SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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MICHAEL WINTERS,

Plaintiff,

- v -

W.H.P. 20 LLC,THE HASTINGS CONDOMINIUM ASSOCIATION INC.,

Defendant.

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INDEX NO. 156710/2021

MOTION DATE 02/14/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

THE HASTINGS CONDOMINIUM ASSOCIATION INC.

Plaintiff,

-against-

LAURAN WALK, ATLANTIC STATE DEVELOPMENT CORP.

Defendant.

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Third-Party
Index No. 595830/2022

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendant/third-party plaintiff The Hastings Condominium Associations Inc. ("Hastings")'s motion for summary judgment and plaintiff's cross-motion for summary judgment are determined as follows:

In this action, plaintiff Michael Winters seeks damages for personal injuries he allegedly sustained on January 23, 2019.[1] Plaintiff alleges that he fell from two ladders (the "Ladders") while working in an apartment unit (the "Apartment") of a condominium building (the "Condo.") located at 71 Murray Street, New York, NY 10007. Plaintiff alleges that the Ladder failed to adequately protect him from a gravity related risk and was the proximate cause of the accident.

[1] By order dated October 31, 2022 (NYSCEF Doc. No. 68), the instant action was joined for trial and discovery with the matter entitled *Winters v Atlantic State Development Corp., Lauren Walk* (Index No. 153548/2019). By Order dated April 13, 2021 (NYSCEF Doc. No. 91), Plaintiff's action under index number 153548/2019 was dismissed in its entirety as against Lauren Walk.

Defendant Hastings moves for summary judgment in its favor dismissing plaintiff's complaint as against it. Plaintiff opposes and cross-moves for summary judgment on his Labor Law § 240 (1) claim as against Hastings.

At the time of the accident, Hastings was the condominium association for the Condo. Third-party defendant, Lauren Walk, was the owner of the Apartment. Walk retained third-party defendant Atlantic State Development Corp. ("Atlantic") to perform construction work in the Apartment. Plaintiff was working in the Apartment.

Plaintiff's Deposition Testimony

Plaintiff appeared for deposition on January 20, 2022 (NYSCEF Doc. No. 76). At the time of the accident, plaintiff was working for Taconic Builders (Plaintiff tr. at 9). He had been sent by the owner of Taconic Builders to assist Atlantic on the Project by supervising Atlantic's employees (*id.* at 20-21) and "to fix mistakes" (*id.* at 19). The Project was a "residential job" (*id.* at 8) in the sixth-floor apartment of the Premises (*id.* at 19).

Plaintiff testified that on the date of the accident, he was using the two Ladders, which belonged to the Condo. (*id.* at 25). Plaintiff testified that John Cordeira, one of the "bosses for Atlantic" (*id.* at 26) told him to borrow the Condo's Ladders (*id.* at 25-26). The Ladders were both A-frame step ladders (*id.* at 34-35). Plaintiff had been using the Ladders daily on the Project from approximately Thanksgiving of 2018 up until the date of the accident (*id*. at 25-26, 28). In response to questioning, plaintiff confirmed that the Ladders were safe, secure, and in good condition at all times prior to the accident (*id.* at 37). He further testified that he never had any issues with the ladders for the entire time he used them (*id.* at 28, 75).

Plaintiff testified that the doorman for the Condo gave him permission to use the Ladders (*id.* at 26). He testified that he asked the doorman for permission to use the Ladders and, as plaintiff was using them every day, began to get the Ladders by himself (*id.* at 26). Plaintiff further testified that Atlantic had refused his requests to keep their own ladders on the worksite (*id.* at 36).

On the date of the accident, plaintiff arrived at the jobsite at approximately 8:00 a.m. (*id.* at 22). Plaintiff was working alone installing "lens caps," which he described as a "two-man job" (*id.* at 40). Plaintiff testified that he did not want to do a "two-man job on two ladders" alone, but that his requests for additional manpower had been refused (*id.* at 42). He further testified that the best procedure to do the work was to have two men, one on each ladder (*id.* at 40). Doing the work alone made it very difficult for plaintiff to balance himself on the Ladders (*id.* at 40).

