

[\*1]

Decided on March 25, 2008

**Supreme Court, Queens County**

**Ismael R. Vargas, Plaintiff**  
**against**  
**McDonald's Corporation, et al., Defendants**

21985 2005

Duane A. Hart, J.

Plaintiff, Ismael Vargas, commenced this action to recover damages for injuries he claims to have sustained when he fell from a ladder while cleaning the windows at a McDonald's restaurant located at 118-25 Hillside Avenue. Plaintiff's complaint alleges defendants' common-law negligence and violations of Labor Law §§ 240(1), 241(6), 200, 202 and 12 NYCRR § 21.

On plaintiff's motion to reargue, it is within the court's discretion to grant the motion when it appears that the court may have "overlooked certain facts and misapplied the law in its initial order." (*Dunitz v J.L.M. Consulting Corp.*, 22 AD3d 455 , 456 [2005]; *Marini v Lombardo*, 17 AD3d 545 [2005]; CPLR § 2221.) Judged by this standard, plaintiff's motion to reargue is granted. (*See Mazzei v Licciardi*, 47 AD3d 774 [2008]; *see New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654 [2007].)

On both the motion brought on by order to show cause and the cross motion by McDonald's, it is this defendant's burden to establish its prima facie entitlement to summary

judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986].) Upon making a showing of its entitlement to summary judgment, the burden then shifts to plaintiff to produce evidence, in admissible form, to demonstrate the existence of a material issue of fact which requires a trial of the action. (*Id.*)

#### *LABOR LAW § 240(1)*

In the prior order dated June 19, 2007, the court misapplied the law as it relates to McDonald's and Trump's liability pursuant to Labor Law § 240(1). Labor Law § 240(1) imposes [\*2]strict liability on owners and their statutory agents. It provides, in relevant part, the following:

All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning ... 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.

The purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices on owners and general contractors, "those best suited to bear that responsibility," (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]) instead of on the workers who are in no position to protect themselves (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]). The duty imposed by the statute is nondelegable even where the owner has not contracted for the work or exercised supervision or control over the work. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra.*)

The question addressed herein is whether Trump, as the fee owner of the land upon which the McDonald's restaurant is situated, is an "owner" for purposes of liability under Labor Law § 240(1), even though Trump leased the land to McDonald's. This question must be answered in the affirmative. It has been held that "[l]iability under Labor Law § 240(1) may lie against the owner of land on which a building is located, even though the owner leased the land to another and did not own the building itself." (*Mejia v Moriello*, 286 AD2d 667 [2001]; *see Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]; *cf. Lacey v Long Island Lighting Co.*, 293 AD2d 718 [2002].) Therefore, Trump is an "owner" under the statute and may be held liable for plaintiff's alleged injuries.

With respect to McDonald's, liability under the Labor Law rests, in large part, upon ownership. (*See Kowalska v Board of Educ. of City of New York*, 260 AD2d 546 [1999].) McDonald's broadly submits that it leased the "premises" where plaintiff was injured to Debil. McDonald's further contends that it owned the restaurant system referred to in the Franchise Agreement, dated September 1, 1994, as the "McDonald's System." However, in reviewing all of

the evidence, including the Operator's Lease dated September 1, 1994, it appears that McDonald's constructed and owned the actual building. Therefore, while McDonald's may have merely *subleased* the land to Debil, it owned the building wherein plaintiff was injured, and *leased* it to Debil. This distinction is determinative. Case law establishes that an out-of-possession *sublandlord*, who does not have the right to control the work being performed, may not be held liable for resulting injuries under Labor Law § 240(1). (See *Sumner v FCE Indus., Ltd.*, 308 AD2d 440 [2003]; see *Crespo v Triad*, 294 AD2d 145 [2002].) Had McDonald's subleased both the land and the building to Debil, or subleased the land to Debil but did not own the building, liability could not attach. McDonald's, however, as the fee owner of the building itself, may be held liable under Labor Law § 240(1).[\*3]

In light of the court's determination herein, that Trump and McDonald's are proper defendants to this action as "owners" pursuant to Labor Law § 240(1), a discussion of plaintiff's accident is necessary. The court recognizes that there are those cases which appear to stand for the proposition that Labor Law § 240(1) "[does] not include routine cleaning in a nonconstruction, nonrenovation context." (*Machado v Triad III Assoc.*, 274 AD2d 558, 559 [2000]; see *Williams v Perkins Rests.*, 245 AD2d 1128 [1997].) Nevertheless, these cases were decided prior to the Court of Appeals' decision in *Broggy v Rockefeller Group*, 8 NY3d 675 [2007], in which the court clarified the application of the statute to the act of "cleaning." Therein, the court held that "cleaning" is expressly afforded protection under section 240(1) whether or not incidental to any other enumerated activity" such as construction or renovation. (*Id.* at 680.) Further, the court specified that it is the "routine, household window washing" that was not encompassed by the statute. (*Id.* at 680; *Williamson v 16 West 57th St. Co.*, 256 AD2d 507 [1998].) It is this court's opinion, therefore, that plaintiff was engaged in the type of activity that is contemplated by the provisions of Labor Law § 240(1).

