

**LeMay v Inmuebles Reunidos, S.A.**

2012 NY Slip Op 31947(U)

July 18, 2012

Supreme Court, New York County

Docket Number: 112472/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER  
*Justice*

PART 15

Index Number : 112472/2010  
LEMAY, IVY  
vs  
INMUEBLES REUNIDOS, S.A.  
Sequence Number : 001  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3, 4  
5, 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

JUL 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/18/12

HON. EILEEN A. RAKOWER  
J.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
IVY LeMAY, Individually and as Administratrix of the Estate  
of Shay LeMay, deceased,

Plaintiff,

Index No.  
112472/10

- against -

**DECISION  
AND ORDER**

IMMUEBLES REUNIDOS, S.A., c/o LAURENCE H.  
PEARSON, ESQ., MANHATTAN MODERN  
MANAGEMENT, SANITARY PLUMBING AND  
HEATING, CORP., and CALRAY GAS AND HEAT  
CORP.,

Mot. Seq. 01

Defendants.

-----X  
IMMUEBLES REUNIDOS, S.A. AND MANHATTAN  
MODERN MANAGEMENT INC.,

Third Party  
Index No.  
590003/11

**FILED**

JUL 20 2012

Third Party Plaintiffs,

-against-

NEW YORK  
COUNTY CLERK'S OFFICE

SURE HEET CHIMNEY REPAIR AND CLEANING  
COMPANY INC.,

Third Party Defendant.

-----X  
SANITARY PLUMBING AND HEATING CORP.  
and CALRAY GAS CHIMNEY REPAIR GAS AND  
HEAT CORP.,

Second Party  
Index No.  
590259/11

Second Third Party Plaintiffs

-against-

SURE HEET CHIMNEY REPAIR AND CLEANING  
COMPANY INC.,

Second Third Party Defendant.

-----X  
HON. EILEEN A. RAKOWER

This is an action to recover for personal injuries sustained by decedent  
Shay Lemay on July 28, 2010 when he fell to his death while performing  
construction work at an apartment building located at 76 Edgecombe Avenue,  
New York ("the subject premise").

On the day of the accident, decedent, then an employee of defendant/third party defendant Sure Heet Chimney Repair Gas and Heat Corp. ("Sure Heet"), was installing a B vent chimney on the exterior side of the building at an elevation which reached from ground level up above its third floor. Wayne LeMay, another Sure Heet employee, was working with decedent on the day of the accident. The subject premises were owned by defendant/third party plaintiff Immuebles Reundios, S.A. ("Immuebles") and managed by defendant/third party plaintiff Manhattan Modern Management Inc. ("Manhattan Modern"). Manhattan Modern also served as the general contractor for the job that decedent was performing. Manhattan Modern, by written agreement dated July 12, 2010, contracted defendant/second third party defendant Calray Gas and Heat Corp. ("Calray") to provide all work labor and services in connection with the installation of the chimney. In turn, Calray subcontracted the work to Sure Heet. Calray was to inspect the job after it was completed.

Wayne LeMay, another Sure Heet employee, was working with decedent on the day of the accident. As Wayne LeMay states in his December 2, 2011 affidavit, "The installation of the B vent chimney at 76 Edgecombe Avenue, New York, New York 10030, required us to do some work some two to three stories above the level of the ground. On the date of Shay's accident we were using a 40 foot ladder to gain access to the areas where work was needed." It is uncontested that the 40 foot ladder stretched only 36 feet at its maximum and was inadequate to reach the third floor roof. As a result, Decedent and Wayne LeMay also used the fire escape in order to gain access to the rooftop staging area. Photographs provided by the parties at oral argument show that the chimney that was to be installed by Sure Heet was located near the building's fire escape.

Steven Arkay, President of Sure Heet, testified that prior to the accident, he had spoken to the building's superintendent and made arrangements for decedent and his co-workers to gain access to the building's roof via the interior of a third floor apartment to perform the chimney installation. Arkay testified that the superintendent had instructed him to tell his employees to call him fifteen minutes prior to arriving at the site so that he could provide the access. According to Arkay, on the day of the accident, Sure Heet employee Mike Whalen called the superintendent.

Aster Johnson, president of Manhattan Modern, testified that he never told Calray not to use the fire escape to access the roof of the building (although in his February 24, 2012 affidavit he states that neither Calray nor Sure Heet had Manhattan Modern's permission to use the fire escape) (p. 98 of his deposition). Johnson states in his affidavit, "[T]he fire escape ladder from which the decedent fell was *not* the only means of reaching the building's roof. The top-floor apartment provided two ways of accessing the roof: first, via an interior staircase leading directly from the apartment to the roof door, and second, via the apartment's terrace which had been affixed to it a metal ladder leading to the roof."

