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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 110219/2004
HOOK, STEPHEN E.
VS
PARTNERSHIP 76
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 110219/04
MOTION DATE
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 5 Cross-Motions	1, 2, 3, 4
Answering Affidavits — Exhibits	5, 6, 7, 8, 9
Replying Affidavits	10, 11, 12, 13, 14, 15

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

Dated: March 16, 2007

MARTIN SHULMAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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STEPHEN E. HOOK, :

Plaintiff(s), :

Index No: 110219/04

-against- : **Decision and Order**

PARTNERSHIP 76, L.P., THE SCHOOL OF VISUAL ARTS, INC. AND GEORGE WASHINGTON HOTEL, :

Defendants. :

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THE SCHOOL OF VISUAL ARTS, INC. :

Third-Party Plaintiff, :

-against-

EDUCATIONAL HOUSING SERVICES, INC. :

Third-Party Defendant.

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HON. MARTIN SHULMAN, J.S.C.

In this elevator modernization accident case, Defendant/Third-Party Plaintiff, School of Visual Arts, Inc. ("SVA"), moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and all related cross-claims. Plaintiff, Stephen E. Hook ("plaintiff" or "Hook"), cross-moves for summary judgment pursuant to CPLR 3212 on the issue of liability and for an order directing an immediate trial on damages. Defendant Partnership 76, L.P. ("defendant" or "Ptrshp 76") also cross-moves for summary judgment pursuant to CPLR 3212 dismissing plaintiff's Labor Law §200 and common law negligence claims and granting Ptrshp 76 summary judgment against Defendant/Third Party Defendant, Educational Housing Services, Inc. ("EHS") on its

cross-claims for common law and contractual indemnification, contribution and breach of contract. Finally, EHS cross-moves for summary judgment pursuant to CPLR 3212 dismissing the complaint, cross-claims and third-party complaint. The motion and cross-motions are being consolidated here for disposition.

Background[1]

Ptrshp 76 is the owner and landlord of a building known as the George Washington Hotel located at 23 Lexington Avenue, New York, New York (the "Building") and BLDG Management Co., Inc. ("BLDG"), manages the Building for Ptrshp 76. On March 31, 1995, Ptrshp 76 and EHS entered into a lease agreement for use of the Building's multiple floors by EHS (Exhibit F to Ptrship 76's Cross-Motion) and its licensees (*see* license agreement between EHS and SVA as Exhibit F to SVA's Motion) for faculty and student housing.

BLDG retained the services of Otis Elevator Company ("OTIS") to complete an elevator modernization project at the Building and OTIS began working at the Building in March 2003. The work included modernizing the two service elevators in November 2003. OTIS executed a formal contract for modernizing the three passenger elevators in July 2004 (*see* Exhibit H to Ptrshp 76's Cross-Motion). Hook, an OTIS employee, was an elevator helper who worked under OTIS employees Bobby Gillis ("Gillis"), an on-

[1] The alleged factual information was generally gleaned from the deposition transcripts of Hook (Exhibit C to Plaintiff's Cross-Motion), Mario Arroyabe, SVA's Director of Facilities (Exhibit D to Plaintiff's Cross-Motion), Joseph LaVacca, EHS's Comptroller (Exhibit E to Plaintiff's Cross-Motion) and Steven Maietta ("Maietta"), BLDG's On-Site Manager (Exhibit F to Plaintiff's Cross-Motion).

site elevator mechanic, and Walter Spardell ("Spardell"), a Job Project Supervisor (*see* Marcus Aff. at ¶10 in support of plaintiff's Cross-Motion).

The 20th floor of the Building housed the main elevator equipment and the 19th floor contained a vacant carpenter's shop area which was used as a secondary elevator room. Both of these floors had double hatchway doors, which when opened, facilitated the vertical hoisting of elevator equipment (controllers, motor, related parts, etc.) through these hatchways between the 18th and 19th floors and the 19th and 20th floors. OTIS and the Building personnel usually took an elevator to the 18th floor and then used the stairwell to access the 19th and 20th floors, and the former used the 19th floor shop space as a staging area to store their equipment and work uniforms.

Approximately two weeks before Hook's accident on November 20, 2003, OTIS personnel noted that one of the 19th floor hatchway doors furthest from the secondary elevator room entrance way had a broken hinge. Discussions ensued between and among Gillis, Spardell and Maietta concerning this defective hatchway door. Prior to Hook's accident, BLDG's On-Site Manager advised OTIS that Shomi 1 Construction, Inc. was being retained to either repair this door or fabricate a new set of hatchway doors and BLDG chose the latter option (*see* invoice as Exhibit G to SVA's Motion).