The accident occurred at some time before 12:00 p.m. (*id.* at 38 - 39). At the time of the accident, plaintiff was standing on both of the two Ladders (*id.* at 34-35). Both Ladders were open, and plaintiff stood with one foot on each ladder "bridg[ing] them both with [his] body" (*id.* at 34-35). Plaintiff testified that the work required him to move the ladders and that he had moved them approximately eight to ten times prior to the accident (*id.* at 35).

Plaintiff testified that the accident occurred when he "missed the tread" on one of the Ladders, which he stated was "human error" (*id*. at 44-45). He further testified that the Ladders did not fail him and that he "would never have had to reach for this tread in the first place if there was another man on the ladder I was trying to reach" (*id.* at 45). Plaintiff was alone when the accident occurred (*id.* at 47).

Portions of plaintiff's deposition taken from a separate action involving the underlying accident were read to him. Plaintiff stated that he agreed with his prior testimony that the Ladders did not shift or move at any time during the accident and that the accident was the result of his "carelessness" (*id.* at 43). He also agreed with his prior testimony that the accident would not have occurred if someone had assisted him in the work (*id.* at 43 – 45).

Deposition Testimony of Barry Appelman, president of Hastings

Barry Appelman appeared for deposition on March 2, 2022 (NYSCEF Doc. No. 80). At the time of the accident, he was the president of Hastings (Appelman tr. at 12). He has no knowledge of Taconic Builders or Atlantic (*id.* at 33). He was aware of the construction project in the Apartment (*id.* at 27). He further testified that to the best of his knowledge all the individual condominium apartments in the Condo were wholly owned (*id.* at 31-32). At the time of the accident, the sixth floor of the Condo was a one-family individual condominium apartment (*id.* at 22-23).

Appelman testified that Hastings approved construction projects at the Condo such as the Project (*id.* at 29-30). Approval did not require construction contracts to be submitted to Hastings (*id.* at 30). Hastings did not inspect construction projects conducted in individual units (*id.* at 32-33).

Applemen testified that at the time of the accident, the Condo had one or two ladders (*id.* at 28-29). Appelman did not know if the ladders were used on the Project (*id.* at 29). He further testified that the Condo did not provide any materials or equipment for the Project (*id.* at 29).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law §§ 240 (1), 241 (6) & 200 claims

Labor Law § 240 (1), also known as the Scaffold Law reads as follows:

"Scaffolding and other devices for use of employees

> "1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

Labor Law § 240 (1) "imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" (*Barreto v Metropolitan Transp. Auth.,* 25 NY3d 426, 433 [2015]). Said liability applies to "injuries that are proximately caused by the failure to provide appropriate safety devices to workers subject to gravity-related risks" (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 111 [1st Dept 2022]).

Labor Law §241 (6) reads as follows:

"Construction, excavation and demolition work

. . .

> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

"Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 93 [2022] [internal quotations marks and citations omitted]).

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."

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]).

Hastings argues that it is not a proper Labor Law Defendant as the Project was conducted in an individual condominium apartment owned by third-party defendant Lauren Walk.

Plaintiff argues in opposition and in support of his cross-motion for summary judgment that the Condo provided the Ladders to plaintiff and the Condo owned the subject building, not just the land beneath it. Plaintiff further argues that he has established prima facie that Hastings violated Labor Law § 240 (1), which was a proximate cause of the accident.

"Liability under the Labor Law as an owner… turns in every case on sometimes fine distinctions relating to ownership of the premises and control of the injury-producing work… [C]ondominium apartments are owned by individual unit owners…" (*Guryev v Tomchinsky*, 20 NY3d 194, 201[2012][affirming dismissal of Labor Law claims against the owners of a condominium building on the basis that they were not Labor Law "owners" as to a construction project conducted in an individual condominium apartment.]).

