Kosmatos v 729 Seventh Owners, LLC

2011 NY Slip Op 31770(U)

June 28, 2011

Supreme Court, New York County

Docket Number: 107543/08

Judge: Doris Ling-Cohan

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SCANNED ON 6/30/2011

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 107543/2008
KOSMATOS, JIMMY
VS.
729 SEVENTH OWNERS, LLC
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

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

I on this motion to/for Summary judgment

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause ... - Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

14

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the attached memorandum decision;

(consolidated for disposition with motion sequence number 007)

FILED
JUN 30 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/28/11

JUSTICE DORIS LING-COHAN

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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JIMMY KOSMATOS,

Plaintiff,

Index No.: 107543/08
DECISION/ORDER

-against-

729 SEVENTH OWNERS, LLC, 729 7TH REALTY CORP., 729 ACQUISITION, LLP, 49-7TH OPERATING INC., EMMES MASTER SERVICES, LLC, REISE FAMILY, LP, REISE ORGANIZATION CORPORATE GROUP, NORTHSTAR REALTY FINANCE CORP., HIMMELL & MERINGOFF PROPERTIES, INC., MERINGOFF PROPERTIES, INC., 729 DEMI-TASSE, LLC, and THE BOARD OF MANAGERS OF 719 7TH AVENUE CONDOMINIUM,

Defendants.

Motion Seq. No.: 006 & 007

FILED
JUN 30 2011
NEW YORK
COUNTY CLERK'S OFFICE

----------X

729 7TH REALTY CORP., REISE FAMILY, LP, REISE ORGANIZATION CORPORATE GROUP,

Third-Party Plaintiffs,

Index No.: 590896/08

-against-

729 DELI INC., c/o DIMITRIOS ATHANASATOS and 729 DELI INC.,

Third-Party Defendants.

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729 SEVENTH OWNERS, LLC, 729 ACQUISITION, LLP, 49-7TH OPERATING INC., EMMES MASTER SERVICES, LLC, NORTHSTAR REALTY FINANCE CORP., HIMMELL & MERINGOFF PROPERTIES, INC., MERINGOFF PROPERTIES, INC., 729 DEMI-TASSE, LLC, and THE BOARD OF MANAGERS OF 719 7TH AVENUE CONDOMINIUM,

Second Third-Party Plaintiffs,

Index No.: 591147/08

-against-

729 DELI INC., c/o DIMITRIOS ATHANASATOS and 729 DELI INC.,

Second Third-Party Defendants.

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HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, two sets of defendants move separately for

summary judgment to dismiss the complaint (motion sequence numbers 006 and 007).

BACKGROUND

On May 31, 2005, plaintiff Jimmy Kosmatos (Kosmatos) was injured when he fell from a ladder in the sub-basement of a condominium building (the building) located at 729 7th Avenue in the County, City and State of New York. *See* Notice of Motion (motion sequence number 006), Correia Affirmation, ¶ 3. Kosmatos is an employee and part-owner of third-party defendant/second third-party defendant 729 Deli Inc. (729 Deli), a New York corporation that formerly operated a deli/restaurant called "Nick's Deli" on a portion of the building's first floor. *Id.*, ¶ 7.

The building is owned by defendant 729 Seventh Owners, LLC (729 Owners), a New York corporation that is controlled by the co-defendant Board of Managers of 719 7th Avenue Condominium (the Board). *Id.*; Exhibit G, at 43-44. At some point, 729 Owners sold ownership interests in the building to two entities known as "Condo 1" and "Condo 2." Correia Affirmation, ¶ 8. Condo 1 now owns the building's first-floor commercial space, the mezzanine that is directly above that space, and the portion of the basement that is directly below that space. *Id.* Condo 2 owns the remainder of the basement, as well as the entire sub-basement, the lobby, the common areas and the 18 floors that are above the mezzanine. *Id.* Defendant 49-7th Operating Inc. (49-7th Operating) was the original owner of Condo 1, and co-defendant 729 7th Realty Corp. (729 Realty) was the prime tenant with which 49-7th Operating executed a master lease for Condo 1.[1] *Id.*, ¶ 23. Co-defendants the Reise Organization Corporate Group and its