During the short period prior to the accident and with Hook's active participation, Spardell and Gillis decided to remove the defective hatchway door. Gillis and Hook then created a bridge comprised of loose floor planking OTIS supplied to cover the hatchway opening at all times when OTIS was not using same to hoist elevator related equipment to or from the 19th floor. This bridge was comprised of four planks which were roughly two inches thick, twelve inches wide and ten feet long. These planks did

not appear to be uniform in size, extended beyond the top and bottom sides of the hatchway opening and did not fully cover the hatchway opening, leaving about three-six inches of gap space on both sides of this opening (*see* photographs as Exhibit G to Plaintiff's Cross-Motion). And because of the length of the planking, it also became necessary to remove the secondary elevator room entrance door. During a work shift, OTIS placed two free standing, fold up warning signs to prevent any pedestrian traffic into the secondary elevator room.

On November 20, 2003 at about 7:20 am, Hook entered the secondary elevator room to begin his shift, took a few steps, stepped on one of the planks and fell through the hatchway opening approximately fifteen feet. Plaintiff landed on his back on the 18th floor directly under the hatchway opening. Shortly thereafter, EMS technicians arrived and transported Hook by ambulance to Bellevue Hospital. Plaintiff suffered serious injuries as a result of this fall and this action ensued.

The Parties' Respective Positions

SVA seeks summary judgment dismissing plaintiff's Labor Law §240(1) and §241(6) claims and any co-defendants' cross-claims against this defendant/third-party plaintiff because SVA, as a licensee, was neither an owner of the Building nor a general contractor with any authority to supervise, direct or control the work to complete the elevator modernization project (the "Project"). The fact that Hook landed on the 18th floor which SVA occupies as a licensee, SVA argues, does not trigger any liability for plaintiff's accident. SVA further claims it did not occupy the 19th floor and thus never had a duty to maintain that floor including the hatchway doors.

In seeking summary judgment dismissing plaintiff's complaint, co-defendants' cross-claim and SVA's third-party complaint against it,[2] EHS proffered similar arguments claiming it never leased the 19th floor space, had no duty to maintain it and played no role in the retention and subsequent supervision of OTIS to complete any phase of the Project (*see* Scott Affidavit in support of EHS's Cross-Motion annexed as Exhibit E thereto).

Plaintiff's cross-motion for summary judgment on the issue of liability under Labor Law §240 against Ptrshp 76, EHS and/or SVA essentially raises the following points: (1) Hook engaged in elevation related risk activity and was not afforded adequate protection; (2) the manner in which the planks were placed[3] to cover the hatchway opening between the 18th and 19th floors constituted a statutory violation; (3) plaintiff's participation under orders and under Gillis' supervision to remove one of the defective hatchway doors and create this makeshift scaffold over the hatchway opening, even if viewed as culpable conduct, will not absolve all or some of the defendants of liability under Labor Law §240; (4) Ptrship 76, via BLDG, had a non-delegable duty to secure the secondary elevator room to prevent such a fall from occurring through the 19th floor

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[2] Plaintiff has claimed that EHS's cross-motion is untimely. Based on the unchallenged time line and procedural posture of the parties during this post-note of issue round of motion practice as discussed in the Reply Affirmation of Raymond M. D'Erasmo, Esq., this court concludes that there is no prejudice to any party in deciding EHS's cross-motion on the merits.

[3] Based on OTIS's own worker safety handbook (Exhibit J to Plaintiff's Motion), to avoid fall hazards such planks "must be either cleated or bolted to prevent displacement. . .[and] should not be of such length so as to extend into areas or passageways where the planking could possibly be displaced by movement of people. . ."

hatchway; (5) even if plaintiff contributed to his fall through the hatchway, his actions are not the sole proximate cause of his accident; and (6) plaintiff cannot be considered a recalcitrant worker who refused to use a protection device which would have otherwise prevented his fall (refused *arguendo* instructions to cleat or bolt the planks to prevent displacement).

