At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York on the 22 day of MARCH, 2013

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

DAVID LEATHERS and
BRENDA LEATHERS,

Plaintiffs,

DECISION and ORDER

v.

INDEX NO. 2536/2011

ZAEPFEL DEVELOPMENT COMPANY, INC.,
TOWN OF AMHERST INDUSTRIAL
DEVELOPMENT AGENCY, and
NORTHPOINTE COMMERCE PARK, LLC,[1]
Defendants.

APPEARANCES: MARC C. PANEPINTO, ESQ., and JONATHAN M. GORSKI, ESQ., for Plaintiffs
JOHN E. SPARLING, ESQ, for Defendants

PAPERS CONSIDERED: The NOTICE OF MOTION of Defendants and the AFFIRMATION [of John E. Sparling, Esq.] IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, with annexed exhibits;'

the MEMORANDUM OF LAW IN SUPPORT OF ZAEPFEL DEVELOPMENT COMPANY, INC., TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY MOTION FOR SUMMARY JUDGMENT;

the NOTICE OF CROSS-MOTION of Plaintiffs and the ATTORNEY AFFIRMATION of Marc C. Panepinto, Esq., with annexed exhibits;

the EXPERT AFFIDAVIT of Ernest J. Gailor, PE, with annexed exhibit;

PLAINTIFFS' MEMORANDUM OF LAW;

the AFFIRMATION [of John E. Sparling, Esq.] IN OPPOSITION TO

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[1]Northpointe has been added to the action as a defendant by stipulation of the parties, although the pleadings have never been amended and nobody seems inclined to include that new defendant in the caption on any of the motion papers. The form of the caption on this Decision and Order is to be regarded as the Court's granting of plaintiffs' *informal* request (at pp 4-5 of their cross-moving papers) for judicial approval of the amendment to the caption.

PLAINTIFFS' CROSS-MOTION AND IN REPLY AND FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, with annexed exhibits;

the ATTORNEY AFFIRMATION [of Marc C. Panepinto, Esq.] IN REPLY AND IN FURTHER SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT;

the March 15, 2013 letter of Jonathan M. Gorski, Esq.; and

the March 19, 2013 letter of John E. Sparling, Esq.

Plaintiffs commenced this action to recover damages for personal injuries sustained by David Leathers (hereinafter plaintiff, in the singular; the claim of Brenda Leathers is derivative) as a result of a workplace fall of January 13, 2011. The fall occurred on premises owned by defendant Town of Amherst Industrial Development Agency and leased to defendant Northpointe Commerce Park, LLC, for which entity defendant Zaepfel Development Company, Inc. is the property manager. More particularly, the accident occurred in a building on a portion of the premises subleased by Northpointe to a non-party entity known as ACTS Testing Labs, Inc., which was the predecessor in interest to a non-party entity known as Bureau Veritas Consumer Product Services, Inc. (Bureau Veritas), which is plaintiff's employer. Thus, Bureau Veritas is the subtenant of the portion of the premises where the accident occurred. Bureau Veritas (otherwise referred to herein as the subtenant or the employer) occupied those premises in furtherance of its business of inspecting, testing, and certifying consumer products. Plaintiff's employment was likewise in furtherance of those corporate purposes of Bureau Veritas, and plaintiff's job function at relevant times involved his manning and use of a saltwater spray chamber, which was situated in a large closet just off the employer's large testing room or "reliability lab," to test such consumer products for their resistence to corrosion.

The salt spray chamber is essentially a steel tank or vat with a lid or cover that opens and closes hydraulically. The chamber device as a whole measures about 4½ feet in width and either

about 5½ or 8½ feet in length, depending on who's measuring. When its lid is open, the top of the chamber is about 4 to 4½ four feet off the floor. The internal tank or tanks of the chamber have some interior piping or tubing suitable for conveying and directing or vaporizing the salt spray. The tank also has some interior shelves to hold the product being tested. The chamber has a set of electronic controls. The chamber appears to be more or less permanently affixed to the premises at least insofar as it is bolted to the floor and connected via external PVC plumbing to an external tank used to fill the chamber. The parties debate whether the drain piping of the chamber is directly connected to the building's drainage system or merely empties out in the area of a floor drain. The chamber is situated in the reliability lab closet atop a floor area or apron tiled with ceramic. Plaintiff goes to great lengths to demonstrate to the Court that the chamber is itself a "structure" for purposes of Labor Law § 240 (1), and the Court has no reason to question that assertion.

