SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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JOSEPH GORMAN, AS ADMINISTRATOR OF THE ESTATE OF JOHN ANTHONY GORMAN.,

Plaintiff,

- v -

1166 LLC,MARSH & MCLENNAN COMPANIES, INC.,J.P. MORGAN CHASE & CO.

Defendant.

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INDEX NO. 152889/2015

MOTION DATE 02/11/2021, 02/11/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 104, 105, 106, 111, 112, 116, 118, 119

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 107, 108, 109, 110, 113, 114, 115, 117, 120, 122

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

On the Court's own motion, the order dated April 15, 2021 is recalled and the following is replaced in its stead:

As a preliminary matter, plaintiff concedes that decedent John Anthony Gorman was not engaged in qualified work pursuant to Labor Law §§ 240(1) and 241(6). Thus, the branches of defendants' motions to dismiss those causes of action are granted without opposition.

Upon the foregoing documents, it is ordered that defendants 1166 LLC ("1166") and March & McLennan Companies, Inc.'s ("MMC") motion and J.P. Morgan Chase & Co.'s ("Chase") motion, each for, inter alia, summary judgment dismissing plaintiff's remaining Labor Law § 200 and common law negligence claims, dismissing any cross claims, and for indemnification from their respective co-defendants, are determined as follows:

Plaintiff commenced the instant action to recover for injuries allegedly sustained by its decedent John Anthony Gorman ("Gorman") who was injured while descending an unstable ladder while working on the 20th Floor of the building located at 1166 Avenue of the Americas, New York, New York. Here, all the movants argue, among other things, that they did not have the ability to supervise or control the activity that allegedly caused Gorman's injury and did not have notice of any dangerous condition.

In support of their motions, the movants submit, inter alia, the deposition testimony of Gorman, Alex Trotta, senior real estate manager for CBRE, John Weatherup, chief engineer for CBRE, and Jesus "Jay" Soto, operating engineer for Jones Lang Lasalle ("JLL").

Gorman averred that back in 2004 he became employed by CBRE, the building manager for the subject premises, as an engineer helper. In that position he was responsible for assisting the engineer in changing filters, disposing of garbage, painting, sweeping and mopping, working with ladders, and tools, changing valves, and opening and closing valves. In 2005 Gorman became an operating engineer which consisted of the same duties plus operating the steam turbines and high-pressure steam and water valves. He added that he also worked on variable air volume boxes ("VAV"), duct work, fans, pumps, and cooling towers.

Gorman stated that his immediate supervisor was CBRE assistant chief engineer John Weatherup and that upon reporting to work each morning he would receive instructions from Alex Trotta. Gorman alleged that on June 3, 2014 he was asked by Weatherup to go see Chase's engineer "Jay" Soto at the tenant's space on the 20th floor concerning an air condition problem. Gorman had interacted with "Jay" for the past six years. Gorman recalled that his task was in part to determine whether the issue at hand was landlord or tenant related. If the issue was not landlord related, CBRE would let Chase solve their issue.

Gorman recalled that "Jay" was accompanied by an independent vendor's employee whom he believed was retained by Chase and was looking at the VAV and ductwork in the ceiling. He claimed that the subject A-frame ladder was already set up under an opening in the ceiling and that the ladder did not belong to him or CBRE. He assumed that the ladder belonged to the vendor's employee who was with "Jay."

He further alleged that he asked for permission to use the ladder and that "Jay" told him to "go ahead." Thereafter, he began looking in the ceiling without first inspecting the ladder before climbing it. He did not observe anything out of the ordinary with respect to the ladder or have any conversations with "Jay" or the other individual about the ladder. After determining that the VAV box was dead, he descended the ladder without issue and told "Jay" that he would need to see blueprints to ascertain whose responsibility it was to remediate the issue. Thereafter, Gorman folded up the ladder and then moved it over a couple of ceiling tiles in efforts to trace the ductwork. Again, he scaled the ladder without inspecting it and without anyone holding it. As he concluded his ascent his hands were above the ceiling tiles while his head was just below the ceiling. Gorman alleged that he was holding onto the ductwork for balance and that he asked "Jay" to hold the ladder because after he was on it for a couple of minutes the ladder shook from side to side and the rungs moved forward and backward. He alleged that as he descended the ladder, the side rails and all the rungs he touched were moving despite "Jay" holding the ladder. Nevertheless, he did not fall off the ladder, no items fell, none of the steps or rungs became dislodged, and the ladder remained in place. Gorman averred that he did not previously notice the ladders instability. Moreover, while he was on the ladder, his co-worker Mike arrived to discuss Gorman's observations. Gorman asked Mike to take a look and using the same ladder, without any warnings from Gorman, Mike ascended and descended the ladder uneventfully. Approximately five minutes

