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| <b>Saliba v Sterling Equities, Inc.</b>  |
| 2021 NY Slip Op 33491(U)   |
| April 6, 2021  |
| Supreme Court, Suffolk County  |
| Docket Number: Index No. 607462/2018   |
| Judge: Joseph C. Pastoressa  |
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SHORT FORM ORDER

INDEX No. 607462/2018  
CAL. No. 2020006200T

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 12/9/20 (003)  
MOTION DATE 12/14/20 (004)  
ADJ. DATE 1/13/21  
Mot. Seq. # 003 MD  
Mot. Seq. # 004 MD

-----X  
CHARLES S. SALIBA,  
  
Plaintiff,  
  
- against -  
  
STERLING EQUITIES, INC., WACHTLER  
KNOPF EQUITIES, LLC, BDG 115 LAND,  
LLC and BLUMENFELD DEVELOPMENT  
GROUP, LTD.,  
  
Defendants  
-----  
STERLING EQUITIES, INC., WACHTLER  
KNOPF EQUITIES, LLC, BDG 115 LAND,  
LLC and BLUMENFELD DEVELOPMENT  
GROUP, LTD.  
  
Third Party Plaintiff(s),  
  
-against-  
  
THYSSENKRUPP ELEVATOR  
CORPORATION,  
  
Third Party Defendant(s).  
-----X

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Upon the following e-filed papers read on these motions for summary judgment : Notices of Motion and supporting papers by third-party defendant ThyssenKrupp Elevator Corporation, filed November 13, 2020, and by defendants Sterling Equities, Wachtler Knopf Equities, LLC, BDG 115 Land, LLC and Blumenfeld Development Group, Ltd., dated November 13, 2020; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers by plaintiff, dated December 16, 2020, and by third-party defendant ThyssenKrupp Elevator Corporation, dated December 15, 2020; Replying Affidavits and supporting papers \_\_\_\_; Other \_\_\_\_; it is

**ORDERED** that the motion by third-party defendant ThyssenKrupp Elevator Corporation for partial summary judgment dismissing plaintiff's Labor Law §§ 240, 241 (6) and 241-a causes of action is denied as moot as plaintiff has withdrawn those claims; and it is further

**ORDERED** that the motion by defendants/third-party plaintiffs Sterling Equities, Wachtler Knopf Equities, LLC, BDG 115 Land, LLC and Blumenfeld Development Group, Ltd. for summary judgment dismissing plaintiff's complaint and in their favor on their claim for contractual indemnification against third-party defendant ThyssenKrupp Elevator Corporation is denied.

Plaintiff commenced this action seeking to recover damages for personal injuries he allegedly sustained on October 4, 2017 when he fell approximately seven to ten feet through the ceiling hatch of an elevator while working at 121 Broadhollow Road in Melville, New York. The property is owned by defendant Sterling Equities, Inc. ("Sterling") and managed by defendant Wachtler Knopf Entities, LLC ("WKE"). Sterling retained third-party defendant ThyssenKrupp Elevator Corporation ("TKE") pursuant to a written contract to perform routine preventative maintenance on the one elevator at the premises. At the time of the accident, plaintiff was employed by TKE as an elevator mechanic and at the premises to perform routine maintenance.

Plaintiff alleges that the defendants were negligent in failing to provide him with safety devices to protect him from falling in violation of, among other things, Labor Law §§ 240, 241 (6) and 200. He also alleges that the defendants are liable for common-law negligence, and had actual and constructive notice of the unsafe condition. Sterling and WKE, and separately defendants BDG 115 Land, LLC ("BDG") and Blumenfeld Development Group, Ltd. ("Blumenfeld"), interposed answers generally denying the material allegations in the complaint. Sterling, WKE, BDG and Blumenfeld, now represented by the same counsel, commenced a third-party action against TKE seeking contribution, contractual indemnity and breach of contract for failure to procure insurance naming the third-party defendants as additional insureds. In its answer to the third-party complaint, TKE denies liability and interposes a counterclaim against the third-party plaintiffs alleging, *inter alia*, that TKE was not notified of any defect in the elevator and that the elevator hatch which caused plaintiff's injuries is not covered under the subject maintenance contract, and thus, it has no obligation to defend or indemnify.

Discovery has been completed and the note of issue filed. TKE now moves for partial summary judgment dismissing plaintiff's Labor Law § 240, § 241 (6) and § 241-a causes of action. Defendants/third-party plaintiffs move for summary judgment dismissing plaintiff's complaint and for judgment in their favor on the contractual indemnification claim against TKE.