On the date of his injury, plaintiff was manning his work station per usual and thus was preparing or seeking to use the salt spray chamber for the purpose of performing some product testing. However, in endeavoring to do his work, plaintiff ascertained that the drainage pipe of the chamber had become clogged with some sludge, which in turn had prevented the chamber from completely draining following plaintiff's immediately preceding use of it; that undrained condition in turn had left the chamber in an insufficiently clean state for it to be used for further corrosion testing. Plaintiff thus undertook to unclog the drain and then clean or rinse out the chamber in preparation for his next work assignment. Plaintiff undertook to do so personally after first contacting his employer's maintenance staff (i.e., his coworkers, not the landlord or the tenant or the property manager or an outside contractor) and being told that they were too busy to attend to the problem immediately. By his own account, plaintiff succeeded in unclogging the drain after working on the clog for more than fifteen minutes with, in turn, an air hose, a fish tape and, finally, a direct spray of water. In the course of those efforts to unclog the drain, plaintiff

disconnected and reconnected the drain pipe by hand from the bottom of the chamber. Plaintiff then undertook to clean out the inside of the chamber. He did so by spraying water in and around the chamber and by climbing into the chamber with a mop. To climb into the chamber, plaintiff used an approximately four-foot-tall A-frame stepladder belonging to his employer. Plaintiff himself placed the stepladder sideways next to the chamber, with one set of legs on top of the ceramic tile apron and the other set on the adjacent and one-half-inch lower flooring of the reliability lab proper (the ladder was thus unevenly footed). As plaintiff recounts his efforts, it took him about an hour in total to unclog the drain and clean out the tank.

According to plaintiff's version, which is somewhat supported by the account of a co-worker, plaintiff injured himself while attempting to climb out of the tank by means of the ladder. Plaintiff had placed his left foot over the edge of the chamber and onto a rung of the ladder (the second from the top rung). When plaintiff swung his right foot over the side of the chamber in order to place it also on a rung of the ladder, the ladder tipped or skidded along the floor, sending plaintiff to the floor and causing him to sustain injuries to his head and arm.

Besides the derivative claim, plaintiff's complaint against defendants states four discrete causes of action for the violation of Labor Law §§ 200, 240 (1), 241 (6), and principles of common-law negligence. The complaint and bill of particulars further allege a violation of 12 NYCRR 23-1.21 (a), (b), and (e).[2] The bill of particulars alleges defendants' failure to furnish, outfit, secure, or erect, or caused to be properly furnished, outfitted, secured or erected, scaffolding, ladders or other appropriate safety devices for the protection of plaintiff in carrying out his task. The bill of particulars further alleges defendants' negligence in failing to provide another employee to foot or secure the ladder, failing to properly inspect or supervise the work area to determine if the work conditions therein were unreasonably dangerous, carelessly

[2]Although, for some reason, the complaint alleges such violations in connection with the cause of action under Labor Law § 240 (1), and not under section 241 (6).

managing the work site, and failing to warn. By their answer, defendants generally deny liability and raise numerous affirmative defenses.

Now before the Court are a motion by defendants for summary judgment dismissing the complaint in it entirety and a cross motion by plaintiff for partial summary judgment on liability under Labor Law § 240 (1). Plaintiff further seeks a determination as a matter of law that there were actionable violations of 12 NYCRR 23-1.21 (b) (4) (ii) and (e) (3). On the basis of the parties' respective submissions, this Court renders the following determinations on the following aspects of the case:

LIABILITY OF DEFENDANTS UNDER LABOR LAW §§ 240 (1) AND 241 (6):

Labor Law § 240 (1) provides, in pertinent part, 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, 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 § 241 (6) provides:

> "All contractors and owners and their agents . . . 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 therewith."

For purposes of interpreting section 241 (6) and applying the regulations promulgated under that non-self-executing statute, "[c]onstruction work" is defined in the Industrial Code as follows:

> "All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not

such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose. " (12 NYCRR 23-1.4 [b] [13]).

