SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

----------X

JASON MIANTI,

Plaintiff,

- v -

STRUCTURE TONE, LLC,STRUCTURE TONE, INC.,TURNER CONSTRUCTION COMPANY, PJ MECHANICAL SERVICE & MAINTENANCE CORP., PENGUIN AIR CONDITIONER CORP., PENAVA MECHANICAL CORP., PACOLET MILLIKEN ENTERPRISES, INC.,HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,7BP OWNER, LLC.,

Defendant.

----------X

INDEX NO. 160122/2017

MOTION DATE

MOTION SEQ. NO. (MS) 005; 006; 007; 008; 009; 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 399, 400, 401, 402, 403, 404

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 398

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 282, 283, 284, 285, 286, 287, 288, 289, 290, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 405, 406

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 407

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328,

329, 330, 331, 332, 391, 392, 393, 394, 395, 396, 397

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

In this Labor Law matter, plaintiff Jason Mianti alleges that he was injured after falling off a ladder as he attempted to close a valve for a drain-down project. This court determined in its January 24, 2020 Decision and Order (January 2020 Order) that plaintiff was injured while performing an act of routine maintenance and was not entitled to Labor Law §§ 240 or 241(6) protection (NYSCEF # 253 at 4). This court also determined that plaintiff's Labor Law § 200 claim was subject to a "means and methods" analysis and not a "dangerous condition" analysis (*id.* at 6). This court granted summary judgment to defendant Structure Tone, LLC f/k/a Structure Tone, Inc. (Structure Tone) and former defendant Penguin Air Conditioning Corp. (Penguin) (*id.* at 8).

Now in MS 5-9, defendants Structure Tone, Penava Mechanical Corp. (Penava), PJ Mechanical Service and Maintenance Corp. (PJ Mechanical), Turner Construction Company (Turner) (collectively, contractor defendants), Pacolect Milliken Enterprises, Inc. (Pacolet), Hines 1045 Avenue of the Americas Investor LLC (Hines Investor), and 7BP Owner, LLC (collectively, owner defendants) move to dismiss (CPLR 3211), and for summary judgment to dismiss (CPLR 3212) plaintiff's complaint and all outstanding cross-complaints and cross-claims.

For his part, plaintiff moves in MS10 to renew the January 2020 Order pursuant to CPLR § 2221(e) with respect to the determination that plaintiff's employer provided him with the ladder and that plaintiff's Labor Law § 200 claim should be analyzed as a premises condition case instead of as a means and methods case. Upon renewal, plaintiff moves to deny Structure Tone's prior motion for summary judgment.

This matter remains pre-note. The Decision and Order is as follows:

BACKGROUND

Plaintiff worked as an assistant chief engineer for non-party property manager Hines Interests, L.P. (Hines Interests)[1] at the time of his March 28, 2016 accident at 7 Bryant Park, New York, New York (premises) (NYSCEF # 335 – Mianti EBT at 37). Hines Investor, the building owner, was in contract to sell the premises to 7BP Owner at the time of the accident. Pacolet was the owner of the ground lease of the premises at the time of the incident. Turner was retained as a general contractor for the construction of the base building at 7 Bryant Park.

[1] Hines Interest is a separate entity from defendant Hines 1045 Avenue of the Americas Investors LLC.

Non-party Bank of China New York, a 7 Bryant Park tenant, retained Structure Tone as a general contractor for a build-out of its floor. Structure Tone hired Penguin to perform heating, ventilation, and air conditioning work. Both Turner and Structure Tone hired PJ Mechanical to perform ductwork at the building. Penguin hired Penava to install piping at the premises.

Plaintiff testified that Hines Interests was requested to perform a drain-down/fill-up of the building's secondary condenser (cold-water) system. According to plaintiff, the building had several water systems, between which are the hot-water and cold-water systems. Plaintiff testified specifically that he was requested to perform a drain-down of the cold-water system, that he never performed a full-building secondary condenser drain-down, but had performed four to five drain-downs of the hot-water system.

As to plaintiff's accident, plaintiff testified that he set up and climbed a ladder to complete the drain-down project by closing a valve (NYSCEF # 335 at 56). Plaintiff testified that he closed the valve, and at the point, he felt the leg on the A-frame ladder move (*id.* at 57). The procedure to close the valve consisted of turning a yellow handle, which plaintiff testified he had done thousands of times (*id.* at 57 and 107). Plaintiff testified that when he did this, "[the ladder] walked, it kicked out, and then it started rocking the ladder, and then when I closed the valve… the ladder went to the right, so when I was falling, I turned and I saw that nipple and I grabbed that, and then once I grabbed that, like almost like monkey bars… and I was hanging down and I felt something… I didn't know if I pulled a muscle or something. I dropped down. I landed on my feet, and then I went down and I told the head of security that I had just fell" (*id.* at 57).