Real Property Law § 339-e (16) defines a condominium "Unit owner" as "a person or persons owning a unit in fee simple absolute or, in the case either (i) of a condominium devoted exclusively to non-residential purposes, or (ii) a qualified leasehold condominium, owning a unit held under a lease or sublease." Further, Real Property Law § 339-h states that each owner of a condominium unit "shall be entitled to the exclusive ownership and possession of his unit."

Here, Hastings has established that it is not an "owner," nor otherwise a proper Labor Law defendant. There is no dispute that that the construction project was done within an individual private condominium unit. Similarly, it is undisputed that Lauren Walk was the owner of the Apartment. Plaintiff does not argue that Hastings was an agent of Walk. Further, Hastings did not enter into any contracts with Atlantic, Tectonic Building, nor any contractors as to the Project.

As such, Hastings is not a proper Labor Law defendant in the underlying action. That a Condo employee may have provided the Ladders to the plaintiff only speaks to his common law negligence claim against Hastings.

Accordingly, Hastings is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6) & 200 claims as against it.

For these same reasons, plaintiff's cross-motion for summary judgment on his Labor Law § 240 (1) claim is denied.

Plaintiff's common law negligence claim against Hasting

"It is well-settled that to establish a claim of negligence, a plaintiff must prove: a duty owed to the plaintiff by the defendant, a breach of that duty, and injury proximately resulting therefrom" (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023]).

"Where a cause of action arises out of the means and methods of the work, a defendant may be held liable for common-law negligence… only if he or she had the authority to supervise or control the performance of the work" (*Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138 [2nd Dept 2016]). Further, "[w]hen a defendant lends allegedly dangerous or defective equipment to a

worker that causes injury during its use, in moving for summary judgment that defendant must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition." (*Lam* at 1138 -1139).

Here, the underlying accident occurred due to the means and methods of the work plaintiff was performing at the time of the accident. Specifically, the accident resulted from plaintiff improperly standing on the steps of both Ladders. At the time of the accident, plaintiff was standing in between the two Ladders, with one foot on a tread of each Ladder (Plaintiff tr. at 34-35). He testified that the accident occurred when he missed the tread on one of the ladders and fell to the floor, which he characterized as "human error" (*id.* at 44-45). Plaintiff testified that he was performing a two-man job by himself because Atlantic had denied his request for additional help (Plaintiff tr. at 42).

Further, there is no basis to conclude that the accident arose due to any allegedly dangerous or defective equipment. Plaintiff confirmed that the Ladders were safe, secure and in good condition at all times prior to the accident (*id.* at 37). He further testified that he never had any issue with the ladders the entire time he used them on the Project (*id.* at 28, 75). Notably, plaintiff himself confirmed that the accident did not occur due a defect, but due to "carelessness" (*id.* at 43).

Hastings has established that it did not exercise any control over the means and methods of plaintiff's work. Plaintiff testified that he was sent by Taconic Builders to assist Atlantic on the Project by supervising Atlantic's employees and "to fix mistakes" (*id.* at 19). There is nothing from his testimony to suggest that Hastings directed or controlled the injury producing work. Appleman, the president of Hastings, also testified that Hastings did not provide any materials or equipment for the Project (*id.* at 29).

Accordingly, Hastings is entitled to summary judgment dismissing plaintiff's common law negligence claim against Hastings.

The parties' remaining arguments have been considered and found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant, the Hastings Condominium Association, Inc.'s, motion for summary judgment pursuant to CPLR 3212 dismissing the complaint as against it is granted; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment as to liability on his Labor Law § 240 (1) claim against the defendant, the Hastings Condominium Association, Inc., is denied.

The foregoing constitutes the Order and Decision of the Court.

6/25/2024	
DATE	**RICHARD G. LATIN, 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**