In applying the foregoing sources of law, the Court concludes that defendants have sustained their burden on the motion of demonstrating their entitlement to judgment as a matter of law dismissing the statutory claims. The Court further concludes that plaintiff in opposition to the motion has failed to raise an issue of fact requiring a trial of such claims, let alone to demonstrate his own entitlement to a determination of defendants' liability under section 240 (1). Irrespective of the fact that the premises on which the injury occurred is owned or managed by defendants, and irrespective of the fact that the statutory liability of an owner is vicarious and exists independent of the acts or omissions (or actual control over the work) on the part of the owner itself, and irrespective of the fact that the portion of the premises effectively subleased to plaintiff's employer constitutes a building or contains a "structure" with in the meaning of Labor Law § 240 (1), the Court nevertheless must determine as a matter of law that plaintiff was not engaged in an activity contemplated and protected by that statute (*see generally Dahar v Holland Ladder & Mfg. Co.,* 18 NY3d 521, 524-526 [2012]). By the same token, the Court must conclude that plaintiff was not engaged in "construction" work as that concept is delimited by Labor Law § 241 (6) and defined by to 12 NYCRR 23-1.4 (b) (13).[3] Rather, the Court determines as a matter of law that plaintiff, notwithstanding his claims that he was engaged in the covered "repair" or "repairing" and "cleaning" of a "structure," was engaged in "routine maintenance in a non-

[3]The Court of Appeals has made clear that the regulation's definition of "construction work" must, notwithstanding its inclusion of the word "maintenance," be construed consistently with the understanding that section 241 (6) covers only industrial accidents that occur in the context of construction, demolition and excavation (*see Nagel v D & R Realty Corp.,* 99 NY2d 98, 101-103 [2002]).

construction, non-renovation context," meaning that plaintiff cannot recover under either statute (*Noah v IBC Acquisition Corp.*, 262 AD2d 1037 [4th Dept 1999], *lv dismissed* 93 NY2d 1042 [1999]; see *Chizh v Hillside Campus Meadows Assocs., LLC.*, 3 NY3d 664 [2004], *affg* 4 AD3d 743 [4th Dept 2004]; *Esposito v New York City Indus. Dev. Agency,* 1 NY3d 526, 528 [2003]; *Nagel,* 99 NY2d at 101-103 [2002]; *Abbatiello v Lancaster Studio Assoc.*, 307 AD2d 788, 789-790 [1st Dept 2003]; *Farmer v Central Hudson Gas & Elec. Corp.*, 299 AD2d 856, 857 [4th Dept 2002], *amended on rearg* 302 AD2d 1017 [4th Dept 2003], *lv denied* 100 NY2d 501 [2003]), *Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [4th Dept 1999]; *Rogala v Van Bourgondien,* 263 AD2d 535, 536-537 [2d Dept 1999], *lv denied* 94 NY2d 758 [2000]; *Koch v E.C.H. Holding Corp.*, 248 AD2d 510, 511 [4th Dept 1998], *lv denied* 92 NY2d 811 [1998]; *Howe v 1660 Grand Is. Blvd.*, 209 AD2d 934 [1994], *lv denied* 85 NY2d 803 [1995]; *see also Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 79 [4th Dept 2009] [held: plaintiff was engaged in "maintenance of a different sort" than that contemplated by statute]).

It is not determinative that, as emphasized by plaintiff, the salt spray chamber almost never became drain-clogged (i.e., only once before in eight years, albeit only a month or so before the date in question) and consequently was almost never in need of any like "repair" or any such thorough "cleaning" (plaintiff acknowledged, however, that he routinely rinsed out or sprayed down the tank twice a day, or "hundreds if not thousands" of times during his eight-year career) What is determinative is that plaintiff, despite his assertions that he was acting as a "plumber," was engaged only in a type of work integral to the carrying on of his employer's daily operation of corrosion-testing products (plaintiff emphasizes that, unless and until it were unclogged and cleaned, the chamber was inoperable, or at least useless for product testing, which must be conducted in a pristine environment, lest the test results be corrupted). Moreover, what is dispositive here is that plaintiff's specific task in unclogging and cleaning the salt spray chamber had became necessary only as a normal consequence of – meaning that plaintiff's work