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[1] On February 28, 1999, 49-7th Operating assigned its interest in the master lease to co-defendant 729 Demi-Tasse, LLC (729 Demi-Tasse), a Delaware corporation that is affiliated with New York co-defendant Emmes Master Services, LLC (Emmes). *See* Notice of Motion,

corporate parent, Reise Family, LP (together, the Reise defendants), are the management company responsible for Condo 1. *Id.*; Exhibit I, at 9-11, 15. Defendant 729 Acquisition, LLP (729 Acquisition) owns Condo 2, and co-defendant Meringoff Properties, Inc. (Meringoff) is the managing agent that 729 Acquisition hired to manage Condo 2.[2] *Id.*; Correia Affirmation, ¶¶ 9, 11; Exh. G.

729 Deli became a sub-tenant of 729 Realty for a portion of Condo 1, via a sublease that the parties executed on November 10, 1986, and thereafter renewed eight times. *Id.*, ¶ 7. The final sublease renewal expired on October 31, 1999, after which 729 Realty commenced a commercial holdover proceeding against 729 Deli, and extended 729 Deli's sub-tenancy several times via court stipulation, most recently until October 31, 2005. *Id.*; Exhibit F. 729 Deli no longer does business in the building.

At his deposition, Kosmatos stated that he was injured at approximately 6:30 P.M. on May 31, 2005, when he went to the building's sub-basement to replace a fan belt in the exhaust system that 729 Deli had installed there near the inception of its tenancy. *Id.*; Exhibit J, at 13-16, 98. He specifically stated that he fell off of the second to the top rung of a ladder, which slid out from under him while he was engaged in replacing the fan belt, and hit his head, right shoulder and the left side of his body on the concrete floor. *Id.* at 26-31, 38-39. He also stated that he had to replace worn-out fan belts on several previous occasions, and that, on this occasion, he knew that the fan belt needed replacement because the deli had started to fill with smoke. *Id.* at 21, 106-108,

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Exhibit F. Co-defendant Northstar Realty Finance Corp. (Northstar) later succeeded to the relationship Emmes had with 729 Demi-Tasse. *Id.*; Exhibit I, at 45. Deposition witnesses have indicated that all of these co-defendants may, in fact, be controlled by the Reise defendants. *Id.*; Exhibits F, G.

[2] Co-defendant Himmell & Meringoff Properties, Inc. (H&M Properties) is Meringoff's corporate parent.

112. Kosmatos stated, however, that the contractor who initially installed the exhaust system had returned once to replace a burned-out motor, and that 729 Deli had thereafter also hired a company to perform routine cleaning and maintenance on the exhaust system. *Id.* at 151-153, 158-160. Kosmatos noted that the sub-basement was *not* part of the space leased by 729 Deli. *Id.* at 37-38, 104-105. Kosmatos also stated that the eight-foot wooden A-frame ladder that he used was one of two ladders that were kept permanently in the sub-basement by the building's owners. *Id.* at 19-25, 116-117. Kosmatos further stated that the second ladder had been purchased and placed in the sub-basement by 729 Deli, that it was made of metal, and that it was shorter than the first, which made it more difficult to use when replacing a fan belt in the exhaust system. *Id.* at 105-106. Kosmatos additionally stated that the building's superintendent, "Johnny," specifically told him that he had permission to use the ladders whenever he needed to change a fan belt. *Id.* at 118-119, 127-128, 130. Kosmatos did not testify that the ladder fell because it lacked rubber "feet," or because there was a slippery condition on the floor underneath it. *Id.* Rather, Kosmatos merely stated that he had informed "Johnny" on several occasions that the ladders were unsafe because they were "old and not good." *Id.* at 120-126.

Meringoff was deposed on January 7, 2010 by its employee, John "Johnny" Savage (Savage), the superintendent of Condo 2 in the building. *Id.*; Exhibit H. Savage stated that there were three ladders in the sub-basement; a 10-foot-tall metal ladder and a six-foot-tall wooden ladder that he had purchased and placed there at some point, and another 10- or 12-foot-tall wooden ladder that 729 Deli had placed there for the express purpose of reaching the exhaust fan system whenever it needed to be repaired. *Id.* at 30-34, 47-48. Savage denied ever having given Kosmatos permission to use Meringoff's ladders. *Id.* at 54-55. He also denied ever having spoken with Kosmatos about the condition of the ladders. *Id.* at 56.