Plaintiff testified that he went to the 29th floor without a ladder or any other equipment to facilitate his access to the 10- to 12- foot high valve because he assumed that a ladder belonging to one of the contractors would be up there (NYSCEF # 335 at 10-11, 82-83). Plaintiff did not know to which of the contractors the ladder belonged (*id.* at 79-80, 82).

Plaintiff testified that just before his accident, he set up the ladder himself, and he inspected the ladder for defects and found none. Plaintiff checked that the ladder was stable and that all legs were touching the ground. He locked the lever and spreader into place; he checked the ladder for dents in the stairs, for any lose, damaged, or missing steps, and for breaks in the ladder; and he made sure the ladder had feet. Plaintiff found the ladder to be stable and in perfectly good condition (*id.* 5 at 6-57, 77-78, 80-1, 83)

There is no testimony or credible evidence that any of the defendants supervised, instructed, directed, or controlled plaintiff's work on the premises. There is no evidence that any of the defendants lent or gave permission to plaintiff

to use a ladder to perform the drain-down task. Plaintiff's activities were directed, controlled, and supervised exclusively by Hines Interests.

Of note, and newly before the court, courtesy of the owner defendants, is the affidavit of Domenic Rauccio, employed by Hines Interests as the Director of Property Management at the premises (NYSCEF # 293). Rauccio averred that he was plaintiff's supervisor on the date of the accident, that Hines Interests did not perform any construction work on the premises, that the owner defendants did not control or supervise plaintiff, that there was ongoing construction work, and that the contractors owned all ladders at the premises (*id.*).

DISCUSSION

Plaintiff's Motion for Renewal (MS10)

Turning first to plaintiff's motion for renewal, it is denied. Plaintiff fails to offer new facts that would change the prior determination of this court.

A motion for CPLR 2221(e) renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination". CPLR 2221(e)(3) states that the motion "shall contain reasonable justification for the failure to present such facts on the prior motion". A motion for renewal "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]).

The only new piece of evidence here since the January 2020 Order is the Rauccio affidavit. However, the affidavit does not offer any new information for this court to consider. This court had before it in January 2020 the same information, namely, plaintiff's testimony that his employer did not provide him with a ladder. As such, the Rauccio affidavit does not provide any new evidence to consider and thus renewal is improper. In effect, plaintiff's motion is an untimely motion for reargument, arguing that this court made an improper determination. If plaintiff wished to make a motion for reargument, it was due in February 2020. Plaintiff never made such a motion.

Even if this court humored plaintiff's theory that this court misapprehended the facts at issue here, and that this matter should be analyzed as a defective equipment or premises condition case, plaintiff's case would still fail as a matter of law. "When a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment 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" (*Chowdhury v Rodriguez*, 57 AD3d 121, 131-32 [2d Dept 2008]).

Plaintiff's testimony indicates that the ladder was not defective. Additionally, plaintiff's testimony explicitly establishes that he was neither lent the ladder by any of the contractors, nor given permission to use the ladder. There is no evidence indicating that any of the contractors had or should have had actual or constructive notice of a ladder defect. There are no open factual questions here. As such, even if plaintiff were entitled to reargument, his argument would fail.

The CPLR 3211 and 3212 Motions (MS5-9)

All defendants now move pursuant to CPLR 3211 and 3212 to dismiss this action, and all outstanding cross-claims. The defendants all argue that law of the case doctrine and issue preclusion requires dismissal of this action. Defendants are correct, and all of their motions are granted.

Motion to Dismiss and Summary Judgment Standards

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party (*Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012]). A motion for summary judgment must be denied if a question of genuine material fact exists (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Law of the Case Doctrine and Issue Preclusion

All of the defendants argue that plaintiff's complaint must be dismissed on the basis of the law of the case doctrine and based on issue preclusion. The standards for both are as follows:

"[T]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 31 NY2d 162, 165 [1975]). The law of the case doctrine only applies to "legal determinations that were necessarily resolved on the merits in the prior decision" (*Sudarsky v City of New York*, 247 AD2d 206 [1st Dep't 1998]).

