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SCANNED ON 5/14/2004

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

PRESENT: ROSALYN RICHTER Justice

PART 24

Paul DeBellis

- v -

NYU Hospitals Center et al

INDEX NO. 100641/00

MOTION DATE

MOTION SEQ. NO. 5

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 17 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/10/07

R. Richter
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

HON. ROSALYN RICHTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

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PAUL DEBELLIS and PATRICIA DEBELLIS,

Plaintiffs,

–against-

NYU HOSPITALS CENTER,

Defendant.

and four third-party actions (Index Nos. 590878/01, 590623/03, 590648/04 & 590871/03).

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Decision & Order
Index No.: 100641/00
Mot. Seq. 5 and 7

RICHTER, J.:

This is an action to recover damages for personal injuries sustained by the plaintiff, Paul DeBellis, an employee of Otis Elevator Company (Otis), who was injured in an accident on January 6, 2000 while working at NYU Hospitals Center (NYU). Motion sequence numbers 005 and 007 are hereby consolidated for disposition. In motion sequence number 005, defendant NYU moves, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' complaint. In motion sequence 007, third-party defendant Charles Calderone & Associates, Inc. (Calderone) moves, pursuant to CPLR 3212, for summary judgment dismissing the first third-party action (Index No. 590878/01). Third-party defendant Joseph Loring Associates, Inc. (Loring) cross-moves, pursuant to CPLR 3212, for dismissal of the second third-party complaint (Index No. 590623/02), as asserted against Loring, and all cross claims.

The plaintiff, Paul DeBellis, was employed by Otis since 1989 in the position of a helper, though he was not an elevator mechanic. On January 6, 2000, Otis sent plaintiff to assist an Otis

elevator mechanic, Kevin McDermott, in the performance of a "five-year test" of certain elevators at NYU Hospitals Center located at 550 First Avenue in Manhattan. According to the plaintiff, the five-year test "is to test all the safeties in and out of the car, test rope and gears in the motor room, and also to test buffers underneath the car." The test was requested by James Bennett, one of *two* regular on-site Otis elevator mechanics assigned to NYU. Bennett was exclusively assigned by Otis to NYU on a daily basis since 1993, helping to maintain the approximately 80 elevators on the premises, Bennett had contacted his supervisor and asked for a "repair team" to perform the five-year test.

In order to perform this test, the shaftway doors of elevator # 30 were opened for McDermott and the plaintiff, and then the elevator car was raised and "locked out" using an access key in the hallway. This task of providing access was performed by Bennett, who went into the elevator, opened up the panel, set the toggle switch on inspection, stepped outside, used a mechanical locking device to hold the hatch door open, turned the key switch and raised the car **up.** The plaintiff then proceeded to enter the elevator shaft and climbed down a steel ladder affixed to the wall to a permanent floor he referred to in his deposition in several ways including a "catwalk." This structure had a permanent floor made out of six or seven three-by-three foot squares of steel grating built into the elevator shaft, and was secured to the wall by angle irons. It ran from one side of the shaft to the other, along two of the walls of the elevator shaft. McDermott and Bennett were still outside the shaft, standing above the plaintiff as he reached the catwalk. Plaintiff had taken several steps when a single piece of the grating that comprised the catwalk collapsed, causing him to fall through.

The complaint alleges that defendant NYU, as owner of the hospital, should be held liable based on common law negligence principles and violations of New York Labor §§ 200, 240 and

241(6). After joinder of issue, NYU commenced a third-party action against Calderone, an elevator consultant whom NYU had hired in 1997 to study the existing systems in conjunction with a planned modernization project.'