was related completely to normal wear and tear attendant to – an immediately preceding use of the chamber for such industrial testing (*see Wicks,* 64 AD3d at 79). Moreover, no matter how involved such work became in terms of troubleshooting the problem and no matter how long it may have taken plaintiff to complete it (*see e.g. Nagel,* 99 NY2d at 99-100 [held: a worker making biannual inspection of elevator and maintaining elevator's brakes, a process taking up to two hours to complete, was nonetheless engaged in maintenance outside the construction context and thus could not recover for injury sustained in fall]), plaintiff's work preceding the accident essentially involved just disconnecting and reconnecting a short length of PVC drainpipe from the salt spray chamber (i.e., without the need for any replacement of that or any other component of the chamber), removing a clog in that drainpipe with a jet of water, and spraying down and mopping out the inside of the chamber's small tank. Therefore, it must be concluded, plaintiff was not engaged in the kind of major structural alteration or repair, or in the kind of major (and typically exterior) cleaning, contemplated by the statutes and regulation.

The foregoing analysis aside, the Court sees an even more basic reason why plaintiff cannot recover against defendants for his accident. The discerning reader will note that missing from the Court's recitation of the background facts of this matter is any mention of anyone's having entered into or let a construction contract or of anyone's having engaged plaintiff (or his employer) to do anything at all except carry out the employer's business of testing consumer products. Certainly, at the time of plaintiff's mishap, no work was being done that had been contracted for by defendants as owner of the premises and manager of the property, nor was any work being done that might have redounded to the benefit of those defendants, such as by the repairing, altering, or cleaning of the leasehold *premises themselves* or a significant *structural component thereof,* as opposed to the repairing and/or cleaning a mere trade fixture of plaintiff's employer, the subtenant of the premises. Upon its reading of section 240 (1), the Court notes that the statute is written in such a way as to impose certain obligations upon owners,

contractors, and their agents that are themselves involved in the "erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure," such as by directly or through-contracting for the performance of such work, or by placing themselves in a position to potentially benefit from another entity's involvement in or contracting for such work, such as the benefit a landowner might derive to his remainder interest in the property as a result of a tenant's doing or contracting for such work thereon (*see generally Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 338-342 [2008] [held: landowner is liable under Labor Law § 240 [1], irrespective of its lack of notice of work contracted for by tenant or practical ability to control such work, for injury suffered by worker in carrying out significant structural alteration to owner's building – Court found that scenario to establish the requisite "nexus" between the out-of-possession owner and the injured worker]). The Court reaches similar conclusions upon its reading of section 241 (6), which is written in such a way as to impose similar obligations upon "contractors and owners and their agents" only "when constructing or demolishing buildings or doing any excavating in connection therewith." Here, as indicated, defendants (likewise, anyone else) never contracted for any such construction work. Nor did defendants ever stand to benefit, even residually or incidentally, from plaintiff's activities which, as relevant herein, involved only such work as was necessary to carry out plaintiff's employer's industrial process of corrosion-testing consumer products for the benefit of the manufacturers, distributors, or consumers of those products. Thus, under the circumstances, the Court cannot conclude that plaintiff was engaged in "the performance of such labor" as is listed in section 240 (1) or that plaintiff was "a person so employed" within the meaning of that section (*see generally Dahar,* 18 NY3d at 524-525). Likewise, under section 241 (6), the Court must determine that plaintiff was not a person "employed" in or "lawfully frequenting" an "area" or place where "construction, excavation, or demolition work [was] being performed" (*see generally Mordkofsky v V.C.V. Dev. Corp.,* 76 NY2d 573, 576-577 [1990]). Moreover, under the circumstances of this case, in which defendants'

involvement was limited to owning, developing, and maintaining premises suitable for the subtenant to carry on its day-to-day business, the Court feels that it would distort the statutes well beyond their intended purposes to impose any liability upon defendants for the mere fact that one of the subtenant's employees wound up getting hurt on the premises in the course of his performance of the day-to-day functions of his job. To be clear, the Court is not basing its determination of these issues on the fact that defendants were out of possession of the premises, nor on the mere fact that defendants had no notice of, nor any supervision or control over, whatever work was being done by plaintiff, but on the simple fact that the premises were not the subject of such significant and ongoing repair, alteration, cleaning, or other construction work as to make it reasonable or fair to charge defendants with the statutory responsibility to relinquish its out-of-possession status, interject itself into its subtenant's daily operations, and thereby insist or assure that only safe practices were adhered to by the subtenant and its employees.

