[* 1]

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

PRESENT: JOAN M. KENNEY J.S.C. Justice PART 8

Index Number : 104327/2007
VALENTINO, JAMES A.
VS.
METROPOLITAN LIFE INSURANCE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

on this motion to/for

PAPERS NUMBERED

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

FILED
JAN 28 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

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

Dated: 1/27/10

JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------X

JAMES A. VALENTINO and BARBARA FREVOLA-VALENTINO,

Plaintiffs,

Index No.: 104327/07

-against-

DECISION AND ORDER

METROPOLITAN LIFE INSURANCE COMPANY, METROPOLITAN INSURANCE AND ANNUITY COMPANY, METROPOLITAN TOWER LIFE INSURANCE COMPANY, INSIGNIA RESIDENTIAL GROUP, INC., ROSE ASSOCIATES, INC., TMC MAINTENANCE & CONTRACTORS, INC. and TRI-MAINTENANCE CONTRACTORS, INC.,

Defendants.

----------X

KENNEY, JOAN, M., J.,

For Plaintiff:	**For Defendants:**	
Anselmo A. Alegia, Esq.	Cohen Kuhn & Associates	W hite & McSpedon, P.C.
261 Madison Avenue, 26th Fl.	Attorneys for TMC Services Inc.	Attorneys for Met Defendants & Rose
New York, New York 10016	2 Park Avneue - 6th Floor	875 6th Avenue, Suite 800
(212) 319-7759	New York, New York 10016	New York, New York 10001
	(212) 553-8300	(212) 564-6633

Papers considered in review of these dispositive motions seeking dismissal of the action:

Papers	**Numbered**
Notice of Motion, Affirmation , Memorandum of Law & Exhibits	1-13
Affirmation in Opposition and Exhibits	14-23
Notice of Cross Motion, Affirmation and Exhibits	24-36
Plaintiff's Affirmation in Opposition to Cross-Motion and Exhibits	37-40

PROCEDURAL BACKGROUND

Defendants TMC Services, Inc. i/s/h/a TMC Maintenance & Contractors, Inc. and TMC Services, Inc. i/s/h/a Tri-Maintenance

Contractors, Inc. (TMC)[1] move, pursuant to CPLR 3211 (a) and 3212, seeking summary judgment, dismissing the complaint and all cross-claims as against them. TMC also cross-moves, pursuant to CPLR 3212, seeking summary judgment, granting them indemnification from defendants Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company, Metropolitan Tower Life Insurance Company, and Rose Associates, Inc. Defendants Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company, Metropolitan Tower Life Insurance Company (collectively, Metropolitan Defendants). Rose Associates, Inc. (Rose) cross-move, pursuant to CPLR 3212, seeking summary judgment as against TMC for full contractual indemnification, inclusive of all past and future attorneys' fees, costs and disbursements expended in the defense of the instant action, and/or for dismissal of the complaint.

The note of issue was filed on June 22, 2009, and TMC's motion for summary judgment is dated August 21, 2009, with a hearing date set for September 24, 2009. This motion was served on the Metropolitan Defendants and Rose several days later. The Metropolitan Defendants' and Rose's cross motion seeking summary judgment is dated September 2, 2009, and TMC's cross motion for summary judgment is dated September 16, 2009.

The Part Rules in effect at the time these motions were filed

---

[1]The complaint indicates two defendants, which are allegedly incorrectly named and should be named as TMC Services, Inc. However, for the purposes of this motion, the appellation "TMC" will be used in the plural to denote two named defendants.

specified that all dispositive motions must be filed no more than 60 days after the filing of the note of issue, except by leave of court for good cause shown. None of the parties sought leave of court before filing the instant motions.

In opposition to the cross motion, both plaintiff and TMC argue that the cross motion should be denied because it is untimely, having been filed more than 60 days after the note of issue was filed.

