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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14  
Justice

FRANCISCO PROCEL, et al. x Index  
Number 4118 1998  
- against - Motion  
Date June 6, 2000  
DAVID BLUMENFELD, et al. Motion  
Cal. Number 32

The following papers numbered 1 to 25 read on this motion by plaintiffs for partial summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6); a cross motion by defendant Neal Lennstrom for summary judgment and a cross motion by defendants David Blumenfeld and Anna Blumenfeld for summary judgment.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits .....	1 - 4
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff Francisco Procel, an employee of third-party defendant Savoy Restoration Corp., was injured when he fell from a ladder which allegedly slid out from under him while he was painting as part of a renovation project at premises owned by defendants Blumenfeld. Defendant Lennstrom was the construction manager for the project. Defendant BDG Construction Corp. (hereinafter "BDG") was hired by defendant David Blumenfeld, the vice-president of BDG, to perform certain services on the project.

The injured plaintiff admittedly separated the two parts of an extension ladder provided by his employer and, at the time of the accident, was using only the top half of the ladder which lacked rubber pads. The Appellate Division, Second Department, has held that in such circumstances a question of fact exists as to whether the injured plaintiff's conduct constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident. (Vouzianas v Bonasera, 262 AD2d 553.) This factual issue precludes a determination as a matter of law as to whether a violation of Labor Law § 240(1) was the proximate cause of the accident. (See, Vouzianas v Bonasera, supra; Ossorio v Forest

Hills S. Owners, 251 AD2d 475; Tweedy v Roman Catholic Church of Our Lady of Victory, 232 AD2d 630; Styer v Walter Vita Constr., 174 AD2d 662.) Furthermore, since comparative negligence is a defense to the imposition of liability under Labor Law § 241(6) (see, Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 349; Long v Forest-Fehlhaber, 55 NY2d 154), the injured plaintiff's conduct also prevents a summary determination of the claim pursuant to that provision. (See, Lorefice v Reckson Operating Partnership, 269 AD2d 572; Posillico v Laquila Constr., 265 AD2d 394; Amirr v Calcagno Constr. Co., 257 AD2d 585; Drago v New York City Tr. Auth., 227 AD2d 372.) Accordingly, plaintiffs' motion for summary judgment is denied.

The cross motion by defendants Blumenfeld is premised in part on their assertion that they are entitled to the benefit of the statutory exemption from the imposition of absolute liability under Labor Law § 240(1) afforded owners of one and two-family dwellings who do not direct or control the work. However, as the parties claiming the benefit of the exemption, defendants Blumenfeld have the burden of showing that it applies here. (Lombardi v Stout, 80 NY2d 290, 297; see, Sweeney v Sanvidge, \_\_\_ AD2d \_\_\_, 705 NYS2d 723, 724.) Defendants Blumenfeld have not submitted affidavits in support of their cross motion and the evidence in the record is insufficient to determine the degree to which David Blumenfeld, who is the vice-president of his own construction company, controlled or directed the work being performed on the construction project. (Cf., Rodas v Weissberg, 261 AD2d 465; Killian v Vesuvio, 253 AD2d 480; Malloy v Hanache, 231 AD2d 693.) Thus, defendants Blumenfeld have not met their burden of demonstrating their right to the exemption under section 240(1) and are not entitled to summary judgment on this issue.

However, the duty to provide a safe place to work is not breached by the owner or general contractor when the injury arises out of a defect in a subcontractor's own plant, tools and methods. (Allen v Cloutier Constr. Corp., 44 NY2d 290, 299; Persichilli v Triborough Bridge and Tunnel Auth., 16 NY2d 136; Heilmann v Bronx River Assocs., 204 AD2d 393.) Since the allegedly defective ladder being used by the injured plaintiff at the time of the accident was owned and supplied by plaintiff's employer, defendants Blumenfeld cannot be held liable in common-law negligence or for a violation of Labor Law § 200, the codification of the common-law duty to provide a safe place to work. (See, Rizzuto v L.A. Wenger Contr. Co., *supra*, at 352; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505.) Accordingly, the cross motion by defendants Blumenfeld is granted only to the extent that they are awarded summary judgment dismissing the claims against them based upon common-law negligence and Labor Law § 200.

Similarly, liability for common-law negligence or a violation of Labor Law § 200 cannot be imposed upon defendant Lennstrom and his cross motion is granted to the extent that the claims against him premised on those grounds are dismissed. In all other respects, defendant Lennstrom's cross motion is denied. Although defendant Lennstrom contends that he cannot be held liable for

plaintiff's injuries under Labor Law § 240 because his employment as construction manager terminated six weeks prior to the date of the accident, the record demonstrates the existence of questions of fact as to whether he still had a role as construction manager on the renovation project on the date of the accident and, if so, whether his position on that date was such as to make him a contractor or agent of the owner within the meaning of Labor Law §§ 240(1) and 241(6). (See, Russin v Louis N. Picciano & Son, 54 NY2d 311, 318; Sog v G.S.E. Dynamics, 239 AD2d 489.)

Dated: August 14, 2000

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J.S.C.