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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 112788/2006
HENRIQUE, RAMSEY
vs.
NEW 520 GSH LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

motion ~~and cross-motion~~ is decided in accordance with accompanying memorandum decision.

This Constitutes Decision and Order of the Court.

FILED
JUL 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/10

SALIANN SCARPULLA J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----------X

RAMSEY HENRIQUEZ and,
JACQUELINE HENRIQUEZ,
Plaintiffs,

Index Number 112788/06
Submission Date 4/12/10
Mot. Seq. No. 003

-against-

DECISION & ORDER

NEW 520 GSH LLC, NEW TRIPLE CROWN, LLC and
NEWMARK & COMPANY REAL ESTATE, INC.,
Defendants.

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Appearances:

For Plaintiffs:
Leav & Steinberg, L.L.P.
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212-766-5222

For Defendants:
Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C.
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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affirm. in Supp	1
Affirm. in Opp. to Def's Mot. for Summ. Judg	2

HON. SALIANN SCARPULLA, J.:

Plaintiffs Ramsey Henriquez ("Henriquez") and Jacqueline Henriquez bring this action for personal injury arising out of an elevator malfunction that occurred at 261 West 36th Street on November 14, 2005. At the time of the incident, Henriquez was a maintenance mechanic in the employ of non-party New York Elevator Co. Inc. ("NYE"). On January 22, 2004, NYE contracted to provide services to defendant Newmark & Company Real Estate, Inc. ("Newmark"), which managed 261 West 36th Street on behalf of the owners, defendants New 520 GSH LLC and New Triple Crown, LLC.

NYE's contract encompassed "a complete preventive maintenance program" for the passenger elevator at 261 West 36th Street. NYE contracted to provide "all material and equipment normally and usually furnished, required, and/or needed to completely, safely and satisfactorily continue the performance and operations of this equipment as originally built by the manufacturer."

NYE assigned Henriquez to the subject elevator. As part of his duties, Henriquez performed periodic inspections of the elevator and minor maintenance work. Under NYE's operating procedure, Henriquez was not authorized to conduct any substantial repairs, but had to identify a condition that required service, issue a written ticket for the work and alert the repair supervisor who would send a special repair team properly equipped to handle the condition.

About a month prior to the November 14, 2005 incident, Henriquez noticed that the subject elevator shook on occasion, and told Kenny, an employee of Newmark, and separately his supervisor at NYE, that the car had a lot of vibration. Henriquez, however, did not attempt to determine the cause of the vibration and did not issue a written ticket for the work.

On the morning of November 14, 2005, while standing outside of 261 West 36th Street, Henriquez learned from Orlando Rivera ("Rivera"), fire safety director and freight hall elevator supervisor at Newmark, that somebody complained of smoke in the passenger elevator. Right after the complaint, Rivera shut off and closed the passenger

elevator. Henriquez, followed by Rivera, came to the elevator, opened the car, but smelled no smoke. Deciding to consult the building's engineer located on the twelfth floor and to visit the motor room, Henriquez activated the elevator, told Rivera to get in, and pressed key twelve.

The elevator ascended properly until the eighth floor, when the car stopped and the doors opened. No one was on the landing strip on the eighth floor. The doors closed again, and as the elevator proceeded, the cabin started shaking vigorously. Then the elevator glided down, descending at an ever increasing rate of speed, and hit the bottom of the elevator shaft. As both men were still trying to climb out of the car, major elevator parts rained down on the car's roof.

Vertical Systems Analysis, an independent consultant commissioned by Newmark, issued a report concerning the elevator by Edward M. Voll, dated December 20, 2005. Voll observed that there was a steel pin on the top of the "counterweight to drum," counterweight that held the entire load. The pin failed, causing one of the two counterweights to fall into the shaft's basement level, which unbalanced the elevator car. It was the falling counterweight, Voll noted, that caused the dust and debris to disburse into the air, with some riders apparently mistaking the odor for smoke. When Henriquez opened the elevator and pressed key twelve, the cabin ascended because the main driving machine was strong enough to lift it. As the car leveled with the twelfth floor, the power was removed from the driving motor by the automatic controller as it is designed to do,

but the worn machine brake was not able to hold the elevator without proper counterbalancing, and the car slid down in a "controlled fall."

Voll also noted that the subject elevator was about one hundred years old, with many major original parts, including the steel pin, still in place. At the time of the accident, there were three open NYC Department of Buildings violation notices dating back to March 9, 2005. In Voll's opinion, had NYE conducted more thorough and careful inspection and maintenance work, it would have discovered the stressed, compromised condition of the failing parts.

Following Voll's report, the New York City Department of Buildings examined the subject elevator and issued a separate accident report, dated February 1, 2006. The Department of Buildings' report made findings that fully agreed with Voll's report.[1] Department of Buildings inspector Leslie Roopnauth and assistant chief Douglas Smith concluded that a broken hoist rope and an excessively worn hitch pin that holds the rope to the counterweight was "the mechanical failure [that] caused the bottom section of counterweight to fall into the elevator pit and crash [the cabin] into the elevator pit at an uncontrolled rate of speed."

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[1]The Department of Building's report inaccurately printed the subject elevator's number as "IP6096," while the correct elevator's number was "IP6097." Despite the apparent typo, the two reports refer to the same elevator, because both reports address the same accident that involving a passenger elevator at 261 West 36th Street on November 14, 2005. The uncontradicted evidence establishes that at that address, there was only one passenger elevator, and there was only one elevator accident involving injury on that day.

On September 12, 2006, plaintiffs filed a complaint, asserting four causes of action under Labor Law §§ 240(1), 241(6), 200, and a derivative claim for loss of consortium by Jacqueline Henriquez. Newmark, New 520 GSH LLC, and New Triple Crown, LLC filed an answer in which they denied the material allegations of the complaint.

Defendants move for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' complaint on the ground that an owner of real property does not owe a duty to maintain its property free of defects to a person commissioned to remedy the very defect that caused the injury. In opposition, plaintiffs argue that there are issues of fact as to whether defendants had notice of the defective condition, which preclude grant of summary judgment.

Discussion

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep't 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to

either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Here, Henriquez may not establish either actual or vicarious liability against defendants on the basis of Labor Law §§ 240(1) or 241(6). Labor Law § 240(1), informally known as "the scaffold law," requires that owners, contractors, and their agents "furnish or erect...scaffolding, hoists, stays...and such other devices which shall be so constructed, placed and operated so as to give proper protection" to construction workers at the work site. Under Labor Law § 240(1), property fee owners, general contractors, and their respective agents are liable for those types of construction, repair or renovation accidents in which a scaffold or other protective device proves inadequate to shield the injured worker from harm flowing directly from the application of the force of gravity to an object or person. *See John v Baherstani*, 281 A.D.2d 114 (1st Dep't 2001).

Labor Law § 241(6) also imposes a nondelegable duty of reasonable care upon owners of premises and general contractors hired to perform renovations "to provide reasonable and adequate protection and safety to the persons" employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. The owner and general contractor are vicariously liable for injuries sustained due to another party's negligence in failing to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-02 (1993).

Labor Law §§ 240(1) and 241(6) are inapplicable to Henriquez's accident, because his injuries occurred in the performance of general maintenance duties, which did not involve either the type of work or the type of hazards envisioned by Labor Law §§ 240(1) and 241(6). *See Esposito v New York City Industrial Development Agency*, 1 N.Y.3d 526, 528 (2003); see also *Lanzilotta v Lizby Associates*, 216 A.D.2d 229, 229-30 (1st Dep't 1995); *McCullum v The Barrington Co. & 309 56th Street Co.*, 192 A.D.2d 489, 489 (1st Dep't 1993).

Further, plaintiffs have not specifically identified any rule or regulation which would support a Labor Law§ 241(6) claim in their complaint, bill of particulars, or papers filed in opposition to this motion. Plaintiffs' general reference to the Administrative Code, the Industrial Code and OSHA rules in paragraph 6 of the bill of particulars is insufficient to support Labor Law § 241 (6) claim. *See Ross v Curtis-Palmer Hydro-electric Co.*, 81 N.Y. 2d 494, 505 (1993).

Labor Law § 200 simply codifies a common law duty of a property owner or employer to provide employees and individuals lawfully on the premises with a safe place to work. *Jock v Fien*, 80 N.Y.2d 965, 967 (1992). Liability under Labor Law § 200 can attach not only to construction work site accidents, but also to accidents occurring during manufacturing and ordinary maintenance activities. *See Jock v Fien*, 80 N.Y.2d at 967.

A basic claim of negligence under Labor Law § 200 contains four elements: duty of care, breach, proximate causation and resulting damages. *See* 2 Warren's Negligence

in the New York Courts, Ch. 2 *et seq.* (Matthew Bender, Revised Ed.). Ordinarily, a landowner is under a duty to maintain its property in a reasonably safe condition, free of defects, and to correct the defect if the landlord creates or has notice thereof. *See Irizarry v 15 Mosholu Four, LLC*, 24 A.D.3d 373, 373 (1st Dep't 2005).

