At an IAS Term, Part 29 of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of March, 2019.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

----------X Index No.:518689/2016

SHELEVON JONES,

Plaintiff,

DECISION and ORDER and JUDGMENT

v.

SAINT RITA's ROMAN CATHOLIC CHURCH DIOCESE of BROOKLYN and ARCHDIOCESE OF NEW YORK,

Defendants.

----------X

Defendant, SAINT RITA's ROMAN CATHOLIC CHURCH DIOCESE of BROOKLYN moves this Court for an Order pursuant to CPLR § 3212 for Summary Judgment dismissing the Plaintiff's complaint, and granting further relief as this Court deems just and proper.

Upon reading the Notice of Motion by Michael J. DeSantis, Esq., Attorney for SAINT RITA's ROMAN CATHOLIC CHURCH DIOCESE of BROOKLYN, dated October 5th, 2018, and all exhibits annexed thereto; the Memorandum of Law of Michael J. DeSantis, Esq., and Howard F. Strongin, Esq., dated October 5th, 2018; the Affirmation in Opposition of Daniel B. Linson, Esq., Attorney for Plaintiff, SHELEVON JONES, dated November 8th, 2018, and all exhibits annexed thereto; the Reply Affirmation of Michael J. DeSantis, Esq., dated December 5th, 2018, and all exhibits annexed thereto; the

Memorandum of Law in Reply and in Further Support of Defendant's Motion for Summary Judgment by Howard F. Strongin, Esq., and Michael J. DeSantis, Esq., dated December 5th, 2018; after argument of counsel and due deliberation thereon, Defendant's motion for Summary Judgment is granted for the reasons set forth below.

FACTS

Defendant moves for summary judgment to dismiss the Plaintiff's complaint arguing there is no legal basis for Plaintiff to recover against it for injuries she sustained when a window struck her at Defendant's premises.

Plaintiff was working as a set dresser on location at 260 Shepherd Avenue, Brooklyn, (the premises), owned by Defendant, where a show was being filmed.

On Wednesday, April 13, 2016, Plaintiff was working in a classroom on the second floor of the premises to prepare for filming the following day. The classroom in which she was working contained double pane and double sash windows. The windows were designed to open into the room to a horizontal position.

Gordon Dukes worked as a set dresser on the job with Plaintiff at Defendant's premises. Dukes testified that because the set dressers were warm, on Wednesday, April 13, 2016, one of the crew members tried to open one of the windows to permit air to come in but there were screws screwed into the window frames, securing the windows in place by preventing the windows from opening. He testified that all of the windows were secured with screws.

One of the set dressers removed the screws from one of the windows to permit it to open but rather than slide up as anticipated, the window opened by dropping forward into

the room, obstructing the filming area, and so the set dresser replaced the screws, returning the window to the closed position.

Plaintiff returned on Friday, April 15, 2016, the day after shooting, to remove items from the set. Plaintiff stated she noticed one of the windows was open in the room where the windows were secured by screws. Plaintiff did not know who had opened the window.

When she bent down in front of that window to pick up a box that was beneath it, she felt something strike her in the head. Plaintiff alleges that when the screws were removed from the window, it became unsafe and fell, causing her injuries.

Gordon Dukes could not say if the window that struck Plaintiff was the one that had been previously opened.

Plaintiff asserts claims pursuant to the Labor Law and pursuant to common law negligence.

Labor Law 240(1), 241(6), 200

Plaintiff asserted claims pursuant to Labor Law sections 240(1), 241(6) and 200 to recover for the injuries she sustained. New York Labor Law affords protections to individuals who are engaged in certain work.

"To successfully assert a cause of action under Labor Law § 240(1), a plaintiff must establish that he or she was injured during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure". Goodwin v Dix Hills Jewish Ctr., 144 AD3d 744, 745-46 [2d Dept 2016], internal citations omitted.

Plaintiff described her work as a set dresser as including removing desks from the classroom, taking down posters that had been hung on the walls and putting everything into boxes.

Workers engaged in setting up on removing scenery or props on sets have been held not to be engaged in construction activities within the meaning of the Labor Law.

In Travers v RCPI Landmark Properties, LLC, 74 AD3d 956 [2d Dept 2010] the plaintiff asserted he was engaged in the erection of a temporary stage. The Court found that plaintiff was not entitled to the protections of the Labor Law when he was injured while moving speakers on a stage and that his claim that he was engaged in the erection of a temporary stage was not supported by the record.