Wayne LeMay, in his April 30, 2012 affidavit, states that "we had in fact been working in excess of one hour at the time Shay's accident occurred. For all the time we were working up to and including Shay's accident no building Superintendent ever showed up." Thus, there was no alternative access to the roof.

Wayne LeMay states in his April 30, 2012 affidavit, "At the time of Shay's accident the work that we were performing at the [subject premises] involved actually handing segments of the B vent chimney down from the roof deck area of the building and affixing portions of the chimney stack to the building from the roof deck area. This was an integral part of the job." Prior to Shay's fall, Wayne LeMay states, "[W]e had been working on a roof top deck area and I had to remove wood lattice from that deck area. In order to complete the job I needed the screw driver which Shay went to retrieve from our truck. It was when Shay was coming back from the street level to the roof and just as he was reaching the top of the roof area he fell to his untimely death."

According to Arkay, at no time prior to the fall did any of the defendants advise Sure Heet to use safety equipment, nor was Sure Heet provided with any such equipment. Wayne LeMay also states in his December 2, 2011 affidavit that "at no time prior to Shay's fall did [defendants] advise us to use safety lines or harnesses and they did not provide us with safety lines or harnesses to use at this job. Likewise, no scaffolding was provided for the safe completion of this job [by defendants]."

Presently before the Court is plaintiff's motion for partial summary judgment pursuant to CPLR §3212 as to liability under Labor Law §240(1). Immuebles and Manhattan Modern cross move for summary judgment seeking the dismissal of plaintiff's Complaint or alternatively a conditional order of common law indemnification against Sure Heet. Sanitary Plumbing and Heating Corp. ("Sanitary Plumbing") and Calray cross move pursuant to CPLR Law §3212 to dismiss plaintiff's Complaint, or, alternatively, granting them summary judgment on their third party complaint against Sure Heet. Sure Heet opposes plaintiff's motion for summary judgment, supports Sanitary Plumbing and Calray's cross motion for summary judgment, and opposes Calray and Immuebles's cross motion seeking a conditional order of common law indemnification against Sure Heet. Oral argument was held on June 12, 2012.

In support of plaintiff's motion, plaintiff submits the attorney affirmation of Jeffery S. Lisabeth and the affidavit of Wayne LeMay, dated December 2, 2011. Attached to Lisabeth's affirmation are the following exhibits: (1) the Letters Administration; (2) Supplemental Summons and Supplemental and Amended Verified Complaint; (3) Third Party Complaint and Answer filed by Immuebles; (4) Preliminary Conference Order dated May 24, 2011; and (5) transcripts of the depositions of Aster Johnson of Manhattan Modern, Jonathan Clark of Calray, and Arkay. Plaintiff also submits an affirmation of Norman H. Dachs and the affidavit of Wayne LeMay, dated April 30, 2012, in further support of the motion.

In support of their cross motion, Immuebles and Manhattan Modern submit an attorney affirmation of David C. Zegarelli which annexes pleadings and the deposition transcript of Aster Johnson, and a copy of violations issued to Sure Heet. The pleadings annexed as exhibits included the Verified Bill of Particulars, Amended Bill of Particulars, third party Summons and Complaint, and Verified Third-Party Answer. Immuebles and Manhattan Modern also submit the affidavit of Aster Johnson.

In support of their cross motion, Sanitary Plumbing and Calray submit the attorney affirmation of James Feehan, which annexes pleadings, the deposition transcript of Jonathan Clark, a copy of the Heating Labor Service Contract between Calray and Manhattan Modern, a Proposal dated April 20, 2010 submitted by Sure Heet to Calray for the installation of a chimney at the

subject premises, the agreement entered between Calray and Manhattan Modern for the installation of the chimney, and Arkay's deposition transcript.

Sure Heet submits the attorney affirmation of Robert C. Baxter in opposition to plaintiff's motion, in support of Sanitary Plumbing and Calray's cross motion for summary judgment, and in opposition to Calray and Inmuebles's cross motion seeking a conditional order of common law indemnification from Sure Heet.

*Plaintiff's Motion for Summary Judgment - As to Labor Law 240*

Plaintiff contends that the accident would have been prevented by the use of protective devices and relies upon the proposition that plaintiffs need not demonstrate the precise manner in which the accident happened but only that the risk of some injury from the defendant's conduct was foreseeable and contemplated by the Labor Law § 240(1) statute.