However, a property owner does not owe a duty of care "'to one hurt through a dangerous condition which [one] has undertaken to fix'." *McCullum v Barrington Co. & 309 56th St. Co.*, 192 A.D.2d 489, 489 (1st Dep't 1993), *citing Kowalsky v The Conreco Co. Inc.*, 264 N.Y. 125, 128 (1934). Here, at the time of the accident, Henriquez was an employee of NYE, with which Newmark contracted to provide comprehensive maintenance and repair work for the subject passenger elevator. NYE assigned Henriquez to oversee the workings of the subject elevator and to identify any malfunction requiring repair. Accordingly, because Henriquez sustained injury as a result of a technical malfunction of the passenger elevator at 261 West 36th Street, to which he was assigned to maintain and which he was actually maintaining at the time of the accident, Henriquez may not assert a negligence claim against defendants.

Henriquez argues that *Kowalsky* is inapplicable. Henriquez notes that at the time of the accident, he was not responding to a call from NYE's office, but was just taking a quick, informal look in response to complaints of smoke. Henriquez was not in the process of repairing the counterweight condition when the accident occurred, nor could he have been, because such repair work fell outside of his job duties at NYE.

This argument, however, is unavailing. *Kowalsky* and its progeny apply not only to repair workers, but also to general maintenance workers. *See Waiters v Northern Trust Co. of New York*, 29 A.D.3d 325, 327-28 (1st Dep't 2006). In addition, *Kowalsky* is not limited only to injuries occurring in the midst of repair work, but also covers situations where, as here, the injury is related to the defective condition that the maintenance worker was contracted to address. *See Polgano v New York City Educ. Constr. Fund.*, 6 A.D.3d 222, 222 (1st Dep't 2004), *lv denied* 3 N.Y.3d 601 (precluding recovery where a plumber fell on water that had leaked onto the floor from the sink he was there to repair).

While Henriquez did not conduct any repair work *per se* when the elevator failed, he was identifying a necessary repair. The general oversight and identification of any necessary repair work was part of Henriquez's job duties. Furthermore, Henriquez testified that approximately a month prior to the accident, he noticed vibrations of the elevator car, such as the ones before the accident, but did nothing to investigate it and did not put in a written ticket to call for a repair team. Because part of Henriquez's job responsibilities was to maintain and monitor the elevator, and he was performing that task when he was injured, Henriquez's claim for negligence must fail.

Henriquez's reliance on *Lanzilotta v Lizby Assocs.*, 216 A.D.2d 229, 230 (1st Dep't 1995) and *Wray v 654 Madison Ave. Assocs, L.P.*, 253 A.D.2d 394 (1st Dep't 1998) is misplaced. In those cases, there existed a separate condition or affirmative act or omission created or taken by defendants, other than the condition within plaintiff's work

purview, which may have caused or been a contributing factor in causing plaintiff's accident. *See Strauss v Original Consumers Oil Heating Corp.*, 9 Misc.3d 57, 59 (1st Dep't 2005) (holding managing agent responsible where its instructions to the maintenance worker on how to proceed increased the likelihood of injury).

Here, in contrast, by the time Henriquez arrived on the scene, Rivera, Newmark's employee, had already shut down and locked the passenger elevator. It was Henriquez himself who opened and chose to operate it again to investigate the complaint and talk to the building's engineer on the twelfth floor. It is undisputed that Henriquez could have used a freight elevator or the stairs to get to the twelfth floor, but he chose instead to ride on the subject elevator. Henriquez has failed to submit any evidence to show that defendants' actions increased the danger of, or created a separate condition which caused or contributed to, Henriquez's accident. Accordingly, Henriquez's Labor Law 200, or common-law negligence, claim fails and is dismissed.

Henriquez also argues in opposition to this motion that liability can be established through the doctrine of *res ipsa loquitur*. This doctrine is inapplicable here. Moreover, plaintiffs failed to plead a claim of *res ipsa loquitur* in the complaint or the bill of particulars and therefore may not raise it now.

Finally, as all of Henriquez's claims are dismissed, Jacqueline Henriquez's derivative claim of loss of consortium must also be dismissed.

Upon the foregoing, it is

ORDERED that this motion for summary judgment dismissing the complaint in its entirety against all defendants is granted without interest, costs, and disbursements; and it is further

ORDERED that within 20 days of entry, movant shall serve a copy of this order with notice of its entry upon all parties, and upon the Clerk of this Court (60 Centre Str., Bsmt); and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of this Court is directed to enter judgment dismissing the complaint.

This constitutes Decision and Order of the Court.

Dated: July 9, 2010
New York, New York

ENTER:

Saliann Scarpulla

Hon. Saliann Scarpulla, J.S.C.