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

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MOHAMMED RASHID,

Plaintiff,

-against-

R.C. DOLNER, INC., R.C. DOLNER, LLC., 2 SPRUCE STREET, LLC., 150 NASSAU STREET, LLC., YITZCHAK TESSLER, 150 NASSAU ASSOCIATES, LLC., 150 NASSAU CONDOMINIUM and IN/EXTERIOR CORP.,

Defendants.

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Index No.: ***117973/03***

ATTORNEY'S AFFIRMATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ROBERT STEIN, an attorney duly admitted to practice law in the State of New York affirms the following under the penalties of perjury:

1. I am counsel to the firm of Grover & Fensterstock, P.C., attorneys for the plaintiff, MOHAMMED RASHID.

2. I am familiar with the pleadings and proceedings in this matter and submit this affirmation in support of the within motion for an Order granting plaintiffs summary judgment against the defendants herein on the issue of liability, pursuant to CPLR §3212 and New York State Labor Law §§240(1) and 241(6), together with such other and further relief this Court deems just and proper.

3. This is an action for personal injuries sustained by the plaintiff MOHAMMED RASHID. Mr. Rashid was severely injured on June 27, 2003 while in the course of his employment as a laborer at a construction site when a ladder collapsed underneath him while he was standing upon same performing repair, cleaning and/or alteration of the exterior facade of the building located at 150 Nassau Street in Manhattan.

4. The action was commenced in or about October of 2003 and after motions to supplement and amend the pleadings were interposed all of the above named defendants properly joined as defendants herein. Copies of the further supplemental summons and third amended verified complaint are annexed hereto as Exhibit "A."

5. Annexed hereto as Exhibit "B" are copies of the verified answers (with cross-claims)

of all defendants to the aforementioned third amended verified complaint.

6. Verified bills of particulars were served in response to the demands of the various defendants amplifying the aforesaid pleadings. Copies of same are annexed hereto as Exhibit "C." The court will take note that violations of Labor Law §§ 240(1) and 241(6) as well as Rule 23-1.21 of the New York State Industrial Code are alleged.

7. An examination before trial of the plaintiff MOHAMMED RASHID was conducted over the course of two (2) days in August and December, 2005. Copies of plaintiffs EBT transcripts are annexed hereto as Exhibit "D."

8. Examinations before trial of witnesses for the defendants were conducted subsequent thereto. A copy of the EBT transcript of defendants R.C. DOLNER, INC. and R.C. DOLNER, LLC. (hereinafter "DOLNER"), by Mr. Tom Ricci, is annexed hereto as Exhibit "E." A copy of the EBT transcript of defendants 2 SPRUCE STREET, LLC., 150 NASSAU STREET, LLC., YITZCHAK TESSLER and 150 NASSAU ASSOCIATES, LLC., by Mr. Harold Schertz, is annexed hereto as Exhibit "F." A copy of the EBT transcript of defendant 150 NASSAU CONDOMINIUM, by Ms. Debbie Coplin is annexed hereto as Exhibit G." A copy of the EBT transcript of defendant IN/EXTERIOR CORP. by Mr. Vincent Scandole is annexed hereto as Exhibit H." A copy of the EBT transcript of defendant 150 NASSAU CONDOMINIUM, by Ms. Debbie Coplin is annexed hereto as Exhibit "I."

9. Pursuant to both the annexed affidavit of the plaintiff as well as his deposition transcript the Court will note that the incident in question occurred while Mr. Rashid was removing tar from the exterior facade of a building located at 150 Nassau Street in Manhattan. The building was in the process of a complete reconstruction, transforming it from an office building into a condominium residence building. He was employed by a company known as Annex Restoration, a sub-contractor on the job site retained to perform exterior facade restoration. He was standing near the top of an extension ladder that was propped up against the side of the building on steps composed of stone. Annexed hereto as Exhibit "J" is a copy of two (2) photographs depicting the area where the incident occurred. No one was provided to hold the ladder. He further testified and avers that there was no rubber or other material on the feet of the ladder to prevent it from slipping and he was provided with no safety devices of any kind to prevent the incident from occurring. As he was reaching up to chip away the substance that he was clearing from

the facade the ladder suddenly slipped out from beneath him causing him to fall straight to the pavement beneath him. He sustained catastrophic and permanently disabling injuries as a direct result of the fall, including *bilateral ankle and heel fractures* requiring open surgical reduction with internal fixation on both ankles. The plaintiff has been totally disabled from the date of the incident to the present.

