SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 07

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SIERRA, HANSEL

Index №. 0020107/2018E

-against-

Hon. WILMA GUZMAN,

COLUMBIA 160 APARTMENTS CORP.

Justice Supreme Court

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The following papers numbered 1 to _____ Read on this motion, (Seq. No. 1) for SUMMARY JUDGMENT LIABILITY, noticed on December 09 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the decision & Order annexed hereto.

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 5/26/20

Hon. _____
WILMA GUZMAN, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

[*1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

Index No. 20107/2018
Motion Calendar No. 21
Motion Date: 3/9/2020

HANSEL SIERRA,

Plaintiff(s),

-against-

COLUMBIA 160 APARTMENTS CORP, and ADVANCED MANAGEMENT SERVICES LTD.,

Defendant(s).

DECISION/ ORDER
Present:
Hon. Wilma Guzman

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion and Affidavits and Exhibits Annexed.....	**1**
Affirmation in Opposition and Exhibits Annexed……..	**2**
Affirmation in Reply.....	**3**

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

The plaintiff HANSEL SIERRA (hereinafter referred to as "Plaintiff"), moves this court for an order pursuant to CPLR § 3212 granting a partial summary judgement on the issue of liability under New York State Labor Law § 240 (1), resulting in personal injuries sustained by plaintiff, against the defendants COLUMBIA 160 APARTMENTS CORP. (hereinafter referred to as "Columbia") and ADVANCED MANAGEMENT SERVICES LTD., (hereinafter referred to as "Advanced") (hereinafter referred to jointly as "defendants"). Defendants have submitted an opposition and plaintiff submitted a reply thereto. After due deliberation, the court determines the motion as follows.

Standard of Review

The proponent of a motion for summary judgement must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgement as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y 2d 320, 508 N.Y.S.2d 923 (NY 1986) and Winegrad v New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985). Summary judgement is a drastic remedy that deprives a litigant of his or her day in court. The party opposing a motion for summary judgement is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding is the key to summary judgement. Rose v DaEcib USA, 259 A.D. 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgement will only be granted if there are no material triable issues of fact. Sillman v Twentieth Century-Fox Film Corp, 3 N.Y.2d 385, 144 N.E.2d 498 (NY 1957).

Plaintiff seeks damages as to the result of an accident that occurred on or about December 29, 2017 at about 9:00 or 9:30 pm, as a result of the defendants' negligence. On the date of the accident, plaintiff was working as an elevator mechanic employed by non-party, Dunwell Elevator (hereinafter referred to as "Dunwell") and was working on a job at Columbia. Columbia was the owner of the property at which plaintiff was working and Advanced was the management corporation of the property. Dunwell assigns one mechanic to each job site, and plaintiff was the mechanic assigned to the building at Columbia. On the date of the incident, plaintiff responded to a call that the elevators at Columbia had gone out of service due to a power outage, and began to make his way to the control room of the building. He scaled the outdoor ladder annexed to the building, when he slipped and fell from the ninth rung, about twelve (12) feet.

Plaintiff seeks relief in the form of summary judgement pursuant to CPLR § 3212 against defendants on the issue of liability pursuant to New York State Labor Law § 240(1) which provides:

> 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.

In his deposition, plaintiff explained that he had been employed by Dunwell and had been performing service at Columbia for seven years and typically had contact with the Superintendent named Armando Hernandez (hereinafter referred to as "Armando"). Further, plaintiff testified that Dunwell did not supply any tools for plaintiff's work, and that defendants did not provide him with any protective or safety equipment at the job site. Plaintiff testified to making many prior complaints to his supervisor and to Armando about the unsafe condition of the ladder involved in the accident, stating that it was old and had very thin rods (rungs), also mentioning that the defendants had not provided any hoist equipment, cages, lifelines or fall protection. Plaintiff testified to making another complaint about the safety conditions in the week prior to the accident. On the date in question, plaintiff testified that he had been called to Columbia in response to complaints that both elevators in the building were not working following a brief power outage. Upon arrival, plaintiff found personnel from Con-Edison working around the building to restore the outage. Plaintiff testified that, once the power had been restored, he went to the control room on the roof to determine the course of the elevator shut down. Plaintiff testified that the only way to get to the control room was to either take the elevator or the stairs to the eleventh floor of Columbia, exit onto the terrace of the penthouse, and then climb a straight ladder annexed to the building. Plaintiff testified

that he determined that the relays and modules on the controller of the elevators had been "burned out" due to the power outage. He was instructed by his supervisor to fix one elevator, and that he would then bring the remaining necessary parts to Columbia. Plaintiff testifies that his supervisor brought the necessary parts for the elevator repair to Columbia at around 9:00 pm, and that he then began to make his way back to the control room to finish the job. While climbing the ladder, plaintiff testifies that he had to hold onto the equipment (relays) under his arm, as no hoists had been provided to him, and as a result, his foot slipped on the ladder rungs and he fell backwards, approximately twelve feet.

