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

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Index Number : 102456/2005

RIEGER, MIKE

VS

303 EAST OWNERS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 6/7/2007

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

MIKE RIEGER and LUCIDA RIEGER,

Plaintiffs,

-against-

303 EAST 37 OWNERS CORP.,

Defendant.

----------X

Index No.: 102456/05

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

In this personal injury action, plaintiff Mike Rieger ("Mr. Rieger" or "plaintiff"), an elevator mechanic performing work on elevators' at defendant's premises, was injured when he fell from a ladder. Plaintiff Mike Rieger now moves for partial summary judgment as to his claims arising from alleged violations of Labor Law § 240(1). Defendant 303 East 37 Owners Corp. (the "Owner") opposes.

I. ***Statement of Facts***

The following facts are undisputed. On October 29, 2004, plaintiff, an elevator mechanic employed by Arista Elevator Company ("Arista"), was performing "modernization" work on two elevators in defendant's building. On the day of his accident, plaintiff was working on a ladder underneath the east elevator cleaning the guide rails, which entailed wiping down the rails on the walls of the elevator shaft with cleaning fluid.

The ladder that he used was "a six-foot A-frame ladder" made of aluminum, which was provided by the building's super. Plaintiff had set up the ladder by opening it up and locking the braces. He then climbed up the ladder, which had six rungs in total. At the time plaintiff had no tools with him—only a rag for cleaning. Before the accident occurred, plaintiff had been up and

down the ladder a few times to clean the rag or to get another rag and saturate it with cleaning fluid. He had spent less than ten minutes doing this when he fell.

At his deposition, plaintiff testified that the ladder was " a little wobbly. The braces were not that great, but they did snap into a lock position." When he fell, plaintiff was up on the ladder, reaching up for the rails. He did not recall which rungs his feet were on or if they were on the same rung when "the ladder just buckled, tilted over" and he fell to the ground. Plaintiff "felt something happened" immediately before he fell, specifically he felt the ladder "going towards the right side[.]" After his fall, plaintiff observed that the ladder's right brace had "broken off and [was] hanging, and the right leg of the ladder [wa]s buckled underneath, folded almost a 45-degree angle underneath the stair of the step of the ladder." Prior to his fall, plaintiff had not noticed anything wrong with the ladder.

Reneato Brasil, the building's superintendent, testified to the following at his deposition. He confirmed that the ladder used by plaintiff at the time of his fall was a 6-foot, aluminum, A-frame ladder, which belonged to the building. After plaintiff's fall, Mr. Brasil observed the ladder and noted that its locking mechanism was bent and it was "twisted." Because defendant failed to produce the subject ladder by August 16, 2006, the court ordered that it is "precluded from contesting the condition and stability of that ladder thereafter."

II. ***Conclusions of Law***

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. *See In re*

Dissolution of Rencor Controls, Inc., 263 A.D.2d 845 (3d Dept. 1999) *citing Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup.Ct. Oswego County 1968)(Aronson, J.); *Bank of New York v. Spitzer*, 43 A.D.2d 105 (1st Dept. 1973).

Plaintiff now seeks summary judgment on his claim for liability under Section 240 (1) of the Labor Law, which provides:

> All 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.

This statute imposes a nondelegable duty on owners, contractors and their agents to protect workers from hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). *See also Striegel v. Hillcrest Heights Dev. Corp.*, 100 N.Y.2d 974, 977-978 (2003) ("Labor Law § 240 (1) was designed to prevent those types of accidents in which the 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 to an object or person") (internal citations omitted).

It is well settled that when a ladder is the safety device offered, 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)[.]" *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1st Dept. 1998). Further, plaintiff need not demonstrate that the ladder from which he fell was defective.

See Montalvo v. J. Petrocelli Constr., Inc., 8 A.D.3d 173, 174-175 (1st Dept. 2004) (summary judgment under 240(1) awarded to plaintiff where evidence establishes that plaintiff was injured, "at least in part, due to the failure of [defendant] to provide adequate safety devices to secure the ladder on which he was working, and since the risk created by such failure is one that it is covered by the statute (i.e., falling)"). *See also Wasilewski v. Museum of Modern Art*, 260 A.D.2d 271, 271-272 (1st Dept. 1999) (plaintiff's account of accident, that ladder "shook and moved, precipitating his fall to the floor," is sufficient to establish that defendant's breach was contributing factor).

Here, it is undisputed that defendant owned the premises where plaintiff was injured. Further, plaintiff, in the course of his work, fell from a ladder, which was unsecured, suffering injuries as a result of that fall.

Although defendant argues that plaintiff has not demonstrated any defect in the ladder that caused the fall, such a showing is unnecessary. *See Montalvo*, 8 A.D.3d at 174. Further, defendant has not set forth a version of how the accident may have occurred that conflicts with plaintiff's account of the incident. *See Wasilewski* at 272 (improper to deny summary judgment to plaintiff where defendant has not set forth "conflicting theory *with supporting evidentiary materials, other than mere speculation*, as to how the accident occurred, and [where] the alleged contradictions do not raise bona fide credibility issues regarding plaintiff's testimony") (emphasis supplied).

While defendant, in its opposition papers, make the conclusory statement that there are questions of fact as to whether the ladder was defective or whether plaintiff may have "lost his balance," causing his own fall, these statements are entirely unsupported by evidence. *See Bernstein v. Freudman*, 102 A.D.2d 805, 806 (1st Dept. 1984) ("Defendants' broad and

conclusory assertions are insufficient to withstand plaintiffs' motion for summary judgment") *aff'd* 64 N.Y.2d 1044 (1985); *S. J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 342 (1974) (bald, conclusory assertions, "even if believable," are insufficient to defeat summary judgment). The cases cited by defendant in support are inapposite. *Robinson v. East Med. Ctr.*, LP, 6 N.Y.3d 550 (2006) (plaintiff does not claim defect in ladder but that ladder was not tall enough; where plaintiff voluntarily chose shorter ladder instead of taller ladder, available on the job, he was sole proximate cause of his own injury); *Montgomery v. Fed. Express Corp.*, 4 N.Y.3d 805 (2005) (plaintiff's chose to use bucket to climb on instead of ladder and then to jump down was sole cause of his injury); *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958 (1998) (court did not specify on what grounds reasonable jury could find plaintiff was sole proximate cause of his own injury). Nor has defendant offered *any evidence whatsoever* to demonstrate that the ladder may not have been defective. Moreover, defendant cannot do so now since it is "precluded from contesting the condition and stability of that ladder[.]" Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants as follows:

1. Defendant 303 EAST 37 OWNERS CORP. is found liable to plaintiff Mike Rieger on his claims arising from violations of Section 240(1) of the Labor Law and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and

2. The action shall continue as to the remaining causes of action.

ENTER:

J.S.C.

Date: June 7, 2007
New York, New York