The doctrine of issue preclusion precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455 [1985]). The proponent of applying issue preclusion must show (1) identity of the previously decided issue and (2) that the party to be precluded had a full and fair opportunity to contest the prior determination (*id.*).

Both the law of the case doctrine and issue preclusion doctrine are applicable here. This court's January 2020 Order was a merits determination, the issues present in the instant motions are identical to those this court previously considered, and plaintiff was afforded a full and fair opportunity to contest the prior determination.

Labor Law §§ 240 and 241(6) Claims

As this court previously articulated in the January 2020 Order, plaintiff's act of turning a valve to facilitate the drain-down of the cold-water system is not construction or alteration work but merely routine maintenance. Acts of routine maintenance are not protected by Labor Law §§ 240[1] and 241[6] (*see Esposito v New York City Indus. Development Agency*, 1 NY3d 526, 528 [2003]).

Additionally, this court found that *Peterman v Ampal Realty Corp.*, 288 AD2d 54, 54-55 (1st Dept 2001) was directly on point for the factual circumstances present here. In *Peterman*, the Appellate Division, First Department held that a worker who was not employed in any construction context and fell from a ladder while closing a water valve in the ceiling to facilitate the plumbing work of others was not protected under Labor Law §§ 240 or 241(6) (*id.*).

Plaintiff does not dispute that the law of the case doctrine and issue preclusion apply with respect to the Labor Law §§ 240 and 241(6) claims. This

court's prior determination that plaintiff's work constituted routine maintenance and that he was not employed in construction activities controls the outcome here. All defendants are entitled to dismissal of plaintiff's claims arising under Labor Law §§ 240 and 241(6).

Labor Law § 200 and Common Law Negligence Claims

As this court previously determined in the January 2020 Order, plaintiff's Labor Law § 200 claim is subject to a means and methods analysis. "Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

This court determined that only plaintiff's employer, Hines Interests, controlled, supervised, and directed his work. None of the defendants here had any supervision over plaintiff's injury-producing work. As such, none of the defendants here can be liable under Labor Law § 200 or via a common law negligence theory.

As discussed above, plaintiff would still be unable to recover in this matter if his case was evaluated under a defective tool/dangerous premises theory (*supra* at 4-5). Plaintiff's testimony establishes that the ladder was not defective and he was neither lent the ladder by any of the contractors, nor given permission to use the ladder. There is no evidence indicating that any of the contractors would have actual or constructive notice of a ladder defect. Thus, even under the alternative theories, plaintiff cannot succeed in this matter.

Prematurity Argument

Plaintiff argues that the summary judgment motions are premature as depositions of the defendants have yet to be held. However, it does not appear that additional discovery is necessary to resolve the instant motions (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008] [finding that since additional discovery was unlikely to be productive in the matter, summary judgment was not premature]). "The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion" (*Singh v New York City Hous. Auth.*, 177 AD3d 475, 476 [1st Dept 2019]).

Here, evidentiary proof that will establish who owned the ladder is improbable. Plaintiff's accident was not witnessed, no pictures of the ladder were ever taken, and the ladder was not preserved. Plaintiff testified that the ladder had rubber feet, was in working order, and not defective. In any event, plaintiff never received permission to use the ladder and it was not lent to him. There is simply no need for additional discovery as no new facts will come to light that will alter this court's decision calculus.

Additionally, no further discovery is needed to determine if any of the defendants controlled, directed, or supervised plaintiff. The record is clear that only non-party Hines Interests controlled, directed, and supervised plaintiff.

Cross-Complaints and Cross-Claims

All defendants moved to dismiss all outstanding cross-complaints and cross-claims. No parties stand in opposition. As all of plaintiff's claims have been resolved in defendants' favor, there is no basis for indemnification. Accordingly, the cross-complaints and cross-claims asserted in this matter are now dismissed.

Accordingly, it is ORDERED that defendants' motions for summary judgment and dismissal (MS6-9) are all granted in their entirety and plaintiff's complaint and all claims are dismissed; it is further

ORDERED that defendants' motions for summary judgment and dismissal of all cross-complaints and cross-claims (MS5-9) are all granted and all cross-complaints and cross-claims asserted in this matter are dismissed; it is further

ORDERED that plaintiff's motion for renewal (MS10) is denied; it is further

ORDERED that the defendants are to serve a copy of this order with notice of entry on all parties within fifteen (15) days of this order; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

4/9/2021
DATE

MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

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