LIABILITY OF DEFENDANTS UNDER LABOR LAW § 200 AND FOR NEGLIGENCE:

By the same token, the Court determines that defendants have demonstrated their entitlement to judgment as a matter of law dismissing these claims of plaintiff. Moreover, as to these claims, plaintiff likewise has not succeeded, in this Court's judgment, in raising any genuine material triable issue of fact.

Labor Law § 200, entitled "General Duty to Protect the Health and Safety of Employees; Enforcement," provides in subdivision (1) that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein who are lawfully frequently such places." Section 200 is generally regarded as merely codifying the common-law duty imposed upon a landowner or general contractor to provide construction workers with a safe place to work (*see Russin v Picciano & Son*, 54 NY2d 311, 316-317 [1981]; *see also Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Allen v Cloutier Constr. Corp.*, 44 NY 280,

299 [1978], *rearg denied* 45 NY2d 776 [1978]; *Adamczyk v Hillview Estates Dev Co.*, 226 AD2d 1049, 1050 [4th Dept 1996]). Thus, a cause of action alleging a violation of Labor Law § 200 is equivalent to one sounding in negligence (see *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]).

Here, the injury occurred while plaintiff, unbeknownst to defendants, prosecuted his task of cleaning out the salt spray chamber. Clearly then, in order for liability to be imposed upon defendants as owner and manager of the premises, it must be shown that there was a defect in the premises themselves that defendants created or that they failed to rectify despite actual or constructive notice of its existence or, alternatively, that defendants had and either negligently exercised or negligently failed to exercise some degree of authority and control over either plaintiff's work in general or the specific activity or instrumentality that brought about his injury (*see Ozimek v Holiday Valley, Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; *Chowdhury v Rodriguez,* 57 AD3d 121, 128-130 [2d Dept 2008]; *Riordan v BOCES of Rochester,* 4 AD3d 869, 870 [4th Dept 2004]; *Hennard v Boyce,* 6 AD3d 1132, 1133 [4th Dept 2004]).

Defendants have demonstrated their freedom from any such liability as a matter of law. If plaintiff's workplace was at all unsafe, it was not as a result of any defect present or inherent in the premises themselves (including in the ceramic tile apron), but rather because of the peculiar method by which plaintiff carried out his task, especially in the manner in which he climbed into and out of the salt spray chamber, a trade fixture used by plaintiff in carrying out his employer's industrial process, while using his employer's small stepladder. Defendants had no control over that stepladder nor any responsibility for its static condition or its transitory placement or use by plaintiff. Clearly, under the circumstances at bar, it must be concluded that defendants did not create any defect in the premises and were not on actual or constructive notice of any such defect.

Nor did defendants have any more general control over plaintiff or his industrial or factory-

like work assignments, even insofar as such work may have involved or necessitated plaintiff's minor "repair" or unclogging of the drain and his minor cleaning of the inside of the chamber just preceding his mishap. Although plaintiff emphasizes that defendants had a right under the lease and sublease to reenter the leased premises for purposes of inspecting and maintaining the property, the appropriate focus here is not on the existence of any such right in the abstract, but on whether defendants could possibly, let alone reasonably, have known of or suspected their need to exercise such right during the brief interval between when plaintiff set up the ladder and when he fell from it. Here, defendants were never notified of the problem with the chamber or its drain, as plaintiff merely called his co-workers before endeavoring to rectify the problem himself.

Accordingly, the motion of defendants for summary judgment dismissing the complaint in its entirety is GRANTED.

The cross motion of plaintiff for partial summary under Labor Law § 240 (1) is DENIED. That portion of plaintiff's cross motion that seeks a determination that there was a violation of 12 NYCRR 23-1.21 (b) (4) (ii) and (e) (3) is NOT ADDRESSED as moot.

SO ORDERED:

HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

MAR 22 2013

BY

KEVIN J. O'CONNOR
COURT CLERK