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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Solomon Justice

PART 55

FISCHETTI, R

-v-

LB 745

INDEX NO. 709783/03

MOTION DATE 7/18/05

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-3 |
| Answering Affidavits — Exhibits | 4-5 |
| Replying Affidavits | 6-7 |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

AUG 22 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/17/05

JAMES S. SOLOMON

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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ROY FISCHETTO and MARYANN FISCHETTO,

Plaintiffs,

-against-

LB 745, LLC,

Defendant.

----------X

INDEX NO. 109783/03

DECISION AND ORDER

JANE S. SOLOMON, J.:

In this personal injury action brought by an engineer and his wife against the owner of the property where he worked, defendant LB 745, LLC ("Lehman Brothers") moves for leave to file a late motion for summary judgment and for summary judgment dismissing the complaint. Plaintiffs Roy Fischetto ("Fischetto") and Maryann Fischetto, his wife, cross-move for summary judgment on Fischetto's Labor Law §240(1) cause of action. For the reasons set forth below, the request to make a late motion for summary judgment is granted. Defendant's motion for summary judgment is granted, plaintiffs' cross-motion is denied, and the complaint is dismissed.

BACKGROUND

Fischetto is employed as an operating engineer by Rockefeller Group Development Corporation ("Rockefeller"), the property manager for the building owned by defendant at 745

Seventh Avenue. According to the agreement between defendant and Rockefeller and various depositions, Rockefeller hired all operating engineers for the property and was responsible for all decisions as to equipment used and purchases of equipment under $10,000.

On February 28, 2003, Fischetto received a special work order directing him to perform work on the chiller heads, which are part of the building's cooling system. Chiller heads are steel doors, weighing approximately one ton, that seal the chiller vessel. The chiller vessel contains tubes that need to be cleaned every several years in order to maintain their efficient use. To remove the chiller head and access the tubes inside of the vessel, Fischetto had to undo the approximately 50 bolts that held it in place and lift the chiller head. Rockefeller provided a gantry for this purpose, which is "a portable type of scaffolding . . . that you could set up in order to rig a chain on top so that you could grab something and lift it or lower it . . ." (Defendant's Exhibit A, at 19). Using the gantry, Fischetto and a co-worker removed the chiller head and hoisted it off of the chiller vessel, lowering it to the ground. At this point something unknown, probably the weight of the chiller head, caused the gantry to move and strike Fischetto. He

fell backwards, hit his head on the ground and severely injured his right leg. As a result, he underwent surgery, did not return to work for six months, and continues to undergo physical therapy.

Plaintiff contends that permanent rigging should have been installed above the chiller heads to make lifting them easier and safer. The record indicates that Rockefeller had considered installing permanent rigging, though it is not clear if that ever occurred.

DISCUSSION

Defendant's request to file a motion for summary judgment past the 120 deadline set out in CPLR §3212(a) is granted. Defendant has shown good cause as required under Brill v. City of New York (2 NY3d 648 (2004)). Several reasonable factors contributed to the tardiness of the motion, including an inadvertently missed court appearance by the plaintiffs, and an ongoing attempt at mediation by the parties. In addition, plaintiffs do not object to the motion as they also move for summary judgment, and neither party is prejudiced.

Labor Law §240(1)

Both parties seek summary judgment as to Fischetto's claim for statutory liability under Labor Law §240(1). That section provides that while "repairing, altering, painting, cleaning or pointing" a building, the building owners are responsible for erecting the proper scaffolding or other devices that will protect the worker, including a gantry of the kind that Fischetto used here and the permanent rigging he claims should have been installed. Section 240(1) imposes absolute liability upon a property owner for any violation of it. It was designed to prevent accidents "directly flowing from the application of the force of gravity to an object or person." Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993). However, as the defendant points out, routine maintenance of a building is not covered under this statute. See Esposito v. New York City Industrial Development Agency, 1 N.Y.3d 526 (2003).

Fischetto testified in a deposition that this activity was not part of his routine, pointing to the special work order. However, cleaning the chiller heads was part of the *building's* routine maintenance and as such any injuries that plaintiff sustained during the routine maintenance activity cannot impose liability under §240(1). While the building is relatively new,

so there are no records of long-term maintenance projects, the purpose of the task Fischetto performed clearly was routine maintenance.

Contrary to Fischetto's argument, there is no need for a written preventative maintenance program to be presented as evidence in order to prove that periodic cleaning to maintain a functioning cooling system is routine maintenance. The fact that Rockefeller was considering installing permanent rigging to lift the chiller head further illustrates that the task was one that needed to be performed regularly.

Labor Law §200

Defendant also seeks summary judgment on plaintiff's cause of action brought pursuant to Labor Law §200, which codifies the owner's common law duty to properly maintain safe a workplace. As to this claim, the dispositive inquiry is whether Lehman Brothers controlled the workplace. In reference to §200, the First Department has held that "an owner's mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability, and that where the injury to due to the method of work, Labor Law §200 and common law negligence claims must be dismissed in the absence of proof of the owner's *actual* control . . ." Brown v.

New York City Economic Devel. Corp., 234 A.D.2d 33, 33 (1st Dep't. 1996).

Here, Lehman Brothers had a contract with Rockefeller where the latter maintained supervision over Fischetto and directed his work. Eugene Mianti, an employee of Lehman Brothers, testified that he knew of that permanent rigging over the chiller heads had been considered as an option by Rockefeller. In his deposition, he describes his understanding of this to be for time-efficiency purposes. The plaintiff does not present any evidence that Lehman Brothers employees were aware of any safety concerns with the gantry or the permanent rigging, nor that the decision as to which type of equipment to use was not up to the sole discretion of Fischetto's employer, Rockefeller. Lehman Brothers did not have actual control over Fischetto and cannot be held liable for his injury under §200.

Labor Law §241(6)

Labor Law §241(6) protects workers who are injured during construction, demolition or excavation work. Plaintiff was not performing tasks in any of those categories but was "performing a task that was part of his regular duties as the managing agent's chief engineer." See Petermann v. Ampal Realty

Corp., 288 A.D.2d 54, 55 (1st Dep't. 2001). As such, the section is inapplicable to him, and the cause of action must be dismissed.

As to the causes of action sounding in negligence and loss of consortium, they also must be dismissed, as plaintiffs have failed to establish that Lehman Brothers, as an out-of-possession owner, owed Fischetto any duty under which plaintiffs can recover.

Accordingly, it hereby is

ORDERED that Lehman Brothers' motion is granted, and the complaint is dismissed; and it further is

ORDERED that the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: August 17 2005

ENTER:



JOHN M. SOLOMON