Labor Law § 240(1) imposes a non-delegable duty upon landowners and contractors to provide proper protection to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Where the injury-producing work constitutes routine maintenance performed in a non-construction, non-renovation context, Labor Law § 240(1) is inapplicable. *Esposito v. New York City Indus. Dev. Agency*, 305 A.D.2d 108 (1st Dept. 2003), *aff'd*, 1 N.Y.3d 526 (2003) (plaintiff was injured during a routine, monthly maintenance check of large commercial air conditioning units in a building that was not under construction); *see* also *Jehle v. Adams Hotel Assoc.*, 264 A.D.2d 354 (1st Dept. 1999); *Agli v. Turner Const. Co., Inc*, 246 A.D.2d 16 (1st Dept. 1998). Similarly, in *Martinez v. City of New York*, 93 N.Y.2d 322 (1999), the Court of Appeals held that where an inspection is "merely investigatory" and is a prelude to any construction work, that inspection falls outside section 240(1).

Plaintiffs' counsel seeks to distinguish the instant case from those cited above by arguing that the work involved repair and not routine maintenance. However, plaintiff unequivocally testified that on the day of the accident, he was present to help with the performance of a five year test. Plaintiffs' counsel also relies on the fact that James Bennett testified that he contacted his supervisor for a "repair team" and knew that plaintiff and Kevin McDermott were in the repair division of Otis.

'NYU also brought third-party actions against Joseph Loring Associates, Inc. and other defendants. In February 2003, NYU discontinued its claim against Loring. However, third-party defendants Calderone, Perkins & Will Partnership and the Offices of Irwin Cantor still have cross-claims against Loring, which will be addressed in this decision.

Diamond Affirm. at ¶ 4. The fact that plaintiff worked for what Otis may have called a "repair team" does not change the fact that the work he performed on the day in question was not repair, but rather a regular inspection. There is no evidence that the elevator car was broken, malfunctioning, or required any repairs. Accordingly, NYU is entitled to summary judgment dismissing plaintiffs' claims based on Labor Law § 240(1).

Labor Law § 241(6) "requires owners and contractors to 'provide adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501-02 (1993). However, the duties imposed are limited by the statutory language to contractors, owners and their agents involved in "constructing or demolishing buildings or doing any excavation. In *Nagel v. D & R Realty Corp.*, 288 A.D.2d 121 (1st Dept. 2001), *aff'd*, 99 N.Y.2d 98 (2002), the Court of Appeals upheld the dismissal of Labor Law § 241(6) claims brought by an elevator mechanic who performed a routine, biennial elevator inspection. The Court held that 241(6) only applies to workers engaged in duties connected to the inherently dangerous work of construction, demolition and excavation of a building or structure. Likewise, in *Bonum v. KWK Assoc., Inc.*, 2 A.D.3d 207 (1st Dept. 2003), the Appellate Division found 241(6) in applicable to a claim brought by an elevator mechanic who was injured when an escape hatch cover in the elevator car gave way. In *Bonura*, the Court found that the worker had no viable Labor Law § 241(6) claim because he was not engaged in construction or any other activity within the protective ambit of the statute. Since the undisputed evidence establishes that the plaintiff was not engaged in any of the activities that fall within the ambit of Labor Law § 241(6), defendants motion to dismiss this claim is granted.

Section 200 of the Labor Law is a codification of the common-law duty of a landowner and a general contractor to provide workers with a safe work environment. *Ross*, 81 N.Y.2d at 505. For a landowner, this also means maintaining its premises in a reasonably safe condition. ***See*** *generally Basso v. Miller*, 40 N.Y.2d 233,241 (1976); *Higgins v. 1790 Broadway Assoc.*, 261 A.D.2d 223,225 (1st Dept. 1999). While plaintiffs' pleadings allege that actual notice exists in this case, they fail to offer any evidentiary support for this claim. **All** of the deposition testimony indicates that there had not been any prior complaints about the condition of the catwalk or any prior problems noted by the Otis employees who had access to the shaft. Thus, plaintiffs negligence claim appears to rely on a theory of constructive notice.[2] ***Murphy v.*** *Columbia Univ.*, **4** A.D.3d 200,201 (1st Dept. 2004); *Bonura*, 2 A.D.3d at 207-08; *Lally v. JGN Constr. Corp.*, 295 A.D.2d 148, 149 (1st Dept. 2002); *Higgins*, 261 A.D.2d at 225.