10. The defendant 150 NASSAU CONDOMINIUM was the owner of the premises (building and land upon which it was situated) at the time of the incident in question. (See deposition transcript of *Harold Schertz*, page 7, lines 17-19 and page 32, lines 18-20) Mr. Schertz was the owner's and developer's agent and a member of the Board of Managers of the building in question and confirmed the above fact in his testimony. The building at 150 Nassau Street was to consist of 125 residential apartments and substantial commercial space on the ground floor. The defendant YITZCHAK TESSLER was the developer of the project and the defendant companies under his control, 2 SPRUCE STREET, LLC., 150 NASSAU STREET, LLC. and 150 NASSAU ASSOCIATES were all technically named as owners of the property at various times during the project.

11. The defendant DOLNER was the general contractor on the job site pursuant to a contract with the owner at the time of the project's inception, defendant 150 NASSAU ASSOCIATES, LLC. a copy of which is annexed hereto as Exhibit "K." (Although technically identified under the contract as a "Construction Manager" the contract does specifically indicate that DOLNER's services include the obligations to " . . . supervise, oversee, perform and furnish, or cause to be performed and furnished, all work, labor, materials, supplies, tools and equipment . . ."[pg. 1, *Introductory Statement*, §D] It further provides that DOLNER " . . . shall be solely responsible for all construction means, methods, techniques, sequences and procedures within the scope of the Work [pg. 3, §1.2 of the contract] and that they have the responsibility to " . . . establish and implement all safety, health and environmental protection measures during the performance of the Work consistent with the requirements of . . . applicable Federal, State and local laws, rules and regulations." [pg. 6, §2.1.2(g) of the contract].

12. The defendant, IN/EXTERIOR had contracts to perform facade restoration work at the site both directly with the owner as well as with defendant DOLNER. IN/EXTERIOR then retained the plaintiff's employer, Annex Restoration to perform all of the exterior facade work on the building in question that they (IN/EXTERIOR) had contracted to perform.

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AGAINST DEFENDANTS R.C. DOLNER, INC., R.C. DOLNER, LLC., 2 SPRUCE STREET, LLC. 150 NASSAU STREET, LLC. YITZCHAK TESSLER, 150 NASSAU ASSOCIATES, LLC., 150 NASSAU CONDOMINIUM and IN/EXTERIOR, CORP. PURSUANT TO LABOR LAW §240(1)

13. In the instant case, the defendants, R.C. DOLNER, INC., R.C. DOLNER, LLC., 2 SPRUCE STREET, LLC., 150 NASSAU STREET, LLC., YITZCHAK TESSLER, 150 NASSAU ASSOCIATES, LLC., 150 NASSAU CONDOMINIUM and IN/EXTERIOR, CORP. are all liable to the plaintiffs due to the violation of Labor Law §240(1) in conjunction with their status as the owners of the premises and contractors on the construction project in question. Labor Law §240(1) states as follows:

> ***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, altering, painting, ***cleaning*** or pointing ***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. (emphasis added)

14. Section 240(1) of the New York State Labor Law was enacted to protect workers from injuries arising out of accidents while performing construction related work on scaffolds or ladders. As noted in the case of Zimmer vs. Chemung County Performing Arts, Inc., 65 N.Y. 2nd 513, 493 N.Y.S. 2nd 102, (1985), "Section 240 (was enacted) for the protection of workers from injury and is to be construed as liberally as may be for the purpose for which it was thus framed." 65 N.Y. 2nd at 521, quoting Quigley vs. Thatcher, 207 N.Y. 66, 67 (1912). "The statute places the ultimate responsibility for work site safety practices upon the owner and contractor, and imposes strict liability for their failure to furnish, erect and insure the operation of safety devices necessary to give protection to the worker against the hazards of his work." Wilk vs. 252 Seventh Avenue, LLC., 2004 NY Slip Op 51765U (NY Co., 2004), citing Bland vs. Manocherian, 66 N.Y. 2nd 452 (1985) and Zimmer vs. Chemung County Performing Arts, *supra.*

15. Labor Law §240(1) imposes a ***nondelegable duty***, and ***absolute liability*** upon owners and their agents for a violation of the statute. The statute was designed to prevent those types of accidents

in which a scaffold, hoist, stay, ***ladder*** or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity. Ross vs. Curtis-Palmer Hydro-Electric Co., 81 N.Y. 2nd 494, 601 N.Y.S. 2nd 49 (1993).

