SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12**

Justice

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KERRY M. SANTORO,

Plaintiff,

- v -

41 MADISON L.P., RUDIN MANAGEMENT CO. INC.,

Defendant.

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INDEX NO. 152969/2021

MOTION DATE 08/01/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

41 MADISON L.P.

Plaintiff,

-against-

SCHINDLER ELEVATOR CORPORATION

Defendant.

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Third-Party
Index No. 596032/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS.

In this action, plaintiff Kerry M. Santoro (plaintiff) alleges that she fell from a fixed ship ladder ladder as she was descending it to reach a secondary elevator motor room inside 41 Madison Avenue, New York, New York (the subject premises) on December 9, 2019.

Defendant 41 Madison L.P. (41 Madison), the owner of the subject premises, and defendant Rudin Management Co. Inc. (Rudin), the managing agent, (collectively defendants) move for summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 200, 240(1) and 241(6). Plaintiff opposes.

I. Relevant Testimony

A. Plaintiff's Deposition Testimony

Plaintiff testified at her deposition that at the time of the subject accident, plaintiff was employed by third-party defendant Schindler Elevator Corporation (Schindler). On December 9, 2019, plaintiff traveled to the subject premises to perform testing on elevators in the building. She was performing "Category 1 Inspection," a New York City mandated annual no load test. The alleged incident occurred while plaintiff was climbing down a "ship ladder"[1] to leave the main elevator machine room to go to the secondary room below. The ship ladder was affixed to a cement slab and had metal rails on each side. Plaintiff testified that she could not tell how the subject ship ladder was originally positioned, but she believed the ladder was pulling away from the wall.

Plaintiff testified that in her experience, ship ladders would have railings that extend past the grating of a hole, unlike the ship ladder off of which she fell. She feels that it would have been safer if the subject ship ladder had handrails, which it did not. When presented with a photo of the subject ship ladder at her deposition, she identified what she noticed to be "troughing," something that would channel ropes or wires, positioned in front of the left side of the subject ship ladder. She testified that the troughing obstructed her ability to access the subject ship ladder.

Plaintiff testified that she descended two to three rungs of the ladder before allegedly falling, resulting in injury. She approximated that she fell about 5 feet because she was on the second rung of what she approximated to be a 6-foot ladder. .

B. Rudin's Deposition Testimony

Rudin produced its building manager, Paul Faust, for deposition. Mr. Faust described Rudin as a commercial real estate company, both owners and managers of residential and

[1] Counsel and the parties describe the ladder at issue as a "ship ladder."

commercial real estate. Mr. Faust explained that 41 Madison had an in-house residential elevator mechanic employed by Schindler on the premises full-time. If any Schindler personnel had an issue with a part of the building, they would report the issue to Mr. Faust. If a safety issue at the premises were ever brought to his attention, Mr. Faust would address the issue and/or report the issue to his supervisor.

Mr. Faust would only enter the elevator motor rooms if a Schindler employee brought something to his attention, which would only be approximately once per year. Further, Mr. Faust conceded that he never climbed down to the sublevels of the motor rooms, and he did not know of a time when other engineers or employees of 41 Madison would have reason to be in the sublevel of the motor rooms.

Prior to his deposition, Mr. Faust also reviewed a logbook entry which stated that a "Category 1" inspection was being performed on December 9, 2019. Mr. Faust reviewed his prior emails and determined that no complaints had been made by Schindler employees regarding the safety of the subject ship ladder

C. Jon Halpern Expert Affidavit

In support of their motion, defendants submit the affidavit of Professional Engineer John Halpern. Mr. Halpern's experience is in the design, installation, modernization, maintenance and repair of elevators. On December 15, 2022, Mr. Halpern performed an on-site examination of the subject machine room and subject ship ladder. Following his inspection, Mr. Halpern concluded, within a reasonable degree of engineering certainty that the subject ship ladder is fully code compliant; that it met all the standards for fixed ladders; and that the subject ship ladder did not require any sort of fall protection because it was less than 6 feet in height.