FACTUAL BACKGROUND

This action is a personal injury action in which James A. Valentino (plaintiff) alleges that, on April 7, 2004, at approximately 8:00 P.M., he sustained serious injuries when he slipped and fell, due to dangerous and hazardous conditions at the residential complex known as Stuyvesant Town/Peter Cooper Village. The premises was owned by the Metropolitan Defendants[2] and managed by Rose. Plaintiff alleges that he fell on a staircase located on the interior side of the front entrance to 7 Peter Cooper Village Road, on which staircase the Metropolitan Defendants and Rose allowed potted plants, with potting soil to be installed, which allegedly poses a tripping hazard. These potted plants were placed in the subject location in the late 1990s or early 2000s. Plaintiff maintains that Metropolitan and Rose had actual and

[2] Metropolitan Life Insurance Company and Metropolitan Insurance and Annuity Company argue that they were no longer the owners of the premises at the time of the alleged occurrence, but, for convenience sake, the court refers to the owner as the Metropolitan Defendants.

constructive notice of the hazardous condition caused by the placement of these potted plants by reason of their installation of the potted plants and their maintenance of the premises.

At his examination before trial (EBT), plaintiff stated that he had seen mulch on the subject staircase on previous occasions, and had mentioned it to a maintenance worker he identified as "Joe" two or three times (EBT, at 23-24) over the years, although he never complained to management about the plants or mulch in writing (*id.* at 27). It is noted that, throughout his EBT, plaintiff refers to the material that allegedly caused his fall alternatively as mulch, chips or dirt. Plaintiff said that he was not aware of anyone else complaining about mulch on the stairs (*id.* at 28-29). Plaintiff further stated that the building had no live-in superintendent, and no doorman (*id.*).

Vito Oliva, a local law compliance manager for Rose, testified at his EBT that Rose had a buildings and grounds manager, Rick Moro, whose responsibilities were to oversee the premises' porters and maintenance staff.

TMC took over janitorial services at the building complex in 2001. Dan Brennan (Brennan), the manager for TMC, testified at his EBT that there is a porter for every two to two-and-a-half buildings in the complex, whose responsibilities are to inspect the buildings on an ongoing basis all day, until the end of their shifts at 4 P.M. (Brennan EBT, at 46-47). Brennan said that if something occurred after 4 P.M., which necessitated TMC's attention,

if the person observing the problem called security, security had someone on duty 24 hours a day (*id.* at 47).

Jose Ojeda (Ojeda), a nonparty witness and allegedly the "Joe" to whom plaintiff referred, was a building porter on the day of the alleged accident, but is now retired. At his deposition, Ojeda testified that sometimes the wood chips in the pots would be blown onto the floor by wind or squirrels, but that he would clean up any mulch or wood chips that were outside of the pots immediately when he saw them during his shift (Ojeda EBT, at 29-20, 39). Ojeda stated that, after 4 P.M., a handyman would pick up any debris if he were called by a tenant or security (*id.* at 60). Ojeda stated that he never spoke to anyone at Metropolitan about the staircase in question (*id.* at 92). He further testified that he was not aware of anyone complaining to Metropolitan about the subject staircase (*id.* at 184).

Mark Quigley (Quigley), the site manager for TMC, testified at his EBT that potted plants were installed in the lobbies at the direction of Rose, and that there was a security department that would roam the site, including the buildings, and generate reports on a nightly basis in terms of maintenance issues, so that they could be addressed the following day (Quigley EBT, at 46 and 53). Quigley further testified that he could not recall receiving any complaints concerning the potted plants from managers or porters (*id.* at 52).

Pursuant to the agreement between Metropolitan Life Insurance

Company and TMC, dated February 1, 2001, Metropolitan Life Insurance Company reserved to itself the supervision, direction and control of TMC's management personnel and employees, and the agreement was not an exclusive agreement for TMC to provide cleaning services (Motion Ex. I).