_____16. As the owner of the premises that was under construction/renovation at the time of the incident in question. the defendant 150 NASSAU CONDOMINIUM is liable under the statute for a violation of Labor Law §240(1). There status as a condominium is, of course, irrelevant under the statute. Caraciolo, et. al. vs. 800 Second Avenue Condominium, 294 A.D. 2nd, 743 N.Y.S. 2nd 8 (1st Dept., 2002).

_____17. As noted in ¶11, above, the defendant DOLNER acted as the general contractor in this construction project pursuant to their contract with the owner of the premises at the time, 150 NASSAU ASSOCIATES. Despite their technical denomination as "Construction Manager," their contract with the owner imposed upon them all of the duties, responsibilities, supervisory control and authority customarily delegated to a general contractor, especially in light of the fact that no other company had that job designation. These included the *establishment and implementation of all safety measures* at the site. The Court of Appeals recently ruled in the case of Walls vs. Turner Construction Company, 4 N.Y. 3rd 861, 798 N.Y.S. 2nd 351 (2005) that "[t]he label of construction manager versus general contractor is not necessarily determinative." 4 N.Y. 3rd at 865. Specific contractual terms creating the agency relationship between the parties, the absence of a party specifically designated as the "general contractor" and the agent's duties to oversee the project and the safety measures implemented therein are far more decisive than mere labels. Following Walls, the New York County Appellate Term stated as follows in the case of Rubanovich vs. City of New York, et. ano., 9 Misc. 3rd 130A, 808 N.Y.S. 2nd 920 (App. Term, N.Y. Co., 2005), "[A] construction manager will be deemed the owner's statutory agent for purposes of liability under *Labor Law §240(1)* . . . where it has a contractual duty to oversee and control activities at the work site and the authority to stop any unsafe work practices." And in the case of Ludmerer vs. Morse Diesel International, Inc., 10 Misc. 3rd 1074A, 814 N.Y.S. 2nd 891 (S. Ct., N.Y. Co., 2005), "Liability for violations of *Labor Law §240(1)* may be imposed against contractors and owners, as well as parties who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors. A construction manager charged with the duty of

coordinating all aspects of a construction project is a contractor with nondelegable duties under *sections 240 and 241 of the Labor Law*. Citing Walls, *supra.*, Russin vs. Picciano & Son, 54 N.Y. 2nd 311, 445 N.Y.S. 2nd 127 (1981) and Nienjadlo vs. Infomart New York, LLC., 19 A.D. 3rd 384, 385, 797 N.Y.S. 2nd 504 (2nd Dept., 2005). It is clear and almost incontrovertible that defendant DOLNER had general oversight responsibilities for this construction project site as well as contractual authority for the safety standards and procedures at the work site regardless whether the worker in question was specifically employed by their company or their sub-contractor. As such, the liability provisions of Labor Law §240(1) are applicable against these defendants as well for the incident herein.

18. As the party that entered into the construction contract with defendant DOLNER for the overall renovation job at the site, the defendant 150 NASSAU ASSOCIATES, LLC. is liable under the provisions of the statute as well. See, Zaher, et. al. vs. Shopwell, Inc., 18 A.D. 3rd 339, 795 N.Y.S. 2nd 223 (1st Dept., 2005). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.' 18 A.D. 3rd at 339, citing Copertino vs. Ward, 100 A.D. 2nd 565, 566 (2nd Dept., 1984).