Plaintiffs argue that as **part** of a building owner's legal duty to maintain its premises in a safe condition and good repair, NYU had **an** obligation to inspect the catwalk **and** that such an inspection would have revealed the existence of the loose grating that led to the plaintiffs fall. In support of this argument, plaintiffs proffer an affidavit from Harlan W. Fair, a professional engineer.[3] Mr. Fair based his conclusions on the deposition testimony of the plaintiff, Richard Cohen of NYU, James

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[2]Plaintiffs' counsel makes the additional argument that proof of NYU's alleged violation of the Industrial Code constitutes evidence of negligence under Labor Law § 200. Since there is no evidence that NYU exercised any supervisory control over the work that resulted in plaintiffs alleged injuries, the alleged failure to provide a safety harness, or any other violations of the **Industrial** Code, there is no basis for a Labor Law § 200 claim against NYU. See *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, **877** (1993); *McSweeny v. Rochester Gas & Elec. Corp.*, 216 A.D.2d 878, 879 (4th Dept. 1995).

[3]The initial unsworn letter from Mr. Fair subsequently was replaced by a sworn affidavit, on which this Court can legally rely.

Bennet of Otis, and Ernest Zimpritsch of Calderone; an incident report by NYU's Security Department; NYU's contract with Otis; Calderone's report on NYU's elevator systems dated April 1997; and drawings of the elevator shaftway and first floor of the building. Fair opines that "the only manner in which a collapse would occur would be the failure of a weld and consequential dislodgement of the ankle support." Fair Aff. ¶ 6.

Fair cites Article 27-127 of the New York City Building Code entitled "Maintenance Requirements," which states:

> All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order.

and Article 27-128, entitled "Owner Responsibility,'' which provides that "[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities." Based on these provisions, Fair opined that NYU had a non-delegable duty to maintain properly the catwalk, and that all structural elements of the building should have been inspected on a periodic basis. "The quality of the welds in particular should be inspected. Periodic repainting will be necessary. It is this inspection that did not take place which allowed deterioration to occur." Fair Aff. ¶ 10.

An owner's duty to provide a reasonably safe premises, including for workers on the premises, encompasses the duty to provide a safe means of ingress and egress to the work location. See *generally Backiel v. Citibank*, 299 A.D.2d 504 (2d Dept. 2002). That duty may also include the obligation to undertake reasonable inspections to detect dangerous conditions. *See generally Fulgum v. Town of Cortlandt*, 2 A.D.3d 775 (2d Dept. 2003) (town may have been negligent in failing to routinely inspect and repair bridge that collapsed); *Waddingham* v. *State*, 90 A.D.2d 855 (3d Dept.

1982) (state failed to inspect escarpment along highway for approximately 25 years). Although the owner is under "a duty to furnish a reasonably safe plant . . . he is not thereby made an insurer against the risk of unforeseeable accidents." *Monroe v. City of N.Y.*, 67 A.D.2d 89, 104 (2d Dept. 1979). "If the place provided by the owner for work is unsafe because of some hidden defect which reasonable inspection would not have disclosed, the owner will not be liable if injury results therefrom." *Id*.

Here, the evidence suggests that no safety inspection was done of the catwalk since it was constructed almost 25 years before the plaintiffs accident. James Bennett, one of two on-site Otis employees charged with the upkeep of the elevators, testified that it was not his responsibility to inspect or maintain the catwalks and that he did not do so. The maintenance contract between Otis and NYU, submitted in support of Calderone's motion for summary judgment, does not include the catwalk in the detailed description of the equipment that was to be maintained. In fact, the depositon testimony submitted with the various motions here indicates that the catwalk and pit ladder were not part of the elevator systems, but part of the building structure itself. ***See,*** *e.g.*, Bennett Dep. at 79; Zimpritsch Dep. at 49, 51; Maltz Dep. at 23. Thus, a question exists as to whether NYU, as the building owner, breached its duty to the Otis employees whom it knew had to be on the catwalk when it failed to conduct any inspections or regular maintenance of the area for more than two decades.