The janitorial specifications section of this agreement states that TMC is to provide a scheduled janitorial staff presence seven days per week, 16 hours per day, and a staff of handymen seven days per week, 24 hours per day. The agreement further provides that the public areas of the buildings are to be constantly checked to insure proper and thorough cleanliness at all times.

Pursuant to section 25.1 of general conditions of the agreement, Metropolitan Life Insurance Company, as the owner of the premises:

> "shall carry commercial general liability insurance in an amount not less than $1,000,000.00 and shall include Contractor [TMC] as an additional insured. Such insurance shall be primary coverage for Owner and Contractor."

In addition, pursuant to section 25.2 of the general conditions, TMC is to obtain commercial general liability insurance that is to be excess of Metropolitan Life Insurance Company's primary coverage, in an amount not less than $35,000,000.00

Further, section 25.4 of the general conditions states:

> "Indemnification - To the fullest extent permitted by law, Contractor agrees to protect, indemnify, defend, and to hold Owner harmless from any and all claims (without necessity of prior payment

> therefor), demands, causes of action, lawsuits, judicial or quasi-judicial proceedings, liabilities, losses, costs, or expenses, including, without limitation attorneys' fees and expenses, alleging, arising out of or resulting from (i) any acts or omissions of Contractor, its employees or agents which are outside the scope of contractors' authority or responsibility hereunder, (ii) except to the extent paid by Owner's commercial general liability insurance policy, the negligent or tortious acts or omissions of Contractor, its employees or agents and/or (iii) Contractor's failure to perform its obligations under the Contract. The provisions shall survive the termination of the Contract for acts occurring during the term of the Contract."

Metropolitan Life Insurance Company and Metropolitan Insurance and Annuity Company assert that, at the time of the alleged accident, they were no longer the owners of the subject building complex for the following reasons: on December 10, 2001, Metropolitan Life Insurance Company conveyed its interest in the property to PCV/ST LLC (Cross motion Ex. K); PCV/St LLC then conveyed its interest to Metropolitan Insurance and Annuity Company on September 3, 2002 (*id.* Ex. L); by certificate of merger, dated October 1, 2004, Metropolitan Insurance and Annuity Company merged into Metropolitan Tower Life Insurance Company (*id.* Ex. M), resulting in defendant Metropolitan Tower Life Insurance Company being the only owner of the property at the time of the occurrence. It is noted that the date stamp appearing on the certificate of merger, affixed by the Delaware Secretary of State, indicates that the certificate of merger was filed on October 8, 2004, some six

months after the date of the alleged accident.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> * * *
> (7) the pleading fails to state a cause of action ... ."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

> "the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*, at 88)."

A motion to dismiss based on subsection (a) (7) of CPLR 3211 may be made at any time, and is not limited to being made prior to the service of responsive pleadings. CPLR 3211 (e); *Oakes v Muka*, 56 AD3d 1057 (3d Dept 2008).

To defeat a motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary

evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

"[O]rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to non-contracting third parties upon the promisor." *Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 (2002). Therefore, a contractor for property maintenance, such as TMC, is generally not liable to third persons in tort except:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties launches a force or instrument of harm; (2) 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 maintain the premises

> safely [internal quotation marks and citations omitted]." *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 (2002).

In the case at bar, there is no evidence or allegation that TMC "launched a force or instrument of harm" that caused the mulch to spill or remain on the staircase, nor has plaintiff alleged that he detrimentally relied on TMC's performance. Further, since the Metropolitan Defendants retained oversight in the maintenance process, and the agreement with TMC was not exclusive, as indicated in the contractual provisions referenced above, it cannot be held that TMC entirely displaced the Metropolitan Defendants' duty to maintain a safe premises. Therefore, TMC has demonstrated a prima facie entitlement to summary judgment as a matter of law. *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1291 (2d Dept 2009): *Wyant v Professional Furnishing and Equipment, Inc.*, 31 AD3d 952 (3d Dept 2006); *Borden v Wilmorite, Inc.*, 271 AD2d 864 (3d Dept 2000).