In support of his position, plaintiff also submitted the deposition of Armando, the superintendent employed by Columbia. In his deposition, Armando testified as to the conditions of the ladder in question, stating that no maintenance was ever done to the ladder, that there was no available lifeline, safety belt, fall protection, hoisting equipment or exterior lighting. Armando further testified that, when an issue arose with the elevators at Columbia, he would contact Dunwell and they would send a mechanic to repair it. Armando testified that on the date in question, a transformer had blown at Columbia, causing a power outage, and that plaintiff had been called in response to the shutdown of both elevators. Armando also testified that the work plaintiff had been doing that night was repair work and not a routine elevator maintenance call. In support, plaintiff has submitted a copy of the repair ticket, signed by his supervisor, that he had filled out on the date in question, which plaintiff testified, is a different format than a routine maintenance ticket would have been. Plaintiff alleges that the occurrence and resulting injuries sustained were caused wholly by the reason of negligence of the defendants by failing to provide plaintiff with a hoists, lifelines and other safety devises to prevent a fall from an elevated surface.

In opposition, the defendants submitted an affidavit of Columbia's expert, Andrew Yarmus (hereinafter referred to as "Yarmus"), a professional engineer called to inspect the site of the accident. In his affidavit, Yarrmus explains that, in order for the defendants to be liable under NYS Labor Law § 240(1), plaintiff would have to demonstrate that the law had been violated by defendants and that the violation was the sole proximate cause of the injuries sustained. Instead, Yamrus alleges that it was plaintiff's own "unsafe behavior" which had caused the accident. He alleges that it was plaintiff's "failure to properly and safely use the provided safety device" which caused his fall, listing only the ladder as the safety device. Further, through Yamrus' affidavit, defendants allege that the work plaintiff had been performing on the date in question does not fall under the "repair work" contemplated by labor law §240(1), instead alleging that the replacing of "relays and modules" falls under the category of "routine maintenance" as they had been damaged due to wear and tear. For these reasons, defendants allege that it was plaintiff's own irresponsibility that caused the accident and that an issue of fact exists concerning the type of work plaintiff was completing, which is enough to deny the plaintiff's request for summary judgement.

In reply to defendant's opposition, plaintiff again refers to his and Armando's testimony in which they both explain the type of work as being "repair work." Further, plaintiff explains that neither party denies that the power outage was the reason for plaintiff being at Columbia on the date in question, making the work an emergency repair, not simply routine maintenance. Further, plaintiff mentioned again that he had testified to prior complaints concerning the unsafe conditions of and lack of safety equipment at the site of the ladder. Finally, as the ladder was the only way to access the control room which was necessary for plaintiff to complete his job, and as defendants concede to there being no hoists, harnesses or other safety devices at the job site, plaintiff denies defendants recalcitrant worker claim argues that there exists no issue of fact for the court to deny his request for summary judgement.

Labor Law § 240(1) requires that "all owners…in the repairing of a building or structure, shall furnish, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders…and other safety devices which shall be so constructed place and operated as to give proper protection to a person involved." In support of their opposition, defendants allege that the work that plaintiff had been completing on the date in question did not qualify under the statute, claiming it had been routine maintenance and not emergency repair work. However, "the record in this matter indisputably shows that the elevator[s] in question were not working that day. Under these circumstances, it is clear that plaintiff was engaged in repair work within the meaning of the statute." Spiteri v. Chatwal Hotels, 247 A.D.2d 297, 669 N.Y.S2d 282 (1st Department). Further, the ladder in question also qualifies under the statute, as "not only are ladders specifically included within the statute's coverage but, here, the ladder constituted the only means of access to the elevator control room, so that plaintiff had to climb it in order to perform his job." Spiteri v. Chatwal Hotels, 247 A.D.2d 297, 669 N.Y.S2d 282 (1st Department). Therefore, the work performed by plaintiff qualifies as "repair work" under the statute of labor law § 240 (1) and no issue of fact exists regarding the type of work which preceded the accident.

In regards to defendants' claim that plaintiff had been a recalcitrant worker and his own recklessness had been the cause of his injury, rather than the negligence of defendants under labor law § 240(1): A recalcitrant worker, under NYS Labor Law §240 (1), is an injured worker who had refused to use the safety devices provided by the owner. This means that, in order to successfully invoke this defense, defendants would have had to prove that specific instructions and safety devices had been provided to plaintiff, and that plaintiff blatantly disregarded them, thus being the cause of his own injury. However, neither party denies that there were no hoist, lifelines, safety devices or fall protection present at the job site, and therefore, "even viewed in the light most favorable to the defendants, there is no evidence in the record that the plaintiff had a safety device available, knew that he was expected to use it, and unreasonably chose not to do so" Auriemma v Biltmore Theatre, LLC, 82 A.D.3d 1, 917 N.Y.S.2d

130, 2011 N.Y. App. Div.(1st Department). Therefore, defendants have not raised triable issues of fact enough to deny plaintiffs request for summary judgement.

Accordingly, it is,

ORDERED and ADJUDGED that plaintiff motion for summary judgement pursuant to CPLR § 3212 against defendants is hereby granted in its entirety. And it is further,

ORDERED and ADJUDGED that upon filing of the note of issue and payment of the appropriate fee, this matter shall proceed to trial on the issue of damages. And it is further

ORDERED and ADJUDGED that plaintiff HANSEL SIERRA serve a copy of this Order with Notice of Entry within thirty (30) days from the date of entry, upon all parties herein and upon the clerk of the Court.

This constitutes the decision and order of the Court.

May 26, 2020
DATE

HON. WILMA GUZMAN, J.S.C.