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

PRESENT: HON. MICHAEL D. STALLMAN PART 5

Justice

0105889/2002

INDEX NO. _____

HAVLIN, PATRICIA

vs

MOTION DATE 5/11/04

CITY OF NEW YORK

MOTION SEQ. NO. _____

SEQ 2

MOTION CAL. NO. 36

SUMMARY JUDGMENT

The following papers, numbered 1 to 6 were read on this motion to/for CD/SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Not of X-m	1
Answering Affidavits — Exhibits	2, 3, 4
Ans Aff	5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

"is determined in accordance with the annexed memorandum decision and order."

FILED
AUG - 5 2004
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 7/29/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

Joseph Havlin,

Index No. 105889/02

Plaintiff,

Decision and Order

-against-

The City of New York, New York City Fire Department, Kreisler Borg Florman General Construction Company, Inc. and Alma Construction Corp.,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, plaintiff alleges liability based on a fall by Joseph Havlin (Havlin), plaintiff's decedent, during the course of Havlin's employment by the New York City Department of Design and Construction (DDC).

According to the complaint, Havlin was a project manager for DDC, and was assigned to the New York City firehouse known as Fire Department Engine Company 93, located at 513-515 West 181st Street, New York, New York (the premises). Havlin is alleged to have fallen on an internal stairway, on September 10, 2001, during the demolition, refurbishment and construction of the premises.

In motion sequence #002, defendants move, and cross-move, for summary judgment against plaintiff on the complaint, and against co-defendants on the cross-claims for indemnification. Plaintiff has cross-moved to compel discovery.

The complaint alleges claims based on Labor Law § 200, § 240(1) and § 241(6), and common-law negligence.

Plaintiff does not oppose the entry of summary judgment with respect to dismissal of the claims based on Labor Law § 240(1) and § 241(6). The requested relief is therefore granted.

Plaintiff does oppose summary judgment with respect to the claims based on common-law negligence, and Labor Law § 200. These claims allege that defendants failed to maintain the premises in a reasonably safe and non-hazardous condition, and caused the dangerous, defective condition which ultimately resulted in injuries to Havlin.

The complaint alleges the following:

Defendants the City of New York (City) and the New York City Fire Department (FDNY) owned, operated, and controlled the premises upon which Havlin was injured. On September 10, 2001, and for a period of time prior thereto, there was construction, demolition, remodeling, maintenance, and related work being performed at the premises. Defendants Kreisler Borg Florman General Construction Company (Kreisler) and Alma Construction Corporation (Alma) were performing construction work at the premises, and acting in a supervisory capacity when Havlin was injured. Defendants are alleged to have had a duty to provide Havlin with a safe place to work, and to have breached that duty by permitting the eastern stairway at the premises, on which Havlin fell, to become and remain in a dangerous state of disrepair, with worn and broken treads. Defendants are further alleged to have failed to provide proper safeguards in maintaining the stairway, despite their knowledge of the alleged unsafe condition of the stairway. Plaintiff is alleged to have sustained severe and permanent personal injuries, and to have incurred a loss of income as a result of the accident.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York,* 49 NY2d 557 (1980). Once a movant has

met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Defendants attached the deposition transcripts of Havlin, witnesses for Alma and Kreisler, and an employee of DDC (Adrein Schreiber) in support of their motion and cross-motion for summary judgment.

To establish a prima facie case of negligence, a plaintiff must demonstrate that the defendant created a dangerous or hazardous condition, or had actual or constructive notice of this condition. *Gordon v American Museum of Natural History,* 67 NY2d 836 (1986).

Labor Law § 200, commonly known as the statutory codification of common-law negligence principles, requires, in addition to the requirements of a common-law negligence action, that the general contractor must have authority to supervise and control the activity bringing about the injury, thereby enabling the contractor to avoid or correct the allegedly unsafe condition. *Artiga v Century Management Company*, 303 AD2d 280 (1st Dept 2003).

In support of the motion for summary judgment, Alma claims that the Labor Law § 200 claim must be dismissed, since Alma did not supervise Havlin, and since the condition of the stairway was open, obvious, and notorious. Alma relies on Havlin's statements at his deposition to the effect that he had been at the premises every day for six weeks prior to the accident, and had traveled up and down the eastern stairway during this time, to establish that Havlin knew of the condition of the stairway. Alma further claims that Havlin was employed as an inspector for DDC, and was at the site to make sure that the work proceeded according to plan, and to oversee the building site. Alma states that Havlin was also responsible for job safety. Alma denies that it had either supervision or control over Havlin.

Kreisler and the City claim that neither of them exercised supervision or control over the area in which Havlin fell, and that neither of them had notice of the alleged condition. They argue that Alma was the demolition contractor with sole responsibility for the demolition project, and for maintenance of the area in which Havlin was injured, relying on the deposition testimony of Alma's project manager and of Adrien Schreiber (Schreiber), project manager for Kreisler. Further, Kreisler claims that Schreiber had ordered the eastern stairway to be barricaded prior to Havlin's accident, and that they had discussed this decision with Havlin. Schreiber also testified that Havlin reported his injury to Schreiber, and told Schreiber that he had been coming down the barricaded stairs, and had slipped.