19. As noted above, the defendant IN/EXTERIOR was the contractor retained by both the owner and general contractor/construction manager to perform facade restoration work on the building. The contract between defendant YITZCHAK TESSLER (the developer of the site and the principal of the various companies that both maintained and transferred ownership interest in the building during the course of the project) and Vincent Scandole, principal of IN/EXTERIOR (See Exhibit "J," annexed hereto) contains that following provision, "The contractor (IN/EXTERIOR) shall be responsible for initiating, maintaining and supervising all safety precautions in connection with the Work of his personnel." [*Terms and Conditions*, ¶16]. Clearly, IN/EXTERIOR was acting as both a contractor and an agent of the owner in their retention of plaintiff's employer, Annex Restoration, and, as such, is liable under the statute for the damages sustained by the plaintiff.

20. A fall from an unsecured ladder is exactly the type of incident covered by the statute. "It is well settled that the failure to properly secure a ladder to ensure that it remain steady and erect while

being used, constitutes a violation of Labor Law §240(1)." Montalvo vs. J. Petrocelli Construction, Inc., 8 A.D. 3rd 173, 780 N.Y.S. 2nd 558 (1st Dept., 2004), citing Schultze vs. 585 W. 214th St. Owner's Corp., 228 A.D. 2nd 381, 644 N.Y.S. 2nd 722 (1st Dept., 1996). See also, Perrone vs. Tishman Speyer Properties, L.P., 13 A.D. 3rd 146, 787 N.Y.S. 2nd 230 (1st Dept., 2004).

21. It is not required that evidence be presented to prove that the ladder in question was "defective." "It is sufficient for purposes of liability under §240(1) that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent." Orellano vs. 29 East 37th St. Realty Corp., 292 A.D. 2nd 289 at 291, 740 N.Y.S. 2nd 16 (1st Dept., 2002).

22. Pursuant to Labor Law §240(1) liability is imposed regardless of the degree of control that the owner may have over the work performed. Wilk vs. 252 Seventh Avenue, LLC., *supra*, citing Haimes vs. New York Telephone, 46 N.Y. 2nd 132, 136-137 (1978).

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23. In addition to the applicability of §240(1) against the defendants herein, the defendants are similarly liable to the plaintiff as a matter of law pursuant to §241(6) of the Labor Law. In Ross vs. Curtis-Palmer Hydro-Electric Co., *supra.*, the Court of Appeals refined the standard of liability under §241(6) by requiring that plaintiff establish the breach of a rule or regulation of the State Industrial Code which constitutes a "specific, positive command," rather than one which simply reflected a "reiteration of common-law standards" and merely incorporated into the code a general duty of care.

24. In this case the plaintiff has complied with the Ross mandate by virtue of the defendants violation of ***12 NYCRR §23-1.21(b)(4)(iv)*** which has been pleaded in the verified bill of particulars and which states, in pertinent part, as follows:

> When work is being performed from (ladder) rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder

> against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

25. A violation of this provision of the Industrial Code has been deemed sufficiently specific to support a Labor Law §241(6) claim. See Montalvo vs. J. Petrocelli Construction, Inc., *supra.*

26. The plaintiff testified (and avers in the affidavit annexed hereto) that his feet were ten to twelve feet above the ground when he fell. (See 8/23/05 deposition transcript of *Mohammed Rashid*, page 94, lines 21-24). It is uncontraverted that the ladder from which the plaintiff fell in this action was *not* equipped with any means or devices for securing the upper end nor was the lower end of the said ladder held in place by anyone, as required by the foregoing provisions of the Industrial Code.

27. As was the case with §240(1), the duties imposed herein to both owners and contractors pursuant to Labor Law §241(6) are nondelegable regardless of the exercise of supervision and/or control over the work site. Rizzuto vs. L.A. Wenger Contracting Co., Inc., 91 N.Y. 2nd 343, 670 N.Y.S. 2nd 816 (1998).

28. In light of the foregoing, it is respectfully submitted that plaintiffs motion herein for summary judgment pursuant to Labor Law §240(1) and §241(6) be granted.

29. No previous application for the relief sought herein has been made before this or any Court.

WHEREFORE, it is respectfully submitted that this Court should grant partial summary judgment against the defendants and in favor of the plaintiffs pursuant to §§240(1) and 241(6) of the New York State Labor Law, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 9, 2006

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ROBERT STEIN