Even in cases where plaintiffs have fallen from ladders while hanging scenery on buildings used as sets for films, courts have declined to extend the protections of the Labor Law. See Tanzer v A. Terzi Productions, 244 AD2d 224 [1st Dept 1997], where the Court held that plaintiff was not entitled to the protections of the Labor Law when he slipped from a ladder while hanging scenery in a building that was being used as a set for a film as the work did not affect the structural integrity of the building, and thus was not considered construction work within the meaning of the statute. See also, Perchinsky v State, 232 AD2d 34 [3d Dept 1997], where plaintiff fell from a ladder while was attaching wire to wall for the purpose of hanging decorations for the production of a home show, and plaintiff was not engaged in work on a building or structure where construction, excavation or demolition work was being performed.

The Court in Lioce v Theatre Row Studios, 7 AD3d 493 [2d Dept 2004], held that the Plaintiff who fell from a ladder while he was installing a light for a theatrical production was not engaged in construction work within the meaning of Labor Law 240(1).

The plaintiff in Holler v City of New York, 38 AD3d 606 [2d Dept 2007], was injured when he was struck by a falling object while assisting in the installation of a hoist motor for the purpose of lifting scenery to prepare for a new show. The Court concluded that this activity was more akin to routine maintenance than to construction activity and it upheld the dismissal of the plaintiff's Labor Law claims.

In the present case, Plaintiff was picking up a box while removing items from a set when she was injured. She was not engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, and therefore she is not protected by the Labor Law.

Since Plaintiff's work as a set dresser did not constitute construction work within the meaning of the Labor Law, she cannot assert a claim under the Labor Law.

Common law negligence

Plaintiff alleges three related arguments as to why her negligence claim should not be dismissed: that the use of screws to keep the windows closed constituted a dangerous condition, that it was foreseeable that a production crew member might remove the screws, and that Defendant had notice of this condition.

As a general matter, an owner of realty owes a duty to maintain the property in a reasonably safe condition. Mullen v Helen Keller Services for Blind, 135 AD3d 837, 837-38 [2d Dept 2016], internal citations omitted. Id. A landowner "has a duty to maintain his or her premises in a reasonably safe condition taking into account all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of

avoiding the risk". Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 14 [2d Dept 2011].

Initially, Plaintiff alleges that the use of screws to keep the windows closed constituted a dangerous condition. Plaintiff offers the testimony of her expert, Eric Heiberg, PE, who stated that the windows deviated from good and accepted engineering principals and building maintenance practices. He also stated that the only reason to wedge screws between the sash and the frame is to attempt to prevent the sash from falling into the room and/or to prevent the window sash from opening. Heiberg concluded that Defendant failed to offer Plaintiff a safe place to work by failing to ensure that the window remained secure and upright.

However, no dangerous condition existed until one of the Plaintiff's co-workers removed the screws, and either failed to replace them or did not replace them properly. Both Plaintiff and Dukes stated in their depositions that another crew member removed the screws holding the window closed, causing the window to become unstable. There is no evidence that the windows were in a dangerous condition prior to the removal of the screws.

Plaintiff claims that it was foreseeable that a third party might remove the screws and thus create a dangerous condition.

"An intervening act constitutes a superseding cause sufficient to relieve a defendant of liability if it is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct". Fahey v. A.O. Smith Corp., 77 A.D.3d 612, 616, 908 N.Y.S.2d 719 [2nd Dept 2010].

While a determination as to whether an act is foreseeable is generally for the trier of fact, summary judgment is appropriate where only one conclusion may be drawn from the

established facts. Niewojt v Nikko Const. Corp., 139 AD3d 1024, 1026 [2d Dept 2016], internal citations omitted.

The facts here are that Defendant leased the premises to the production company for a limited purpose and time, to shoot a scene.

The opening of the window was not necessitated by or an integral part of the show being filmed. It was not reasonably foreseeable that a member of the crew would take it upon themselves to remove screws used to secure the windows.

As the window was not dangerous until the screws were removed, and the removal of the screws by a third party was not reasonably foreseeable, Defendant owner can not be held liable for the window falling.

WHEREFORE it is Ordered and Adjudged that Defendant is granted summary judgment dismissing the complaint.

This shall constitute the decision and order of the Court.

ENTER,

J S C HON. WAYNE P. SAITTA
J.S.C.

NANCY T. SUNSHINE
Clerk

2019 MAR 11 AM 10:02
KINGS COUNTY CLERK
FILED