Plaintiff's complaint does not contain a Labor Law § 241-a cause of action and in the affirmations in opposition to the motions, plaintiff's counsel asserts that the Labor Law §§ 240 and 241

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(6) causes of action are withdrawn. Therefore, TKE's motion for partial summary judgment is denied as moot. The branches of the motion by defendants/third-party plaintiffs seeking summary dismissal of the Labor Law §§ 240 and 241 (6) causes of action are also denied as moot.

With respect to the branch of the motion by defendants/third-party plaintiffs for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, it is argued that the defendants cannot be held liable under Labor Law § 200 or for common law negligence because plaintiff has failed to prove either actual or constructive notice of the subject condition.

Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a reasonably safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1993]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 35 NYS3d 700 [2d Dept 2016]; *Rojas v Schwartz*, 74 AD3d 1046, 1046, 903 NYS2d 484 [2d Dept 2010]). A cause of action sounding in a violation of Labor Law § 200 or common-law negligence may arise from a dangerous or defective condition on the premises, or the manner in which the work was performed (*see Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Where a premises condition is at issue, property owners may be held liable 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 (*Ortega v Puccia, supra*; *Padovano v Teddy's Realty Assocs., Ltd.*, 56 AD3d 444, 866 NYS2d 743 [2d Dept 2008]).

During his deposition, plaintiff testified that upon arriving at the premises on the morning of his accident to conduct routine preventative maintenance of the elevator, he was informed by David Huezo, the facilities manager, that the elevator was making intermittent noises. Plaintiff testified that he then began troubleshooting which included getting on top of the elevator cab, and immediately upon stepping on the elevator hatch, it collapsed. Plaintiff fell seven to ten feet to the floor of the of the elevator, sustaining injuries. The elevator hatch had also fallen to the floor, at which time plaintiff observed that the hatch did not have a steel frame, but had been attached to the ceiling with a makeshift frame made of wood.

Plaintiff testified that years prior to his accident, at the time when the premises was being renovated for the fitness center to move in, he observed during a scheduled routine maintenance visit that the elevator hatch had been removed. Plaintiff maintains that he called the facility manager, who at that time was Bill, and informed him that the hatch had to be reinstalled or the elevator would be taken out of service. Upon returning to the premises three to four months later for the next routine maintenance visit, the elevator hatch was still missing from the ceiling, prompting plaintiff to have another conversation with Bill. According to plaintiff, Bill thereafter informed him that the hatch had been reinstalled which plaintiff observed three to four months later during a routine maintenance visit. Plaintiff clarified that aesthetically the elevator hatch appeared properly installed by looking up at the ceiling from inside the elevator cab; however, he did not view the hatch from on top of the cab. It was not until the day of the accident that he had a reason to get on top of the elevator cab, and it was after his accident that he realized someone had reinstalled it improperly using furring strips and wood. He explained that an elevator hatch has a steel frame capable of supporting from between 350 pounds and

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one-thousand pounds and is never installed with a wood frame. Plaintiff testified that the makeshift frame would not have been installed by a TKE mechanic.

William, "Bill," Martel testified that he did not recall a conversation with plaintiff about the elevator hatch being missing or removed. He also testified that during the time he worked at the subject premises years prior to plaintiff's accident, he did not observe any defect in the ceiling of the elevator or that the elevator hatch had been removed. During his deposition, David Huezo, the facilities manager assigned to the premises since 2015, also denied being notified of, or observing that the elevator hatch was missing. He also denied informing plaintiff that there were intermittent noises coming from the elevator. However, Martel and Huezo acknowledged that renovations had been performed on the premises prior to the fitness center taking occupancy, but neither knew exactly what year that had occurred. They also acknowledged that the elevator hatch could have been removed during the renovations or at the time the fitness center was moving into the second floor.

The conflicting deposition testimony submitted by defendants/third-party plaintiffs in support of their motion for summary judgment raises questions of fact as well as issues of credibility thereby precluding the grant of summary judgment in their favor dismissing the Labor Law § 200 and common-law negligence claims (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Pollack v Margolin*, 84 AD3d 1341, 924 NYS2d 282 [2d Dept 2011]). The testimony of the plaintiff is sufficient to raise an issue of fact as to whether the defendants created or had notice of the allegedly defective condition. Moreover, although the preventative elevator maintenance agreement between defendants/third-party plaintiffs and TKE contains an indemnification provision, it is premature to decide the issue before fault is determined (*see Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]; *Tulovic v Chase Manhattan Bank, N.A.*, 309 AD2d 923, 767 NYS2d 44 [2d Dept 2003]).

Accordingly, the motions are denied.

Dated: April 6, 2021



HON. JOSEPH C. PASTORESSA, J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION