NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

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PATRICK FORLENZA and MARIA FORLENZA,

Index No. 151121/2014

Plaintiffs,

-against-

EQT PARTNERS INC., EQT CORPORATION, 1114 AVENUE OF THE AMERICAS II, LLC and 1114 TRIZECHAHN-SWIG LLC,

Defendants.

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Gerald Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by a worker on December 12, 2013, when he fell from a ladder while repairing a window mullion on the 38th floor of an office building located at 1114 6th Avenue, New York, New York (the Premises).

Defendant EQT Partners, Inc. (EQT) moves under CPLR 3212 for summary judgment dismissing the complaint against it.[1]

BACKGROUND

On the day of the accident, non-party 1114 6th Ave. Co., LLC (1114 6th Ave.) owned the Premises where the accident occurred. Pursuant to a lease with 1114 6th Ave., EQT was a tenant at the Premises, occupying a portion of the 38th floor (the EQT Lease). Non-party Brookfield Properties (Brookfield), a building management company, employed the maintenance workers at the Premises. Brookfield was plaintiff Patrick Forlenza's employer.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Brookfield as an on-site mechanic. As such, he was responsible for repairs, plumbing and steam work at the Premises. Plaintiff's work was solely supervised and directed by his supervisors, who were Brookfield employees. Brookfield also provided plaintiff with his safety equipment.

[1] By Decision and Order dated October 24, 2014, the complaint was dismissed as against defendants 1114 Avenue of the Americas II, LLC and 1114 Trizechahn-Swig LLC. By Decision and Order dated March 7, 2017, the complaint and all cross-claims alleged against defendant EQT Corporation were dismissed.

Plaintiff explained that, if a tenant needed repairs in the tenant's unit, the tenant would contact Brookfield. Brookfield would then send him, or a coworker, to the tenant's unit to make the repairs.

On the day of the accident, EQT requested that Brookfield repair a window in its 38th floor office. Plaintiff reviewed EQT's request and travelled to the 38th floor. Once there, he inspected the subject window and found that a mullion, which is a decorative aluminum "frame that sits in between the windows that either a shade or a blind gets connected to" had fallen from the window (plaintiff's tr at 33).

Plaintiff determined that he would need a 6-foot A-frame ladder to reach the top of the window and reinstall the mullion. Plaintiff then went to the sub-cellar of the Premises, obtained a ladder and returned to the 38th floor. Plaintiff then placed the ladder on top of a convector, which was located underneath the window. The convector was a two-foot tall, three -foot wide radiator.

Before climbing the ladder, plaintiff inspected it and found it in good working order. In addition, he testified that the ladder was stable, and that all four legs were securely placed on top of the convector, before he climbed the ladder and began reinstalling the mullion.

After successfully installing one screw at the top of the window, and as he began installing a second screw, the ladder shifted and one of its legs moved off of the convector. Plaintiff explained that "[o]nce the one leg came off, the ladder went and I went with it" (*id.* at 103).

Affidavit of Alex Darden (An EQT Partner)

Alex Darden stated that, at the time of the accident, he was a partner in EQT. He explained that, before the accident, EQT's office manager contacted Brookfield to request that it repair a piece of a window frame that had fallen. Darden stated that, pursuant to the EQT Lease, the windows were not part of EQT's leased space and, therefore, EQT had no authority to repair said windows. Instead, window repair at the Premises was the responsibility of the landlord, 1114 6th Avenue. In addition, Darden states that EQT had no authority to control or supervise plaintiff.

The EQT Lease

The EQT Lease provides, in pertinent part, that "the windows are not part of the Premises and Landlord reserves all rights to such parts of the Building" (EQT's notice of motion, exhibit G, the EQT Lease at 47).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*,

68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt about whether a triable fact exists, a court must deny a summary-judgment motion (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim Against EQT

EQT moves for summary judgment dismissing the Labor Law § 240 (1) claim against it. Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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."

Initially, the crux of this matter is whether EQT, as a lessee at the Premises, is a proper Labor Law defendant, such that it may be liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6). Important to this matter, "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *accord Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]).

Here, EQT, as a lessee, had an interest in the Premises. But no evidence exists that EQT contracted to have the subject work performed for its benefit. While EQT called Brookfield to report the broken mullion, as stated by Darden in his affidavit, pursuant to the Lease, it was the landlord's responsibility to repair the windows at the Premises. Accordingly, EQT is not an "Owner" for the purposes of the Labor Law, and is not a proper Labor Law defendant.

Thus, EQT is entitled to summary judgment dismissing the Labor Law § 240 (1) claim against it.

The Labor Law § 241 (6) Claim Against EQT

EQT moves for summary judgment dismissing Labor Law § 241 (6) claim against it. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Initially, as discussed above, EQT is not a proper labor law defendant, and, therefore, is entitled to summary judgment dismissing the Labor Law § 241 (6) claim against it on that ground.

In any event, Labor Law § 241 (6) applies only to areas "in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). Here, plaintiff fell from a ladder while repairing a window in an office building that was not in the process of being constructed, excavated, or demolished. Accordingly, Labor Law § 241 (6) does not apply to the facts of this case.

The Common-Law Negligence and Labor Law § 200 Claims Against EQT

EQT moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it, on the ground that it did not supervise and/or control plaintiff's work. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All 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 or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Here, plaintiff does not oppose that part of EQT's motion seeking to dismiss the common-law negligence and Labor Law §200 claims against it.

Thus, EQT is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant EQT Partners Inc. (EQT) under CPLR 3212 for summary judgment dismissing the complaint is granted, and the complaint is dismissed as against EQT with costs and disbursements as taxed by the Clerk of the Court upon a submission of an appropriate bill of costs.

Dated: March 23, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.