Additionally, it is apparent that plaintiff's accident arose from the type of elevation-related risk encompassed by the statute. Plaintiff gave deposition testimony that the windows he was required to clean were approximately 20-25 feet in height, reaching the ceiling from the floor. Thus, it was necessary use a ladder, approximately 15-20 feet in height, to carry out this task. Plaintiff alleges that he was at the top of the ladder when he fell, thus, sustaining injuries. There is, although, an issue of fact as to whether the accident was caused by a violation of the statute or plaintiff's own actions. (See *Kozlowski v Grammercy House Owners Corp.*, 46 AD3d 756 [2007].)

As such, Trump's initial motion for summary judgment dismissing plaintiff's complaint should have been denied. Likewise, McDonald's instant motion for leave to renew is granted, however, summary judgment in favor of McDonald's must also be denied.

*LABOR LAW § 241(6)*

Plaintiff's Labor Law § 241(6) claim must be dismissed as against both defendants. The statute provides, in pertinent part:

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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

6. 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply [\*4]therewith.

The record indicates that at the time of plaintiff's accident, he was not involved in any construction, demolition or excavation of the subject building. Therefore, plaintiff is not entitled to the protection afforded by Labor Law § 241(6). (*Retamal v Miriam Osborne Mem. Home Assn.*, 256 AD2d 506 [1998].)

Moreover, even if plaintiff's accident had occurred in the context of construction, demolition or excavation, plaintiff was required to demonstrate that his injuries were proximately caused by a violation of a specific Industrial Code regulation applicable to the circumstances of the accident. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*.) By generally citing defendants' violation of 12 NYCRR § 21, plaintiff failed to do so, and his Labor Law § 241(6) claim must be dismissed as against all defendants.

#### *LABOR LAW § 200 & COMMON-LAW NEGLIGENCE*

Plaintiff's claim under Labor Law § 200 and the common law must also be dismissed as against both defendants. Labor Law § 200 codifies the common-law duty of owners and general contractors to provide workers with a safe place to work. (*Haider v Davis*, 35 AD3d 363 [2006].) Implicit to this duty is the precondition that "the party charged with that responsibility have the authority to control the activity bringing about the injury." (*See generally Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981].) Therefore, "[t]he duty of an owner to provide a safe workplace [under Labor Law § 200] is contingent upon a contractual or other actual authority to control the activity during which the plaintiff's injury was sustained, and prior notice of the unsafe condition." (*See Lafleur v Power Test Realty Co. Ltd. Partnership*, 159 AD2d 691, 691-692 [1990].)

As there is no indication that Trump retained or exercised any control or maintenance responsibilities whatsoever, it may not be held liable under Labor Law § 200 or the common law. While McDonald's did retain a general right to inspect the premises where plaintiff's accident

occurred, "a reservation of a general right to inspect the premises does not rise to the level of a contractual duty to repair which imposes liability upon a lessor." (*Id.* at 692; *Jones v Bartlett*, 275 AD2d 956 [2000].) Therefore, McDonald's may not be held liable under Labor Law § 200 or the common law.

### *LABOR LAW § 202*

Labor Law § 202 not only protects those employed to clean the exterior surfaces of buildings, but also the windows of said buildings, whether exterior or interior. The statute provides in pertinent part:

The owner, lessee, agent and manager of every public building and every contractor involved shall provide such safe means for the cleaning of the windows and of exterior surfaces of such building as may be required and approved by the board of standards [\*5]and appeals. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved shall not require, permit, suffer or allow any window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter and the rules of the board of standards and appeals. A person engaged at cleaning windows or exterior surfaces of a public building shall use the safety devices provided for his protection. Every employer and contractor involved shall comply with this section and the rules of the board and shall require his employee, while engaged in cleaning any window or exterior surface of a public building, to use the equipment and safety devices required by this chapter and rules of the board of standards and appeals.

Before the statute was amended in 1970, the statute mandated owners, lessees and others responsible for public buildings to install and maintain anchors on all windows. (Labor Law § 202, L. 1955, ch. 379.) In 1970, the statute was amended so that it referred exclusively to requirements established by the Board of Standards and Appeals. (Labor Law § 202, L. 1970, ch. 822.) Therefore, prior to 1970 a defendant could be in direct violation of the statute whereas, after 1970, "statutory liability [was] predicated on a violation the Industrial Code." (*See Brown v Christopher Street Owners Corp.*, 2 AD3d 172 , 173 [2003]; *Bauer v Female Academy of the Sacred Heart*, 97 NY2d 445, 452-453 [2002].)

As with his Labor Law § 241(6) claim, by generally citing defendants' violation of 12 NYCRR § 21, plaintiff failed to set forth a specific violation of an applicable Industrial Code provision, and

his Labor Law § 202 claim must be denied as against all defendants.

Accordingly, McDonald's motion brought on by order to show cause, and cross motion dismissing plaintiff's complaint, are granted, solely to the extent that plaintiff's common-law negligence claims and Labor Law § 241(6), 202 and 200 claims are dismissed as against McDonald's. Plaintiff's motion to reargue is granted and, upon reargument, Trump's initial motion for summary judgment is granted solely to the extent that plaintiff's common-law negligence claims and Labor Law § 241(6), 202 and 200 claims are dismissed.

Dated: March 25, 2008

J.S.C.