Meringoff was also deposed on January 7, 2010 by its senior vice president, Richard Beltz (Beltz). *Id.*; Exhibit G. Beltz confirmed that Meringoff had control over the sub-basement as part of Condo 2. *Id.* at 59-60. Beltz also confirmed that there were ladders kept in the sub-basement for use by Savage and his staff of Meringoff employees. *Id.* at 58-59.

Property manager Mark Stempel (Stempel), representing the Reise defendants, was deposed and confirmed that Condo 2, and not Condo 1, managed the sub-basement where Kosmatos was injured. *Id.*, Exhibit I, at 40-41. Stempel also stated that the Reise defendants did not have access to the sub-basement to store ladders or any other property there. *Id.* at 56-57.

Kosmatos initially commenced this action on February 1, 2008 by serving a summons and complaint on 729 Owners, which filed its initial answer on May 1, 2008. *See* Notice of Motion (motion sequence number 006), Exhibits A, B. Kosmatos then served a supplemental summons and complaint that named all of the instant defendants on or about May 28, 2008. *Id.*, Exhibit A. That supplemental complaint sets forth causes of action for: 1) negligence; 2) violation of Labor Law § 200; 3) violation of Labor Law § 240; 4) violation of Labor Law § 241 (6); and 5) violation of Industrial Code §§ 23-1.5; 23-1.7, 23-1.16 and 23-1.21. *Id.* 729 Realty and the Reise defendants filed a joint answer to the supplemental complaint on August 6, 2008. *Id.*; Exhibit B. The remaining co-defendants (hereinafter, the 729 defendants) also filed an answer on that date. *Id.*; Exhibit C. 729 Realty and the Reise defendants thereafter commenced the first third-party action herein on October 27, 2008 by serving a summons and complaint on 729 Deli and its principal officer, Dimitrios Athanasatos (Athanasatos). *Id.*; Exhibit D. The 729 defendants later commenced the second third-party action herein on December 15, 2008. *See* Notice of Motion (motion sequence number 007), Exhibit D. 729 Deli has failed to answer either third-party complaint and is now in default. Currently before the court are two separate motions for summary

judgment to dismiss the complaint by 729 Realty and the Reise defendants (the Reise motion), and by the 729 defendants (the 729 motion).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003).

The court notes that Kosmatos has agreed to withdraw his claims pursuant to Labor Law § 241 (6) and the named Industrial Code provisions because "there is no dispute that this accident did not take place within the construction or renovation context." *See* Meyerson Affirmation in Opposition, ¶ 4. Therefore, at the outset, the court grants both of the instant motions, on consent, to the extent of dismissing Kosmatos's fourth and fifth causes of action.

The Reise Motion

The Reise defendants first argue that Kosmatos's Labor Law § 200 and common-law negligence claims must be dismissed as against them on the ground that they owed Kosmatos no duty of care, since they neither owned, managed nor controlled the sub-basement where he was injured. *See* Notice of Motion (motion sequence number 006), Correia Affirmation, ¶¶ 28-31. In *Ortega v Puccia* (57 AD3d 54, 61 [2d Dept 2008]), the Appellate Division, Second Department,

cogently summarized the law governing Labor Law § 200 as follows:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work.
>
> ***
>
> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner...cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

This action can only involve the former - i.e., "dangerous condition" - variety of claim, because Kosmatos does not assert that any of the Reise defendants was responsible for supervising or controlling the "manner of his work." In their motion, the Reise defendants cite Beltz's and Stempel's deposition testimony that the building's sub-basement was part of Condo 2 rather than Condo 1, and note that none of that testimony indicates that the ladders that were kept there were in any way connected with Condo 1. *Id.*; Exhibits G, at 59-60; I, at 40-41.