In their cross claims, the Metropolitan Defendants and Rose allege that TMC breached its contract with them by not properly performing its maintenance duties, and, therefore, TMC should be held proportionately responsible for any resulting liability of the Metropolitan Defendants and Rose to plaintiff. The court disagrees.

In order to prevail on a theory entitling the Metropolitan Defendants and Rose to contractual contribution or indemnification from TMC, the Metropolitan Defendants and Rose must make a

requisite showing that TMC was negligent in performing its contractual duties, resulting in plaintiff's injuries. *Holub v Pathmark Stores, Inc.*, 66 AD3d 741 (2d Dept 2009). This the Metropolitan Defendants and Rose have failed to do.

The evidence indicates that the stairwell was clean and clear at 4 P.M., when the TMC employee finished his shift. There is no contractual requirement that TMC perform general maintenance services 24 hours per day, and the contract in question, as well as the practice of having the day shift end at 4 P.M., had been in effect for several years prior to the occurrence in question. The alleged accident took place four hours after the end of the maintenance shift, no report of spilled mulch had been made to any defendant in this action prior to the alleged accident, and no evidence has been presented as to how long the purported mulch had been on the stairwell before plaintiff slipped, thereby providing sufficient time and opportunity to discover and remedy the problem. *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 (2005). The Metropolitan Defendants and Rose have failed to raise a triable issue of fact that TMC breached its contract either by placing the mulch or allowing the mulch to be placed on the stairwell, or by failing to clean up the purported mulch after having actual or constructive notice of its existence on the stairs. *Dejesus v New York City Housing Authority*, 11 NY3d 889 (2008).

Based on the foregoing, TMC's motion to dismiss the complaint as against it is granted. Additionally, since TMC cannot be held

responsible for plaintiff's injuries, pursuant to section 25.4 of the general provisions of its contract with Metropolitan Life Insurance Company, TMC is not obligated to contribute or indemnify the Metropolitan Defendants and/or Rose in this personal injury action, and the cross claims asserted as against it are similarly dismissed.

The Metropolitan Defendants' and Rose's cross motion for summary judgment is denied. Although their cross motion is timely, pursuant to the provisions of CPLR 2215, they are not entitled to the relief sought.[3] According to the contractual provisions quoted above, the Metropolitan Defendants and Rose would only be entitled to contribution and/or indemnification from TMC if the accident were in some way attributable to the acts or omissions of TMC's agents or employees. As discussed above, TMC cannot be held liable for plaintiff's injuries, and so the Metropolitan Defendants and Rose are not entitled to contribution or indemnification from TMC.

TMC's cross motion for summary judgment, seeking indemnification from the Metropolitan Defendants and Rose, is rendered moot by this decision granting TMC summary judgment dismissing the complaint and all cross-claims as against TMC.

CONCLUSION

Consequently, it is hereby

---

[3] TMC's motion was timely filed within 60 days after the filing of the note of issue, and the Metropolitan Defendants' and Rose's cross motion was filed at least seven days prior to the return date for TMC's motion. The time for filing the cross motion is governed by CPLR 2215.

ORDERED that TMC Maintenance & Contractors, Inc.'s and Tri-Maintenance Contractors, Inc.'s motion for summary judgment is granted and the complaint is hereby severed as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, all cross claims asserted as against said defendants are dismissed, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that Metropolitan Life Insurance Company, Metropolitan Insurance and Annuity Company, Metropolitan Tower Life Insurance Company's and Rose Associates, Inc.'s cross motion for summary judgment is denied; and it is further

ORDERED that TMC Maintenance & Contractors, Inc. and Tri-Maintenance Contractors, Inc.'s cross motion for summary judgment is denied as moot; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties continue their scheduled mediation 2 conference on for January 28, 2010.

Dated: January 27, 2010

ENTER:

Joan M. Kenney, J.S.C.