D. William Seymour Expert Affidavit

In opposition, plaintiff submits the expert affidavit of elevator consultant and electrical engineer William Seymour. Mr. Seymour, who opined that the subject ship ladder was defective and hazardous because there was no grab-bar, handrail, or top-rail at the top of the ladder for plaintiff to hold onto as she descended the ladder. According to Mr. Seymour, the ship ladder violated the Industrial Code, and such violation(s) were a substantial factor in causing the plaintiff to fall. Thus, Mr. Seymour asserts that Mr. Halpern's position that the ship ladder was code compliant is meritless.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985).

Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest." *Ferber v Sterndent Corp.*, 51 NY2d 782, 783 (1980).Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). Summary judgment is a drastic

remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

A. Labor Law §§ 240(1) and 241(6)

In her opposition, plaintiff's counsel affirms that: "We acknowledge that the facts in this case do not support a cognizable Labor Law §240[1] or Labor Law §241[6] claim." *See* NYSCEF doc. no. 59 at 1, n 1. The Court of Appeals has made it clear that routine pmaintenance is not a protected activity within the purview of Labor Law §§ 240(1) or 241(6). *See Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 (2003); *Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 (2002).

As plaintiff concedes that she cannot prove a cognizable Labor Law §§ 240(1) or 241(6) claim and, given that she was performing routine maintenance when she was allegedly injured, defendants' motion is granted to the extent of dismissing plaintiff's Labor Law §§ 240(1) or 241(6) claims.

B. Labor Law § 200

Labor Law § 200 codifies the common law duty of an owner to provide construction workers with a safe place to work. *See Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 (1993). It is well-settled that an owner or general contractor will not be found liable under common law or Labor Law § 200 when it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity that caused any such dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Labor Law § 200 and common law claims fall under two categories: "those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed." *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 133-144 (1st Dept 2012). Under the first category, the owner had to have either created the condition or have actual or constructive notice of it. *Id.* at 144.

Here, plaintiff's action is premised on the existence of a hazardous condition on the premises – in this case, the absence of a grab-bar or handrail or top-rail on the ship ladder. Defendants argue that they are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law claims because they establish that they did not create the hazard or have notice that it existed for a sufficient length of time to discover and remedy. Defendant relies upon the affidavit of its expert Jon Halpern, P.E., to support its claim that the ladder was not defective and that it complied with all applicable building codes. Specifically, according to Mr. Halpern, the ladder was inspected annually as part of the "Category 1" test and that there was never a deficiency found.

Plaintiffs oppose, arguing that proof that the ship ladder was code compliant at the time of the accident does not negate the question of defendants' liability. Moreover, Mr. Halpern's opinion is refuted by plaintiff's expert William Seymour. Mr. Seymour who opined that the ladder was defective and hazardous because the vertical supports of the ladder do not extend above the floor, and there is nothing with which to hold on to when accessing the ladder. Further, Mr. Faust concedes that he never climbed down to the sublevels of the motor rooms, could not recall the last time he was there prior to plaintiff's accident, and could not recall the last time that the motor rooms were inspected.

Given the competing expert affidavits, summary judgment is not warranted based on the conflicting opinions as to whether the ladder was inherently dangerous and whether it violated applicable codes and regulations. *See Cabrera v New York City Transit Authority*, 171 AD3d 594 (1st Dept. 2019) ("...[t]here is no basis for disturbing the jury's credibility determinations pertaining to damages, which mainly came down to a battle of the experts" [quotations and citations omitted]). Mr. Seymour's affidavit directly contradicts Mr. Halpern's opinion that the ladder was not inherently dangerous and did not violate any regulations or codes. The disagreement between these two experts presents a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution. *See id.* Further, issues of fact exist as to whether defendants had notice of the alleged defective condition, as there is no testimony from a witness with personal knowledge with respect to when the subject ladder was last inspected, and no regular inspection routine was established by the evidence adduced herein.

III. Conclusion

Accordingly, it is ORDERED that the motion of defendants 41 Madison L.P. and Rudin Management Co. Inc. is granted, in part, and plaintiff's claims for Labor Law §§ 240(1) and 241(6) are dismissed; and it is further

ORDERED that the said claims defendants 41 Madison L.P. and Rudin Management Co. Inc. are severed and the balance of the action shall continue.

The foregoing constitutes the decision and order of the Court.

1/17/2024
DATE

LESLIE A. STROTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE