Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

JADADIC ADZER and ISMET ADZER,

Plaintiffs,

-against-

RUDIN MANAGEMENT CO., INC., ONE TIMES SQUARE CENTER PARTNERS, L.P., THREE TIMES SQUARE CENTER PARTNERS, LLP, TISHMAN INTERIORS CORPORATION, 42nd ST. DEVELOPMENT PROJECT, INC., 3 TIMES SQUARE ASSOCIATES, LLC, W.H. CHRISTIAN & SONS INC., COMPONENT ASSEMBLY SYSTEMS, INC., G.M. CROCETTI, INC., ATLANTIC HARDWARE & SUPPLY CORP., M&R HARDWARE CORP., EGG ELECTRIC INC., PREMIER FIRE SUPPRESSION SYSTEMS, INC., ANTOVEL GELBERG PAINTING & WALLPAPERING, INC., WDF/GREENE/AXION, WDF INC., FLUSH METAL PARTITIONS, P&S INDUSTRIES, LTD., AABCO SHEET METAL CO., INC., ZWICKER ELECTRICAL CO., INC., COUNTRY NELSON SIGN CORP., and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

Index No: 11847/03

Motion Date: 2/28/07

Motion Cal. No.: 1

Motion Seq. No.: 30

RUDIN MANAGEMENT CO., INC. and THREE TIMES SQUARE CENTER PARTNERS, LLP.,

Third-party Plaintiffs,

-against-

COLLINS BUILDING SERVICES,

Third-party Defendant.

The following papers numbered 1 to 19 read on this motion by defendant, ANTOVEL GELBERG PAINTING & WALLPAPERING, INC., for summary judgment dismissing the complaint insofar as it is asserted against it.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Answering Affidavits-Exhibits.....	8 - 10
Answering Affidavits-Exhibits.....	11 - 13
Replying Affidavits.....	14 - 16
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Upon the foregoing papers it is ordered that this motion is granted and the complaint insofar as it is asserted against the defendant, ANTOVEL GELBERG PAINTING & WALLPAPERING, INC., is dismissed.

The defendant, ANTOVEL GELBERG PAINTING & WALLPAPERING, INC., (Antovel) contracted with Tishman Construction Corporation of New York (Tishman) as agent for the owner, to paint the interior of the premises. Antovel now moves for summary judgment dismissing the complaint insofar as they are asserted against it on the ground that it cannot be held liable to the plaintiff as it did not, by virtue of its contract to paint the premises, assume a duty of care to the plaintiff and that it did not create nor exacerbate or have actual or constructive notice of a defective or dangerous condition in the locker room. In support of its motion, Antovel submitted, inter alia, its contract with Tishman and the affidavit of its foreman, Hubert Faustin, who supervised and was present at the premises when the locker room was painted in July, 2001.

A contractual obligation, standing alone, does not impose a duty of care and, thus, tort liability in favor of third persons (see Espinal v. Melville Snow Contrs., 98 NY2d 136, 138 [2002] citing Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 NY2d 220, 226 [1990]; Palka v. Servicemaster Mgt. Servs. Corp., 83 NY2d 579 [1994]). A contracting party may be found to have assumed a duty of care, and potential tort liability, where the contracting party, fails to exercise reasonable care in the performance of his duties, "launch[es] a force or instrument of harm", or where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other

party's duty to safely maintain the premises (Espinal v. Melville Snow Contrs., 98 NY2d at 140 [citations omitted]).

The defendant, Antovel, has established, prima facie, its entitlement to summary judgment by submitting sufficient competent evidence, including the affidavit of its foreman, Hubert Faustin, which demonstrated that Faustin asked a Tishman supervisor to move the lockers away from the wall, that he sent the painters in to paint after he saw that the lockers were moved away from the wall and that none of Antovel's employees moved the lockers in the locker room. In addition, Antovel's contract provided that it would paint the portions of the premises designated. Where as here, the defendant has established, prima facie, its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of relevant, material issues of fact requiring a trial. (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v City of New York, 49 NY2d 557, 562 [1980].)

The contract between Antovel and Tishman is not a comprehensive or exclusive maintenance contract or the kind contemplated in Espinal which would give rise to a duty owing to the plaintiff. The plaintiff does not allege detrimental reliance, therefore, the only other possible basis for imposing liability is if Antovel had "launched a force or instrument of harm" or, in other words, created or exacerbated a dangerous condition which caused or contributed to the plaintiff's accident (Espinal v. Melville Snow Contrs., 98 NY2d at 141-142 [2002]).

In opposition, the plaintiff and defendants, RUDIN MANAGEMENT CO., THREE TIMES SQUARE CENTER PARTNERS, LLP, 42nd ST. DEVELOPMENT PROJECT, INC., 3 TIMES SQUARE ASSOCIATES, LLC (hereinafter collectively Rudin) argue that based upon the deposition testimony of Faustin questions of fact exist as to whether any of Antovel's painters moved the lockers before or after painting the locker room. It is argued that because Faustin did not actually see who moved the lockers a triable issue of fact exists warranting denial of the motion. The plaintiff, Rudin and the Tishman defendants also argue that summary judgment should be denied as premature. In this regard it is claimed that because Faustin testified that he asked a Tishman supervisor to move the lockers and a further deposition of the Tishman supervisor will be demanded and the deposition of Tishman Interiors has not yet been held. The plaintiff's and defendants' arguments are without merit and insufficient to raise a triable issue of fact.

Moreover, the question of who moved the lockers is neither material nor relevant in the absence of competent evidence that

"moving" the lockers from one side of the room to the other created or exacerbated a dangerous or defective condition of which Antovel had actual or constructive notice (see Kushner v. City of Albany, 27 AD3d 851 [2006], aff'd 7 NY3d 726 [2006]; Pina v. New York Paving, Inc., 266 AD2d 120 [1999]). There has been no such evidence presented.

The only dangerous condition alleged by the plaintiff is the presence of lockers which were not properly secured to prevent them from moving, tipping or falling. The depositions, affidavits and contracts previously submitted by the various parties in the context of 29 prior motions established that the lockers were never secured or affixed to the wall or floor prior to plaintiff's accident. Collins Building Services (Collins) owns the lockers. Pursuant to the maintenance contract between Collins and Rudin, Collins was responsible for providing and maintaining lockers for their employees. Collins purchased lockers that were delivered to and received at the premises by Collins' employees who placed them in the locations chosen by Collins. The plaintiff and defendants have submitted no evidence to show any conduct, other than possibly moving the lockers, on the part of Antonel that caused or contributed to the locker tipping on to plaintiff.

To deny a motion for summary judgment on the ground that "facts essential to justify opposition may exist, but cannot then be stated" there must be a likelihood of discovery leading to such evidence (see, Mazzaferro v. Barterama Corp., 218 AD2d 643, 644 [1995]; Frierson v. Concourse Plaza Assocs., 189 AD2d 609, 610 [1993]). The "mere hope" that somehow evidence will be uncovered during additional discovery to prove a case is not a basis for postponing a determination of a summary judgment motion pursuant to CPLR 3212(f) (see Donohue v. Werle, 12 AD3d 398 [2004]; Morissaint v. Raemar Corp., 271 AD2d 586 [2000]; Mazzaferro v. Barterama Corp., 218 AD2d 643, 644 [1995]; Plotkin v Franklin, 179 AD2d 746 [1992]).

Dated: March 26, 2007
D# 30

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J.S.C.