether plaintiff was employed by FHA or Development. On January 29, 2024, plaintiff filed a note of issue and certificate of readiness.

Plaintiff's Claims Against Estate

Estate and Dunkirk move for summary judgment dismissing plaintiff's complaint against Estate. In so-moving, these defendants contend that there is no basis for any claims against Estate since it relinquished its ownership interest in the building to Dunkirk over two years prior to the accident. In support of this argument, Estate submits copies of deeds for the property, as well as the deposition testimony of Estate's administratrix and Jamaica's property manager, Elizabeth Farrell, both of which indicate that Estate transferred its ownership interest in the property to Dunkirk prior to the accident. In opposition to this branch of Estate and Dunkirk's motion, plaintiff argues that there are questions of fact regarding whether or not Estate is subject to liability under Labor Law §§ 200, 240 (1), and 241 (6) as a statutory agent of the owner Dunkirk.

"Labor Law §§ 200, 240, and 241 [only] apply to owners, general contractors, or their 'agents'" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011] [quoting Labor Law §§ 200(1), 240(1), 241]. Here, it is undisputed that Estate was not a general contractor or the owner of the property at the time the accident occurred. Further, contrary to plaintiff's claim, there is not an issue of fact regarding whether or not Estate was a statutory agent for purposes of these statutes. A party "hired for a specific project is subject to liability under [the Labor Law] as a statutory agent of the owner or general contractor only if it has been 'delegated the . . . work in which plaintiff was engaged at the time of his injury,' and is therefore 'responsible for the work giving rise to the duties referred to in and imposed by [the statutes]'" (*Coque v Wildflower Estates Devs., Inc.*, 31

AD3d 484, 488 [2d Dept 2006], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Further, in order to impose liability against a defendant as a statutory agent of the owner or general contractor, "the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951 [2d Dept 2011]). Here, Estate did not delegate the work that plaintiff was performing at the time of the accident since it did not hire FHA to perform this work. Further, although there was a management agreement between Estate and Jamaica (which did hire FHA), that agreement was contingent upon Estate's ownership interest in the building, which it relinquished to Dunkirk over two years prior to the accident. Finally, in the absence of any ownership interest in the building, it is clear that Estate did not have any authority to control or supervise plaintiff's work.

Accordingly, that branch of Estate and Dunkirk's motion which seeks summary judgment dismissing plaintiff's complaint against Estate is granted.

Plaintiff's Labor Law §§ 240 (1) and 241 (6) Claims Against FHA

As an initial matter, the court notes that plaintiff's notice of motion and affirmation in support of his motion only seek summary judgment under his Labor Law §§ 240 (1) and 241 (6) claims against Dunkirk and Jamaica. However, in his opposition papers to Jamaica and FHA's summary judgment motion, plaintiff contends that he is also entitled to summary judgment against FHA since it was the general contractor on the project. It was improper for plaintiff to seek this relief against FHA for the first time in opposition papers.

In any event, as noted above, the court has already determined that there is an issue of fact regarding whether plaintiff was employed by FHA or Development. If it is ultimately determined that plaintiff was employed by FHA, his claims against that defendant would be precluded pursuant to the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6). Accordingly, plaintiff is not entitled to summary judgment against FHA under his Labor Law §§ 240 (1) or 241 (6) claims.

Plaintiff's Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment against Dunkirk and Jamaica under his Labor Law § 240 (1) cause of action. At the same time, Jamaica and Dunkirk separately move for summary judgment dismissing this cause of action. In support of his motion, plaintiff points to his own sworn deposition testimony wherein he confirms the details of his fall and argues that this testimony is sufficient to demonstrate a prima facie violation of Labor Law § 240 (1). Plaintiff further contends that, as the owner of the building, Dunkirk is liable for this violation of the statute as a matter of law. In addition, given the fact that Dunkirk hired FHA to carry out the work that he was performing at the time of the accident, plaintiff maintains that Jamaica is also liable for the § 240 (1) violation as it was the statutory agent of the owner.

In opposition to this branch of plaintiff's motion, and in support of its own motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, Dunkirk argues that it is not subject to liability under the statute since it was an out-of-possession owner that had ceded all possession, control and management responsibilities of the building to Jamaica. In support of their motion for summary judgment, FHS and Jamaica maintain

that the pipe that struck the ladder was not an object that required securing under the statute inasmuch as plaintiff was attempting to remove the pipe when the accident occurred.

Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, "[t]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable for damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by

a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In cases where a worker falls from a scaffold or ladder that is not shown to be defective, the issue of whether or not the ladder or scaffold provided adequate protection under the statute is for the jury to determine (*Mora v 1-10 Bush Terminal Owner, L.P.*, 214 AD3d 785, 786 [2d Dept 2023]; *Esquivel v 2707 Creston Realty, LLC*, 149 AD3d 1040, 1041 [2d Dept 2017]; *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). However, evidence that the ladder or scaffold collapsed, moved, fell, or otherwise failed is sufficient to make a prima facie showing of a Labor Law § 240 (1) violation (*Exley v Cassel Vacation Homes, Inc.*, 209 AD3d 839, 841 [2d Dept 2022]; *Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]). This includes ladder collapses caused by an object such as a pipe, piece of wood, or piece of masonry striking the apparatus (*Cevallos v WBB Construction, Inc.*, 227 AD3d 657, 658-659 [2d Dept 2024]; *Kun Sik Kim v State St. Hospitality*, 94 AD3d 708, 709-710 [2d Dept 2012]; *Durmiaki v International Bus. Mach. Corp.*, 85 AD3d 960, 960-961 [2d Dept 2011]).

Here, plaintiff has made a prima facie showing that his injuries were caused by a violation of Labor Law § 240 (1), by submitting his sworn deposition testimony in which he stated that he fell a distance of ten feet while performing demolition work, when a piece of a pipe he was attempting to remove from the ceiling of the building struck the ladder, thereby causing the ladder to collapse. Further, the evidence submitted by plaintiff demonstrates that the building was owned by Dunkirk, and that Jamaica was a statutory agent of the owner, since it hired FHA to perform the work that plaintiff was carrying out at the time of the accident. As such, both Dunkirk and Jamaica are subject to liability for

the Labor Law § 240 (1) violation, and the burden shifts to them to submit sufficient evidence to raise a triable issue of fact regarding their liability under the statute.

Defendants have failed to meet this burden. Contrary to Dunkirk's argument, the fact that it was an out-of-possession owner with no control over or involvement in the underlying work does not insulate it from liability under Labor Law § 240 (1). "[I]t is clear that the statutory duty imposed by [Labor Law § 240 (1)] is '*nondelegable* and that an owner is liable for a violation even though the job was performed by an independent contractor over which it exercised no supervision or control'" (*Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339 [2008] [quoting *Rocovich*, 78 NY2d at 513 [1991]). Thus, in *Sanatass*, the Court found that the fee owner of a commercial building was liable for a violation of Labor Law § 240 (1) notwithstanding the fact that it was completely unaware that a tenant had contracted for the underlying work and that the tenant's failure to obtain the owner's permission prior to the commencement of the work violated a term of the lease agreement between the parties (*Sanatass,* 78 NY2d at 342). In so-ruling, the court noted that an owner's lack of notice, control, and "even the lack of 'any ability' on the owner's part to ensure compliance with the statute is legally irrelevant" (*id.*, at 340 [quoting *Coleman v City of New York*, 91 NY2d 821, 823 [1997]). Under the circumstances, as the owner of the building, Dunkirk is liable for the Labor Law § 240 (1) violation that caused plaintiff's injuries.

Jamaica and FHA's argument that Labor Law § 240 (1) does not apply here because the pipe that struck the ladder was not an object that required securing is also without merit. In raising this argument, Jamaica and FHA rely upon case law that deals with accidents

involving workers who are struck by falling objects. While it is true that plaintiff testified that the pipe struck him in the foot, he also testified that the pipe struck the ladder, which caused both him and the ladder to fall to the ground. Thus, this is a falling worker case and as noted above, testimony that a worker's fall is caused by an object striking a ladder and causing it to collapse constitutes prima facie evidence of a Labor Law § 240 (1) violation.

Accordingly, plaintiff's motion for summary judgment against Dunkirk and Jamaica under his Labor Law § 240 (1) claim is granted. Dunkirk and Jamaica/FHA's respective motions for summary judgment dismissing this cause of action are denied.

Plaintiff's Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment against Dunkirk and Jamaica under his Labor Law § 241 (6) cause of action. At the same time Dunkirk and Jamaica/FHA separately move for summary judgment dismissing this claim against them. In support of this branch of his motion, plaintiff maintains that his accident was caused by a violation of New York State Industrial Code provision 12 NYCRR 23-1.21(e)(3) and that, as the owner and statutory agent of the owner, Dunkirk and Jamaica are liable under Labor Law § 241 (6) for this violation as a matter of law.

In opposition to this branch of plaintiff's motion, and in support of its own motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, Dunkirk reiterates its argument that it is not subject to liability under the Labor Law since it lacked control over the work and had delegated all responsibilities for the property to Jamaica. In support of their motion for summary judgment dismissing plaintiff's Labor Law § 241 (6)

claim, Jamaica/FHA argue that the ladder used by plaintiff was appropriate for the work being performed.

Labor Law § 241(6) provides, in pertinent part, that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a specific standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *see also Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

Industrial Code section 23-1.21(e)(3), which pertains to stepladders, provides in pertinent part that "[w]hen work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means." This provision is sufficiently specific to support a Labor Law § 241 (6) cause of action (*McNamara v Gusmar Enter., LLC*, 204 AD3d 779, 782-783 [2d Dept 2022]).

Furthermore, plaintiff has made a prima facie showing that his accident was caused by a violation of this provision. In particular, plaintiff testified that he was standing on the 10th step of a 12-foot A-frame ladder at the time he fell and that the ladder was not being held by his coworker or otherwise secured when the accident occurred. Accordingly, the burden shifts to Dunkirk and Jamaica to raise a triable issue of fact regarding their liability under Labor Law § 241 (6).