Kreisler and the City claim that the sole proximate cause of Havlin's fall was his decision to use the barricaded stairs, which he had been previously directed not to use. Further, they claim that Havlin's decision not to avail himself of a safe stairway when he had been specifically instructed not to use the eastern stairway constitutes recalcitrance, and bars recovery under the Labor Law.

In the alternative, Kreisler and the City seek summary judgment against Alma on their contractual claim for indemnity.

Plaintiff opposes the motions for summary judgment and has cross-moved to compel the taking of the deposition of Anthony Bonito (Bonito), the project manager for the City, who was allegedly present each day of the project to oversee the demolition and construction at the premises. In the alternative, plaintiff seeks to have defendants' answer stricken.

The factual disagreement between Alma, on the one hand, and Kreisler and the City, on the other, as to which of these defendants, if any, had supervisory responsibility for the project at the premises, precludes the granting of summary judgment to either party, since defendants have each

failed to establish entitlement to judgment as a matter of law on the claim under Labor Law § 200, as is their burden. *Bush v St. Clare's Hospital*, 82 NY2d 738 (1993).

Defendants have not separately addressed their liability for common-law negligence, and the motions for summary judgment with respect to that claim are therefore denied.

Alma opposes the cross-motion for summary judgment on the claim for contractual indemnity, arguing that the indemnity contract is unenforceable, as violative of General Obligations Law § 5-322.1(1), as a matter of law, and that questions of fact exist as to Kreisler's liability for negligence and Alma's obligation to indemnify Kreisler.

General Obligations Law § 5-322.1(1) prohibits the use of indemnification clauses which promise to indemnify a promisee for liability resulting from the promisee's own negligence. That section provides as follows:

> [a] covenant, promise, agreement or understanding in, or in connection with ... a contract or agreement relative to the construction, alteration, repair or maintenance of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable[.]

The indemnification clause between Alma and Kreisler is contained in paragraph 33.3 of their contract. That paragraph states that Alma promises to indemnify Kreisler for injury or death resulting directly or indirectly from the work of the contractor or its subcontractors, "excepting any loss or damage caused by the negligence of the Owner or Construction Manager." Affirmation of Corinne Robinson Mahoney, Esq., dated December 11, 2003, exh. "D", ¶ 33.3.

It is well-settled that an indemnification clause that contemplates full indemnification of the owner or construction manager/indemnitee, regardless of the contributing fault of the indemnitee, is void, and against public policy. *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 (1997).

The law is still unsettled, however, as to whether a partial indemnification clause, such as the one in issue here, is enforceable as a matter of law where there is a question of fact as to whether the owner/construction manager/indemnitee was at fault. *Correia v Professional Data Mgt., Inc.* 259 AD2d 60 (1st Dept 1999). However, summary judgment would be premature, where a partial indemnification clause is in issue, since there can be no apportionment of liability until the factual issue of the extent of the indemnitee's liability, if any, has been determined. Kreisler's cross-motion for summary judgment on the claim for indemnification is therefore denied, as premature, with leave to renew, after the apportionment of liability.

Plaintiff's cross-motion to compel the deposition of the City's employee, Bonito, is conditionally granted. Plaintiff asserts to a history of dilatory tactics, dating back to April 7, 2003, on the part of the City in producing this witness. The City claims that it produced an appropriate witness instead of Bonito, namely Schreiber, who had formerly worked for Kreisler, but was in the City's employ at the time that he was deposed. Plaintiff concedes that Schreiber was deposed on November 17, 2003, as a non-party witness. The City has now offered to either produce Bonito as a witness, if he is still in the City's employ, or to provide plaintiff with Bonito's last known address. Accordingly, the City shall notify all parties whether or not Bonito is still in the City's employ on or before August 31, 2004 and if he is not, the City shall provide plaintiff with Bonito's last known address by that time. If Bonito is still employed by the City, the City is directed to inform all parties of

Bonito's availability for deposition on dates certain in October 2004 on or before September 10, 2004.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in part, and the causes of action based on Labor Law §§ 240 (1) and 241 (6) are dismissed; and it is further

ORDERED that defendants' motion and cross-motion for summary judgment are denied in all other respects, with leave to renew that portion of the defendant Kreisler Borg Florman General Construction Company's cross-motion which seeks summary judgment on its claim for indemnification against defendant Alma Construction Corporation after the apportionment of liability; and it is further

ORDERED that plaintiff's cross-motion to strike defendants' the City of New York and the New York City Fire Department's answer is denied, except that defendants shall produce witness Anthony Bonito for deposition, if he is still within the City's employ, or provide plaintiff with the witness's last known address; and it is further

ORDERED that counsel for defendants the City of New York and the New York City Fire Department are directed to file proof of compliance with the previous decretal paragraph within 45 days of service of this order with notice of entry; and it is further

ORDERED that the action shall continue.

This decision constitutes the order of the Court.

Dated: July 29 2004
New York, New York

ENTER

J.S.C.