In its cross-motion for summary judgment against EHS and SVA on its cross-claims for contractual and common law indemnification, contribution and breach of contract, Ptrshp 76 argues that: (1) EHS did, and does, lease the 19th floor space, denominated as "upper penthouse space" (see Maietta Affidavit as Exhibit E to Ptrshp 76's Cross-Motion) in its March 31, 1995 lease, to be used for storage of its educational materials and student belongings (Exhibit F to Ptrshp 76's Cross-Motion); (2) Building rent rolls record EHS as occupying the 19th floor (Exhibit G to Ptrshp 76's Cross-Motion); (3) EHS and SVA agreed to participate in paying for the Project (*see* June 2, 2004 memorandum as Exhibit I to Ptrshp 76's Cross-Motion); (4) defendant should not be liable for common law negligence or a Labor Law §200 violation because it did not direct, supervise or control any OTIS personnel including Hook and/or the worksite and none of Ptrshp 76's and BLDG's employees worked in the secondary elevator room; (5) only OTIS personnel made the decision to remove the defective hatchway door and create/maintain unconnected planking for use as a scaffold or bridge over the open hatchway during the cessation of all hoisting activities; (6) both EHS, pursuant to its lease agreement, and SVA, pursuant to its license agreement (which generally incorporated EHS' lease by reference and made it a part of the license agreement), imposed contractual obligations, jointly and severally, to procure insurance naming

Ptrship 76 as an additional insured and to indemnify and hold defendant harmless for any accidents at the Building; and (7) after providing due notice of their respective obligations, neither EHS nor SVA have procured insurance to cover defendant for such accidents, nor did they agree to take over defendant's defense of this action and/or to indemnify Ptrshp 76 if plaintiff ultimately prevails against Ptrship 76 in this action.

Conflicting arguments resting, in part, on affidavits, affirmations and documentary evidence further emerge regarding the respectively perceived, questions of fact:

- Is the "upper penthouse space" the 19th floor carpenter's shop where the accident occurred and was such space included as EHS's leased space?;
- Was the loose planking over the secondary elevator room hatchway used as a passageway or stairway vitiating any liability under Labor Law §240(1), or was it the functional equivalent of a scaffold, ladder or other device enumerated in this statute?;
- Was BLDG's On-Site Manager an active or passive participant in addressing the defective 19th floor hatchway door problem and its resolution which led to the accident?;
- Were EHS and SVA actively engaged in the Project from its inception or were they merely obligated to underwrite a portion of its costs without either entity having any authority to supervise, direct or control the work and regardless of whether the former may be a lessee of the 19th floor where the secondary elevator room and accident site is located?; and
- Did Hook disregard the use of protective devices or was he a recalcitrant worker as to absolve some or all of the defendants from liability because his actions were the sole proximate cause of his accident?

Discussion

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st

Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985), once such proof has been offered, in order to defeat the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Further, "[w]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action ... and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *Id.*, 49 N.Y.2d at 560, 427 N.Y.S.2d at 596. *See also*, *Vermette v. Kenworth Trucking Co., a Div. of Paccar, Inc.*, 68 N.Y.2d 714, 506 N.Y.S.2d 313 (1986); *Marinelli v. Shifrin*, 260 A.D.2d 227, 228-229, 688 N.Y.S.2d 72, 73 (1st Dept., 1999);

Spearmon v. Times Square Stores Corp., 96 A.D.2d 552, 553, 465 N.Y.S.2d 230, 232 (2nd Dept., 1983).

Labor Law §240(1) states, in relevant part:

> all contractors and owners and their agents [involved]. . . in the erection, demolition, repairing, altering. . . of a building or structure shall furnish or erect. . . for the performance of such labor, scaffolding, hoists, stays, ladders, slings. . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. . .

"The Court of Appeals has stated that the statute should be interpreted as liberally as necessary to accomplish its purpose, which is to protect workers exposed *to gravity related hazards such as falling from a height . . .*" (emphasis added) (*see McCann v. Central Synagogue*, 280 A.D.2d 298, 299, 720 N.Y.S.2d 459, 460 [1st Dept., 2001]). Against this backdrop, this court rejects the notion that the planking was placed over the hatchway to primarily serve as a passageway. When Spardell and Gillis (together with Maietta's active acquiescence and approval) decided to remove the defective hatchway door and temporarily place loose planking to cover the hatchway opening in accordance with its self-perceived custom and practice, OTIS was obviously attempting to protect its employees from an elevated risk hazard of an opening with a fifteen foot drop. And while OTIS personnel, including Hook, may have incidentally used this "bridge" to traverse the secondary elevator room, still, this "bridge" was clearly intended to protect its workers from a work site elevation differential and is a device covered by Labor Law §240(1) (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219 [1991]). Consistent with the statute, properly cleating or bolting uniformly sized planks would have provided the additional, albeit requisite, measure of protection (Exhibit J to Plaintiff's Cross-Motion) to prevent plank displacement and Hook's hazardous fall on

November 20, 2003. *See also, Serpe v. Eyris Productions, Inc.*, 243 A.D.2d. 375, 663 N.Y.S.2d 542 (1st Dept., 1997). In searching the record, this court concludes that there essentially can be no dispute how the unwitnessed accident actually happened. Except for defendant's counsel's conclusory supposition, there is no evidence in the record to demonstrate that Hook was either a recalcitrant worker or failed to use any employer-supplied protective device. Contrarily, plaintiff used the "bridge" with OTIS's and BLDG's seal of approval and without any required instruction to use other protective devices OTIS provided him for elevated risk hazards.