Defendants argue that the fire escape ladder was not a "safety device" within the contemplation of the statute. They also argue that the fire escape was not the only means of ingress/egress, and further, that there is no evidence, testimony or allegation that the decedent had been ordered or required to use the fire escape. Defendant alleges that there is no evidence that fire escape was broken; this was not a slip and fall ("tripping hazard") and that Lemay did not fall through a hole or opening. Defendants also contend that a fire escape ladder is not a portable ladder and that the fire-escape ladder, as its name implies, was a normal appurtenance to the building designed solely to provide a means of egress from the roof in the event of conflagration. Defendants state that it was not designed or intended as a safety device against elevation related risks. Defendants also emphasize that decedent was never directed to use this permanent ladder.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence



that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

Labor Law §240(1) states in relevant part:

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 absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect workers from elevation-related risks and hazards, such as “falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). The statute ‘is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed.’” *Ross*, 81 N.Y. 2d. at 500 (citation omitted). Where an owner or contractor fails to provide any safety devices, liability is mandated by Labor Law §240(1), without regard to external considerations. (*See Zimmer v. Chemung*, 65 NY2d 522 [1985]). In order to prevail on a Labor Law §240(1) claim, a plaintiff must establish that the statute was violated and the violation was a proximate cause of his or her injuries. (*Kyle v. City of New York*, 268 A.D. 2d 192, 196 [1st Dept 2000], *lv denied* 97 N.Y. 2d 608 [2002]).



Based on the record and after oral argument, the Court finds that plaintiff has established a prima facie case of liability as to Labor Law § 240(1). On the day of the accident, decedent fell while performing a construction job that required the installation and affixing of a chimney to the exterior of a building at an elevation which reached from the ground level up above the third floor. The job was well underway when decedent fell to his death on his way back up to the elevated work-site with a screw driver to complete the job. While defendants focus on how decedent accessed the roof, it is undisputed that inherent in the work subcontracted to Sure Heet and which decedent was performing at the time of the accident was elevation-related risk. As Wayne LeMay states in his April 30, 2012 affidavit, “[a]t the time of Shay’s accident the work that we were performing at the [subject premises] involved actually handing segments of the B vent chimney down from the roof deck area of the building and affixing portions of the chimney stack to the building from the roof deck area. This was an integral part of the job.” However, despite the elevation related risk that the chimney installation entailed, it is undisputed that no safety devices were provided or made available to decedent and the Sure Heet employees in order to perform the work.

#### *Defendants’ Cross Motion*

Defendants also cross move for summary judgment seeking to dismiss plaintiff’s Labor Law §200(1) and §241(6) claims. Plaintiff’s opposition papers are silent with respect to defendant’s cross motion as to liability under Labor Law §241(6) claim. As such, defendants’ cross motion to dismiss plaintiff’s Labor Law §241(6) claim is granted without opposition.

Plaintiff opposes defendants’ cross motion seeking to dismiss the Labor Law §200(1). Labor Law §200 directs that the workplace be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to those working there. This includes the ways and approaches to the work area. (*Caspersen v. La Sala Bros.*, 253 NY 491 [1930]). However, “liability will be imposed only upon a showing of both notice of the dangerous condition and control of the site of the injury” (*Blyma v. County of Saratoga*, 296 A.D. 2d 637 [3d Dept. 2002]). Thus, plaintiff must demonstrate that defendants supervised or controlled plaintiff’s work and had

actual or constructive notice of the alleged dangerous condition. Based on the record before the Court and after oral argument, with the exception of Sanitary Plumbing, defendants have failed to make a prima facie showing of entitlement as a matter of law to warrant dismissal of plaintiff's Labor Law §200 as there is a question of fact as to whether the defendants knew that work was being performed by Sure Heat on the day of the accident without access to the inner staircase and safety devices.

There are no allegations set forth to support a claim against Sanitary Plumbing. As such, all causes of action against Sanitary Plumbing shall be dismissed.

Wherefore it is hereby

ORDERED that plaintiff's motion for partial summary judgment as to liability under Labor Law 240(1) is granted as against Immuebles Reunidos, S.A. and Manhattan Modern Management; and it is further

ORDERED that defendants/third party plaintiffs Immuebles Reunidos, S.A. and Manhattan Modern Management Inc.'s cross motion is granted to the extent that plaintiff's Labor Law §241(6) claim is dismissed as against them; and it is further;

ORDERED that defendants/second third party plaintiffs Sanitary Plumbing and Calray cross motion is granted to the extent that plaintiff's Complaint is dismissed as against Sanitary Plumbing and Heating Corp. and plaintiff's Labor Law §241(6) claim is dismissed as against defendant Calray Gas and Heat Corp.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 7/18/12

  
EILEEN A. RAKOWER, J.S.C. **FILED**

JUL 20 2012