Moreover, unlike the defect in ***Monroe,*** which involved rusted portions of support brackets encased within a brick wall, a factual question exists as to whether the defect that caused the accident could have been discovered as a result of reasonable, periodic inspections. The plaintiff testified that a portion of the metal grating came loose, which is a defect that could have been observed during

a visual inspection. Plaintiffs expert, Mr. Fair, noted that the quality of the welds should be inspected, and periodic repainting should occur to prevent detoriation. Thus, material issues of fact exist as to whether the defect that led to plaintiffs injury was the result of any negligent failure to inspect and/or repair. *See Fulgum*, 2 A.D.3d at 775.

NYU relies on the fact that its employees never accessed the elevators shafts to support its claim that it had no responsibility for the catwalk. First, this argument ignores the essence of plaintiffs argument which is that NYU had an obligation to retain someone to inspect the area and that it was negligent for failing to do so. Indeed, following this accident, NYU arranged with Otis, in a separate contract, to repair the metal grating. The general rule is that "evidence of subsequent repairs is not discoverable or admissible in a negligence case." *Hualde v. Otis Elevator Co.*, 235 A.D.2d 269, 270 (1st Dept. 1997); *see also Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 122-123 (1981). However, evidence of subsequent repairs is widely held to be discoverable if there are issues of control and maintenance. *Klatz v. Armor Elevator Co., Inc.*, 93 A.D.2d 633, 637 (2d Dept. 1983).

Finally, NYU argues that the claim should be dismissed because plaintiffs injury arose out of the very type of defect that he was assigned to remedy by virtue of his inspection and employment with Otis, the company responsible for maintaining the elevators. The rule NYU relies upon is that "'[n]o responsibility rests upon an owner of real property to one hurt through a dangerous condition which he has undertaken to fix.'" *McCullum v. Barrington Co.*, 192 A.D.2d 489 (1st Dept. 1993) *quoting Kowalsky v. Conreco Co.*, 264 N.Y. 125, 128 (1934); *see also Appelbaum v. 100 Church L.L.C.*, __ A.D.3d ___, 774 N.Y.S.2d 705 (1st Dept. 2004). The plaintiff, however, was not hired to inspect or fix the catwalk. Indeed, it appears that the catwalk was not part of Otis' contractual obligations prior to the date of the accident. As NYU persuasively argued in support of the motion

to dismiss the claims pursuant to Labor Law 240(1), plaintiff was engaged only in a routine inspection of the elevator system at the time of the accident and no one was aware that any dangerous condition existed. An employee of an independent contractor does not assume the risk of injury from other defects or dangerous conditions in the premises which are outside the scope of that employee's work. **Backiel v.** *Citibank, N.A.*, 299 A.D.2d at 507 (2d Dept. 2002). Accordingly, for the reasons set forth above, summary judgment on the Labor Law 200 claim is denied?

Calderone's motion for summary judgment dismissing the third-party complaint by NYU is granted. The undisputed facts show that Calderone was retained in April 1997, to study the existing mechanical **and** electrical systems, which did not include the subject catwalk, as part of a planned modernization program of NYU's building. Ernest Zimpritsch, the project manager for Calderone testified that the catwalk was not part of the elevator system **and** NYU has offered no arguments to refute this position. Furthermore, Mr. Zimpritsch testified that if the metal grating on the catwalk had been loose when he inspected the shaft in 1997, he would have reported the problem to building personnel. There is no evidence that he ever saw such a problem, and then failed to bring it to NYU's attention. Nor is there any evidence that might establish that the defect which caused the metal grating to fall underneath the plaintiff in January of 2000 existed at the time of Calderone's observations in March of 1997.