after having gotten off the ladder he began feeling lower back pain. Eventually, Gorman examined the building blueprints and determined that the subject ductwork was under Chase's jurisdiction.

Trotta averred that he was a property manager for CBRE and that he oversaw the day-to-day operations of the building. In this capacity he supervised a management staff that included operating engineers, including Gorman. He explained that the subject building has 44 floors and operates as a "commercial condominium," meaning that each floor of the building was owned by a separate ownership entity. Pursuant to a prime lease, Chase leased floors 7-21 from 1166, including the subject 20th floor. There was also a sublease between Chase and MMC, wherein MMC subleased the 14, 15, 16, 17, 20 and 21st floors back to Chase.

He further alleged that Chase had a unique agreement with the building wherein they were permitted their own climate management system that was installed by Siemens. Trotta testified that Siemens installed the VAV system so that Chase could control heating and cooling on its leased floors. He averred that on the date of the accident Gorman responded to the 20th floor to assist Chase with diagnosing an issue with their VAV system. In general, when an engineer would respond to these requests it would be to either address the issue itself or to simply determine whose responsibility it was to remediate the issue. He clarified that CBRE engineers did not take any instruction from Chase engineers with regard to their responsibilities at the premises, Chase engineers did not have control over the day-to-day work of CBRE engineers, and Chase engineers could not terminate or hire CBRE engineers.

Trotta recalled that he learned of Gorman's injury on the same day it allegedly happened. He claimed that he was initially told over the phone and that he then went to Weatherup's office where Gorman was present. Trotta alleged that Gorman told him that the ladder was shaking but that it did not break. At that point Trotta had Gorman fill out a workers' compensation occupational

and incident report worksheet. Trotta additionally stated that the ladder that Gorman used, which had "High Tech" written on the side, was not a CBRE ladder. CBRE never retained High Tech's services and CBRE has the letters "CBRE" written on the side of their ladders that are kept in the basement engine room or on the 13th and 33rd floors. He added that, pursuant to standard procedures and protocols, CBRE employees were prohibited from using non-CBRE ladders and from allowing other contractors to borrow CBRE ladders.

Weatherup testified, among other things, that he supervised plaintiff's work and that no one from Chase, nor its employees, had authority to direct or control any CBRE engineer's work, and neither Chase, nor its employees, could terminate CBRE engineers. He averred that he saw Gorman post-accident. He alleged that Gorman said that he met with "Jay" Soto on the 20th Floor, and that he went up a ladder that was already set up when he arrived. Weatherup averred that Gorman told him that the ladder shook which resulted in his back and neck pain. Weatherup insisted that he was critical of Gorman for having used the subject ladder in contravention of the CBRE policy to only utilize ladders that belong to CBRE. He further stated that CBRE did not have any wooden A-frame ladders and that they never hired High Tech for anything. Moreover, he believed that Chase did hire High Tech for low voltage electrical work and that Soto stored ladders in the closet of the 20th floor space. Lastly, he averred that Soto showed up at CBRE's space following the accident because he felt bad about Gorman. Weatherup maintained that Soto stated he "had the ladder out" for Gorman.

Jesus "Jay" Soto testified that he is an operational engineer for JLL, Chase's managing agent. Part of his job entailed managing the HVAC units at the subject premises and that he was present there on the day of the accident. He averred that Chase used their own equipment and stored their own ladders in the building's basement and did not keep any ladders on the 20th or 21st

floor. Soto alleged that he was not sure why Gorman was present on the 20th floor on the date of his accident. He claimed that Gorman was already there, on the ladder, when he and a Siemens employee walked out of a freight elevator onto the floor. He added that he looked up at Gorman and asked what he was doing and then left him in the area. He alleged that he made no observations concerning the ladder nor did he see Gorman move up or down. Further, when shown photographs of the subject ladder he claimed not to recognize it and that he was not familiar with High Tech.