It is well settled that Labor Law §240 (1) "imposes absolute, nondelegable liability on an owner for injury proximately caused by breach of the statutory duty, even where the job was being performed by an independent contractor over which the owner exercised no supervision or control. . . [a]n owner's duty to provide safe work conditions is nondelegable regardless of the element of control. . ." *Sferrazza v. Port Authority of New York and New Jersey*, 8 A.D.3d 53, 777 N.Y.S.2d 645 (1sl Dept., 2004). Here, BLDG's On-Site Manager was not a passive bystander. The fact that OTIS used the secondary elevator room as a staging area to change, store equipment and/or plan the work day did not bar BLDG from exercising any control over decisions affecting that portion of the Building (i.e., the secondary elevator room). On behalf of Ptrshp 76, Maietta was fully engaged in addressing the repair/replacement of the defective hatchway door and verbally expressed his concern and recommendations to OTIS personnel to avoid the risk posed by OTIS's unilateral decision to remove the hatchway door. Only after Gillis and/or Spardell persuasively argued that placement of planking over an exposed hole was standard protocol in the elevator industry did Maietta actively

acquiesce and verbalize his imprimatur to this protective device. There is nothing in this record to the contrary. Accordingly, plaintiff has established his prima facie entitlement to summary judgment against Ptrshp 76 on liability under Labor law §240(1) and his cross-motion is granted in its entirety. The branch of Ptrshp 76's cross-motion to dismiss plaintiff's common law negligence and Labor Law §200 claims is denied as moot based upon this court's ruling that defendant is strictly liable for plaintiff's injuries.

After review of the record, this court must dismiss the complaint and all cross-claims against SVA. This in turn moots SVA's third-party complaint against EHS, warranting its dismissal as well. It is noted that SVA's license agreement does not include the 19th floor. Further, even if this court credited the defendant's memorandum confirming SVA's obligation to defray a portion of the Project's costs, that fact alone would not implicate any liability on SVA's part under Labor Law §240. Parenthetically, it is fairly routine for landlords to pass along the costs of capital improvements and other building-related expenses to commercial tenants without such tenants ever having any input in the landlord's decision making process to complete a major capital improvement, the landlord's selection of the independent contractor and the manner in which an independent contractor completes the particular project. In this vein, Ptrshp 76 has not proffered any evidence to show that SVA possessed the legal right to occupy the 19th floor and actually did so and/or had the authority to supervise, direct or control the work to complete the Project.

Dueling affidavits seemingly raise an issue as to whether EHS actually leased all or a portion of the 19th floor. Nonetheless, it should have been fairly simple to produce documentary evidence which would indisputably place the secondary elevator room

within the demised premises EHS actually leased. Defendant has not produced such evidence, *viz.*, the "Master Plan" referenced in the lease between Ptrshp 76 and EHS. Nonetheless, while EHS may possibly possess a leasehold interest in some portion of the 19th floor, there is no evidence that this tenant ever physically occupied any portion of the 19th floor and/or used the vacant carpenter shop/secondary elevator room to store its materials and student belongings. As found wanting with SVA, defendant also offers no evidence to show that EHS had the authority to supervise, direct or control the work to complete the Project. Similarly, being a then potential beneficiary of the Project and a claimed underwriter of a portion of its costs does not convert EHS into an "owner" or "contractor" implicating its liability under Labor Law § 240(1).

Based on the foregoing, the motion for summary judgment dismissing the complaint and cross-claims against EHS is granted and the remaining branches of defendant's cross-motion for summary judgment on its cross-claims against EHS and SVA for contractual and common law indemnification, contribution and breach of contract are denied.

This matter shall proceed to a jury trial solely on the issue of damages. Counsel for plaintiff and Ptrshp 76 are directed to appear for a pre-trial conference on March 27, 2007 at 9:30 am, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
March 16, 2007

Hon. Martin Shulman, J.S.C.