The Reise defendants also cite the Appellate Division, First Department's, decision in *Balsam v Delma Engineering Corp.* (139 AD2d 292, 296-297 [1st Dept 1988]), reiterating the long-standing rule that:

> Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more

> of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property [internal citations omitted].

Kosmatos replies that the Reise defendants "did not prove that the [exhaust] systems did not pass through their property, or benefit their property, and they did not prove that the allegedly defective ladder in question was not theirs." *See* Meyerson Affirmation in Opposition, ¶ 26. The Reise defendants claim that Kosmatos's legal argument is "irrelevant" because it does not matter whether the exhaust system passes through parts of the building that they manage, and that Kosmatos's statement regarding ownership of the subject ladders is a "misstatement of fact." *See* Correia Reply Affirmation, ¶¶ 3, 5. The Reise defendants specifically note that Savage's deposition testimony established that the ladders belonged either to Meringoff or to 729 Deli. *Id.*, ¶ 3; Notice of Motion (motion sequence number 006), Exhibit H, at 30-34, 47-48.

After review, as explained below, the court agrees with the Reise defendants that they owed Kosmatos no duty of care, and thus, the Labor Law § 200 and negligence claims must be dismissed. With respect to the first point, Kosmatos has not cited, nor has the court been able to discover, any legal authority to support the argument that the mere fact that duct work passes into an adjacent portion of a building is - without more - a sufficient ground to create a duty of care that the owner/lessor of that *adjacent* portion must observe. Thus, pursuant to the holding of *Balsam v Delma Engineering Corp.* (139 AD2d 292, *supra*), since liability requires a showing of "occupancy, ownership, control or a special use of" the property where the plaintiff was injured and since it is not disputed that the Reise defendants did not own, occupy, use or control the portion of the sub-basement where Kosmatos was injured, there can be no liability as against the Reise defendants, since there was no duty of care.

With respect to Kosmatos' argument that the Reise defendants have not disproved their

purported ownership of the ladder, the court notes that such ownership is only relevant where the plaintiff's Labor Law § 200 claim is based upon the "manner of work" performed, discussed *supra*. *See Ortega v Puccia*, 57 AD3d at 61. Precedent holds that, in addition to ownership, the proponent of such a claim must also demonstrate that the defendant controlled or supervised his work. *See e.g. Rakowicz v Fashion Inst. of Technology*, 56 AD3d 747 (2d Dept 2008). Here, however, as previously discussed, Kosmatos has offered no such proof, or even any allegations as to the Reise defendants supervising and/or controlling his work. Thus, Kosmatos' argument concerning ownership of the ladder is unavailing. The court further notes that, in any event, there is no evidence herein that the Reise defendants owned the subject ladder. Instead, this assertion is advanced solely by Kosmatos's attorney, and is not supported by an affidavit of merits. It is well settled that "[a]n attorney's affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof." *Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 (1st Dept 1997).

Thus, the court rejects Kosmatos's argument that the Reise defendants are liable because they may have owned the subject ladder. Therefore, since there is no evidence that the Reise defendants owned, occupied or controlled either the portion of the building where Kosmatos was injured, or the ladder that he was injured on, the Reise defendants have adequately established that they did not owe Kosmatos any duty of care. Accordingly, the Reise defendants' motion for summary judgment to dismiss is granted with respect to Kosmatos's first and second causes of action (which allege liability for negligence and violation of Labor Law § 200).

The Reise defendants next argue that Kosmatos's Labor Law § 240 claim must be dismissed because "he was not doing construction work at the time of the accident, but [merely] general maintenance work." *See* Notice of Motion (motion sequence number 006), Correia

Affirmation, ¶ 34. They cite the decision of the Appellate Division, First Department, in *Stadtmuller v Metropolitan Life Ins. Co.* (271 AD2d 361 [1st Dept 2000]) to support their contention that Kosmatos's replacement of a fan belt in the ventilation system constituted mere "maintenance," as opposed to a "repair." *Id.* Kosmatos cites the decision of the Appellate Division, First Department, in *Santiago v Fred-Doug 117, L.L.C.* (68 AD3d 555 [1st Dept 2009]) and concedes that there is an issue of fact as to whether his replacement of the fan belt constituted "maintenance" or "repair work." *See* Meyerson Affirmation in Opposition, ¶¶ 13-25. The Reise defendants' reply papers merely restate their original argument. *See* Correia Reply Affirmation, ¶ 4.