It is well settled that the purpose of Labor Law § 200 was to codify the common law duty owed by owners and general contractors to maintain a safe work site (*see Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 [1993]). Claims for personal injury under Labor Law § 200 and common law negligence fall into two categories: (1) those arising from the manner in which the work was performed and (2) those arising from an alleged defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 Ad3d 139 [1st Dept 2012]).

In order for an owner or general contractor to be liable for an injury due to inadequate workplace safety concerning the equipment used, it must be demonstrated that the defendants controlled the manner in which the work was performed (*see Doodnath v Morgan Contracting Corp.*, 101 AD3d 477 [1st Dept 2012]). Thus, a defendant must have the authority to supervise or control the performance of work before it may be liable for inadequate workplace safety arising from alleged defects or dangers in the methods or materials of the work (*see Foley v Consolidated Edison Co. of New York, Inc.*, 84 Ad3d 476 [1st Dept 2011]; *Sheehan v Gong*, 2 AD3d 166 [1st Dept 2003](fact that ladder that caused plaintiff's injury may have been located at the work site by defendant was insufficient to establish common law negligence or Labor Law § 200, especially

where there was an expectation that plaintiff would use his own ladder); *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828 [2d Dept 2012]).

When an accident arises from a dangerous premises condition rather than the methods or manner of the work, a defendant will be liable where it created the dangerous condition or failed to remedy a dangerous condition it had actual or constructive notice of (*see Mendoza v Highpoint Associates, IX,* LLC, 83 Ad3d 1 [1st Dept 2011](summary judgment in favor of defendant inappropriate where defendant had plaintiff inspect roof despite knowing it was in "flimsy" condition)). Further, the mere fact that an incident took place does not mean liability will be imposed on any party (*see Cooke v Bernstein*, 45 AD2d 497 [1st Dept 1974]; *Villanueva v 114 Fifth Avenue Associates LLC,* 162 AD3d 404 [1st Dept 2018](defendants not liable where no evidence of any defect inherent in the freight elevator); *Antonio v West 70th Owners Corp.*, 171 AD3d 474 [1st Dept 2019](stairs in which employee of subcontractor sustained injuries after slipping and falling were not in dangerous condition where no observable defects on the stairs and stairs were not wet)).

Here, since the cause of Gorman's injuries was the choice of equipment used for the job, the subject ladder, it is evident that the case turns on whether either of the movants exercised supervision or control over Gorman's means and methods of work, and not whether there was a dangerous premises condition to which one of the defendants could be responsible. Based on the testimony, it is clear that Gorman was only supervised, under the control of, and directed by his employer, CBRE, and not 1166, MMC, or Chase. Further, the choice to use the non-CBRE ladder was completely of Gorman's own making.

Additionally, even if the ladder was deemed to be a dangerous condition on the premises, none of the parties claimed to have knowledge of the ladder, let alone notice of its defective

condition. Moreover, Gorman did not even have knowledge of its defective condition after initially ascending and descending it.

Thus, movants met their prima facie burdens and it is incumbent on plaintiff to raise a triable issue of fact. Here, plaintiff's submitted opposition is almost completely directed towards Chase and not 1166 or MMC. Furthermore, plaintiff's numerous questions concerning Chase's control of the ladder are a red herrings that fail to raise a triable issue of fact as to whether Chase had any control over Gorman's work, or whether the ladder constituted a dangerous premises condition to which Chase had notice of. Therefore, dismissal of plaintiff's remaining Labor Law § 200 and common law negligence claims are appropriate.

Accordingly, 1166 and MMC's motion and Chase's motion are both granted to the extent that plaintiff's complaint is dismissed as to all parties in its entirety, without costs or disbursements to any party; and it is further

ORDERED that the remainder of both motions are denied in all other respects as moot; and it is further

ORDERED that the movants shall serve a copy of this order, together with notice of entry, on plaintiff within 30 days of the date the decision is uploaded onto NYSCEF; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

5/13/2021
DATE

RICHARD G. LATIN, J.S.C.

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