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[4]Plaintiff also may be able to rely on the doctrine of res ipsa loquitor to support its claim at trial. This Court need not address the applicability of this principal since it has other reasons to deny summary judgment on the negligence claim. It is unclear whether the collapse of a portion of the catwalk is an event that does not ordinarily occur in the absence of someone's negligence. ***See,*** *e.g., Lukasinski v. First* ***New Amsterdam Realty,*** *L.L.C.*, 3 A.D.3d 302 (1st Dept. 2004) (doors mounted on hinges generally do not fall off in the absence of negligence). Moreover, there are factual questions as to whether NYU had exclusive control over the catwalk, which also was accessible to Otis employees and ***NYC*** elevator inspectors.

Joseph Loring Associates, Inc. (Loring) contends that it should be granted summary judgment, because the only consultation it did with the subject elevator was to conduct a study on the speed that the elevators could travel and the resulting waiting periods over 25 years ago when the building was built. Third-party defendant Calderone is the only party that opposes dismissing Loring from the case. Calderone argues that the deposition testimony of Loring's principal, Mr. Barry Maltz, establishes that Loring was retained to provide consulting engineering services for the "[m]echanical or heating and air conditioning, electrical, plumbing and elevator" portions of the building," Maltz Dep. at 19, and that material issues of fact exist as to the precise nature and extent of Loring's services, as a subcontractor to the architect hired to construct the wing, concerning the building's infrastructure systems as well as the elevator systems, shaftways and catwalks.

While Calderone argues that there are material issues of fact, it fails to point to any. It also fails to recognize additional deposition testimony by Mr. Maltz, in which he testified as follows:

> Q. When you design the elevator systems and you also stated that you would design the pits, are you familiar on this project that a catwalk was created in one of the pit levels?
> **A.** I saw it on the drawings.
> **Q.** That particular catwalk, would that be something that would be part of your responsibilities to create?
> **A.** No.
> MR. FITCH: Objection to the form. You may answer.
> Q. Would that be because it's not mechanical in nature?
> **A.** That's correct.

Maltz Dep. at 23. Mr. Maltz testified further that although he did not know who designed the catwalk at issue in this action, "in general it would be the architect or the structural engineer.'' *Id.* at 24.

Since Loring has demonstrated that the catwalk involved in the plaintiff's accident was not

part of Loring's engineering duties and Calderone failed to come forward with evidentiary facts sufficient to require a trial on this issue, Loring's motion for summary judgment is granted.

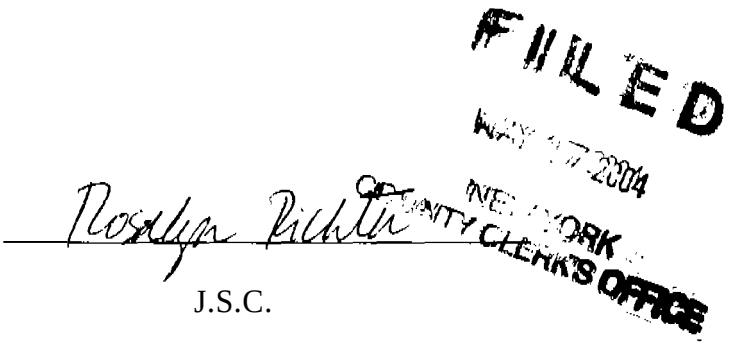
For the foregoing reasons, it is hereby

ORDERED that defendant NYU's motion for summary judgment (motion seq. 005) is granted to extent of dismissing the claims predicated on Labor Law §§ 240 and 241(6), **and** denied with respect to plaintiffs' claim based on Labor Law § 200 and common law negligence; **and** it is further

ORDERED that Calderone's motion for summary judgment (seq. no. 007) is granted and the third-party action **(Index** No. 590878/01) and any and all cross-claims against Calderone are hereby dismissed; and it is further

ORDERED that Loring's cross motion for summary judgment **(seq.** no. 007) is granted and the third-party complaint as against Loring (Index No. 590623/02) and all cross-claims asserted against Loring are hereby dismissed.

Dated: May 10, **2004**



Rosalyn Richter
J.S.C.