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

> 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.

In construing this statute, the Appellate Division, First Department, holds that:

> While "repair" of a broken or malfunctioning item is among the statute's enumerated activities, "routine maintenance" to prevent malfunction is not covered activity [internal citations omitted].

Santiago v Fred-Doug 117, L.L.C., 68 AD3d at 555. In *Santiago*, the First Department found a triable issue of fact where it was unclear whether an employee engaged in replacing an air-conditioner's fan belt was performing an emergency repair on a broken unit, or merely conducting maintenance work as part of a routine service call. *Id.* There, the plaintiff had testified that he was responding to an emergency repair request at the time of his injury, while the defendant had testified that the plaintiff was on the premises in response to a work order that had been submitted

for a maintenance job. The Court concluded that these "discordant versions of the facts" precluded any finding, as a matter of law, concerning the nature of the work performed. *Id.* at 556.

Here, there is similar discord. Kosmatos first testified that, after the exhaust system's motor burnt out and was replaced by the contractor that originally installed it, it became necessary to replace the fan belts with some frequency, and that such replacements were performed either by the company that 729 Deli had hired to clean the exhaust system, or by whichever 729 Deli employee was on duty at the time. *See* Notice of Motion, Exhibit J, at 106-108, 112. Under these circumstances, it would appear reasonable to characterize the act of replacing a fan belt as an instance of routine "maintenance." However, Kosmatos also testified that he had undertaken the fan belt replacement in response to the perceived emergency caused by smoke filling the deli. *Id.* at 21, 106-108, 112. As previously discussed, work undertaken in response to an "emergency" is deemed to constitute a "repair" that falls within the coverage of Labor Law § 240 (1). The difficulty in this case is that Kosmatos is the only party with personal knowledge of the facts of his injury, and that his deposition testimony about the circumstances of that injury is ambiguous - it could be fairly characterized as describing "a regularly scheduled emergency." This, of course, is not susceptible of easy resolution under the case law following Labor Law § 240 (1) that demands a clear distinction between "maintenance" and "repairs." Rather than parse legal definitions, however, the court believes that the holding of *Santiago v Fred-Doug 117, L.L.C.* (68 AD3d 555, *supra*) indicates that such a contested factual issue is more appropriately resolved at trial rather than via a motion for summary judgment.

Moreover, since Labor Law § 240 (1) *specifically applies to* "contractors and owners and their agents," and the Reise defendants have demonstrated that they are none of these because

their interest lies with Condo 1 and not Condo 2 where Kosmatos was injured, there can be no liability against the Reise defendants based upon Labor Law § 240(1). Thus, Kosmatos has no recourse against the Reise defendants under Labor Law § 240 (1). Therefore, Kosmatos's third cause of action must fail as a matter of law, and the Reise defendants' motion for summary judgment of dismissal is granted with respect to this claim. Accordingly, the court concludes that the Reise defendants' motion is granted in its entirety.

The 729 Motion

In the first portion of their motion, the 729 defendants argue that Kosmatos's claim pursuant to Labor Law § 240 (1) should be denied because "he was not engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure at the time of the accident." *See* Memorandum of Law in Support of Motion (motion sequence number 007), at 2-5. The 729 defendants cite a quantity of case law decided by the Appellate Division, First Department, to support the proposition that Kosmatos's act of replacing the fan belt in the deli's sub-basement exhaust system constituted mere "maintenance" rather than "repair work." *Id.* As previously discussed, Kosmatos has asserted that he was responding to a smoke infiltration in the del and concedes that there is a factual issue as to whether he was engaged in "routine maintenance" or "repair work" at the time of the subject accident. *See* Meyerson Affirmation in Opposition, ¶¶ 13-25. The 729 defendants' reply papers merely restate their original argument. *See* Jaffee Reply Affirmation, ¶¶ 1-15. However, as previously indicated, the court's review of the deposition testimony herein discloses that, at this juncture, the submissions reveal that Kosmatos's act of replacing the exhaust system fan belt bore the characteristics of both emergency repair work and normal maintenance. The court has also previously stated its belief that the First Department's recent decision in *Santiago v Fred-Doug 117, L.L.C.* (68 AD3d at 555) mandates