The defendants have failed to meet this burden. In particular, as previously noted, as the owner of the building, Dunkirk is subject to liability under Labor Law § 240 (1) and the fact that it had delegated all responsibilities regarding the building to Jamaica is irrelevant for purposes of that statute. The same holds true for Dunkirk's liability under Labor Law § 241 (6) (*Sanatass*, 10 NY3d at 339-342). Furthermore, Jamaica and FHA's motion (Seq. 05) and opposition papers do not contest or even address the applicability of Industrial Code section 23-1.21(e)(3).

Accordingly, plaintiff's motion for summary judgment against Dunkirk and Jamaica under his Labor Law § 241 (6) claim is granted. Dunkirk, Jamaica and FHA's respective motions for summary judgment dismissing this cause of action are denied.

Plaintiff's Labor Law § 200/Common-Law Negligence Claims

Dunkirk moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it. In support of this branch of its motion, Dunkirk notes that the underlying accident arose out of the means and methods employed by plaintiff in carrying out the work. Dunkirk further maintains that the evidence demonstrates that it did not and could not exercise any control, supervision, or authority

over the means and methods used by plaintiff inasmuch as it was an out-of-possession landlord with no active employees or operations. Jamaica and FHA also move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them. In so moving, these defendants contend that the accident was not caused by a defective condition and that they did not have any control or authority over plaintiff's work.

In opposition to these branches of the defendants' motions, plaintiff argues that the moving defendants have failed to make a prima facie showing that the accident was not caused by their negligence. Plaintiff also maintains that there are issues of fact regarding whether plaintiff was supervised and controlled by FHA supervisors.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work or who have actual or constructive notice or otherwise created the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2d Dept 2005]; *Aranda v Park East Constr.*, 4 AD3d 315, 316-317 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [2d Dept 1998]). Specifically, "[w]here a premises condition is at issue, property owners [and contractors] may be held liable for a violation of Labor Law § 200 if the owner [or contractor] either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*,

57 AD3d 54, 61 [2d Dept 2008]). However, "[w]hen a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" (*Schnell v Fitzgerald*, 95 AD3d 1295, 1295 [2d Dept 2011]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62). General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]).

Here, the accident was caused by the means and methods plaintiff employed in attempting to remove the pipes from the ceiling. Furthermore, contrary to plaintiff's claim, Dunkirk has made a prima facie showing that it did not exercise any control or supervision over the means and methods plaintiff used in carrying out the work. In this regard, the evidence before the court demonstrates that Dunkirk had no employees and no presence at the jobsite. Accordingly, that branch of Dunkirk's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it are granted.

Turning to Jamaica and FHA's motion to dismiss plaintiff's Labor Law § 200 and common-law negligence claims against them, Jamaica has made a prima facie showing that it did not have the specific authority to supervise and control the means and methods used by plaintiff in carrying out his work by pointing to Ms. Farrell's deposition testimony, as well as plaintiff's own deposition testimony. In particular, it is clear from this evidence that Jamaica merely hired FHA on Dunkirk's behalf, was not present at the jobsite and did not exercise any control over the work. Further, plaintiff has failed to submit evidence sufficient to raise a triable issue of fact regarding Jamaica's liability under his Labor Law § 200 or common-law negligence claims. Accordingly, Jamaica is entitled to summary judgment dismissing these claims.

With respect to FHA, the court has already determined that there is a triable issue of fact regarding whether or not plaintiff was employed by FHA or Development. If it is ultimately determined that plaintiff was employed by FHA, then his Labor Law § 200 and common-law negligence claims against that defendant would be precluded under Workers' Compensation Law § 11 and 29 (6). However, if it is determined that plaintiff was employed by Development, then he would have viable Labor Law § 200 and common-law negligence claims against FHA since there is evidence that FHA controlled and supervised plaintiff's work. In particular, FHA's manager Fred Stark testified at his deposition that plaintiff was supervised by FHA foreman Lawrence Mauer and Mr. Mauer's assistant John Weldon. Accordingly, that branch of FHA and Jamaica's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against FHA is denied.

Conclusion

Accordingly, it is hereby

ORDERED, that that branch of Dunkirk and Estate's motion (Seq. 03) which seeks summary judgment dismissing plaintiff's complaint against Estate, is granted; that branch of the motion which seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against Dunkirk, is denied; and that branch of the motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Dunkirk, is granted; and it is further

ORDERED, that that branch of plaintiff's motion (Seq. 04) which seeks summary judgment against Dunkirk and Jamaica, under plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, is granted and that branch of the motion which seeks summary judgment against FHA under his Labor Law § 240 (1) and 241 (6) claims, is denied; and it is further

ORDERED, that that branch of FHA and Jamaica's motion (Seq. 05) which seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against them, is denied and that branch of the motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them, is granted with respect to Jamaica and denied with respect to FHA.

This constitutes the decision and order of the court.

ENTER

J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
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