that, where there is a reasonable factual dispute as to the nature of the work performed, such issue must be resolved at trial. Further, it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Indus., Inc.*, 295 AD2d 218 (1st Dept 2002). Therefore, a trial is necessary with respect the 729 defendants' potential liability on plaintiff's Labor Law § 240 claim and, therefore, the 729 defendants' motion is denied with respect to Kosmatos's third cause of action (i.e., for violation of Labor Law § 240).

The 729 defendants next argue that Kosmatos's Labor Law § 200 and common-law negligence claims should be dismissed because "he conceded that ... no one was supervising his work," and because they "did not supply the ladder" in question which, they assert, was actually owned by 729 Deli. *See* Memorandum of Law in Support of Motion (motion sequence number 007), at 8-11. In his opposition papers, Kosmatos disputes these claims, and responds that the deposition testimony herein shows that the ladder that he fell from belonged to "the building's owners," and that Meringoff's superintendent (i.e., Savage) had given him permission to use it. *See* Meyerson Affirmation in Opposition, ¶ 27. The 729 defendants' reply papers do not further address their argument regarding the subject causes of action. *See* Jaffee Reply Affirmation, ¶¶ 1-15.

As previously discussed, the Second Department held in *Ortega v Puccia* (57 AD3d at 61, *supra*) that, in Labor Law § 200 and common-law negligence claims "[w]here a premises condition is at issue, property owners may be held liable ... if [they] either created the dangerous condition that caused the accident or had actual or constructive notice of [it]." Here, Kosmatos alleges that the 729 defendants own the ladder that he fell from, and cites the decision of the Appellate Division, First Department, in *Higgins v 1790 Broadway Assoc.* (261 AD2d 223, 225

[1st Dept 1999]), for the proposition that conflicting deposition testimony regarding the allegedly defective condition of a ladder at a work site presents a question of fact as to the existence of the property owner's actual and/or constructive notice of that purportedly defective ladder. Although the *Higgins* case was decided before *Ortega v Puccia*, it is still good law because it does not contradict *Ortega's* holding that the issue of actual or constructive notice is relevant to Labor Law § 200 claims that are based on a "dangerous condition." By contrast, the 729 defendants' responsive argument concerning their lack of "supervision and control" of Kosmatos's work is clearly directed against Labor Law § 200 claims that are based on the "means and manner" of the work being performed at the time of the plaintiff's accident. However, that is not the nature of Kosmatos's claim against the 729 defendants. Because they are the owners/managers of Condo 2 (which includes the sub-basement where he was injured), and because there is conflicting deposition testimony as to whether they owned the ladder that Kosmatos was injured on, Kosmatos's Labor Law § 200 cause of action is properly deemed to be a "dangerous condition" claim. Thus, the 729 defendants' motion is denied with respect to Kosmatos's first and second causes of action. Accordingly, the court concludes that the 729 defendants' motion should be granted in part and denied in part.[3]

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants 729 7th Realty Corp., Reise Family, LP, and Reise Organization Corporate Group is granted and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the

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[3] As noted previously, Kosmatos has agreed to withdraw his fourth and fifth causes of action.

submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants 729 Seventh Owners, LLC, 729 Acquisition, LLP, 49-7th Operating Inc., Emmes Master Services, LLC, Northstar Realty Finance Corp., Himmell & Meringoff Properties, Inc., Meringoff Properties, Inc., 729 Demi-Tasse, LLC, and the Board of Managers of 719 7th Avenue Condominium is granted solely to the extent that the fourth and fifth causes of action of the complaint are severed and dismissed, but is in all other respects denied; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that within 30 days of entry of this order, the Reise defendants shall serve a copy upon all parties with notice of entry.

Dated: New York, New York
June 28, 2011

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\kosmatosv729etal.dlc.frank lane.wpd

FILED

JUN 30 2011

NEW YORK
COUNTY CLERK'S OFFICE