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

PRESENT: **JUDITH J. GISCHE, J.S.C.** PART _____

Justice

INDEX NO. _____

Index Number : 101297/2003

PETERS, FRANK

MOTION DATE _____

vs

TRAMMELL CROW

MOTION SEQ. NO. _____

Sequence Number : 003

~~SUMMARY JUDGMENT~~

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: _ Yes _ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 03 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: Apr 27 2007

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Frank Peters and Bonnie Peters,

Plaintiff

-against-

Trammel Crow Company,
D.P. Facilities, Inc.,
Triangle Services, Inc., and
ARI Products, Inc.,

Defendants.

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DECISION/ORDER
Index No.: 101297/03
Seq. No.: 003, 004

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Motion Sequence #3	
ARI's motion (§3212) w/LMC affirm, exhs	1
Pltff's opp w/MLT affirm, GDD affid	2
DP's opp w/JVW affirm	3
Triangle's affirm (no position) w/YAA affirm	4
Triangle x/motion (§3212) w/YAA affirm, MH affid, exhs	5
ARI reply in support and opp to Triangle motions w/LMC affirm	6
Pltff opp to Triangle x/motion w/MLT affirm, exhs	7
Trammel Crow opp to Triangle x/motion w/JB affirm	8
Triangle reply to pltff w/YAA affirm	9
Triangle reply to ARI's opp	10
Triangle reply to Trammel Crow's opp	11
Motion Sequence #4	
Trammel Crow's motion (§3212) w/JKB affirm, exhs	1
Pltff's opp w/MLB affirm, exhs	2
Triangle opp w/YAA affirm	3
ARI opp w/OR affirm	4
Trammel Crow reply (to plaintiff) w/JKB affirm	5
Trammel Crow reply (to ARI) w/JKB affirm	6
Trammel Crow reply (to Triangle) w/JKB affirm	7
DP opp w/JVW affirm	8

Upon the foregoing papers the court's decision is as follows:

Plaintiff Frank Peters alleges that he sustained personal injuries at the building located at One West 39th Street, New York, New York ("the building"), occupied by HSBC, his employer (a non-party). Mrs. Peters has asserted a derivative claim for loss of consortium. The defendants are various companies involved with the building where the accident occurred.

The court has two motions and a cross motion. Each is by a defendant seeks summary judgment dismissing plaintiff's complaint and the cross claims asserted by other defendants against it. Since issue has been joined, and the motions were brought not more than 120 days after the note of issue was filed, they are all properly before the court for an adjudication on the merits. CPLR § 3212: Brill v. City of New York, 2 NY3d 648 (2004).

Moreover, because the motions all involve the same incident, state similar claims, and rely upon much of the same evidence (EBT testimony, etc.) they are hereby consolidated for consideration and disposition in this decision/order. Any claims about the timeliness of opposition or reply papers have been considered by the court, but there being no apparent prejudice to any defendant, all submitted papers have been considered. The court's decision is as follows:

Background

Mr. Peters claims he was injured on November 8, 2002 when the handrail he was holding onto as he descended the internal stairs on the 8th floor of the building broke in half or split into two. It is plaintiff's contention that the handrail was unsafe

because it was improperly installed and maintained. Plaintiff further contends that the doctrine of *res ipsa loquitor* is applicable to the facts of this case because handrails do not split into two in the absence of negligence. Plaintiff also argues that the defendants had actual or constructive notice of the dangerous condition which they failed to correct, thereby causing his injuries.

The defendants can best be categorized into two separate groups: those who were involved with the building when there was an extensive renovation to the 8th floor in 1994-1995 and those who became involved with the building thereafter. It appears that the handrail was first installed in 1994-1995 as part of that renovation. Mr. Gerard has testified on behalf of D.P. Facilities, Inc. ("DP") that DP was the construction manager of that project and that DP subcontracted the installation of the stairs and handrail to ARI Products, Inc. ("ARI).

Trammel Crow Company ("Trammel Crow") first became the property manager for the building in 1998. In 2001, Trammel Crow enter into a service contract with Triangle Services, Inc. ("Triangle") for "Engineering and Cleaning Services" (the "service contract"). Under the service contract, Triangle was to provide "at its sole cost and expense all necessary supervision, labor, materials and equipment to properly staff, clean and maintain [the building] . . . " Pursuant to Exhibit "A," however, there were also a number of engineers on staff.

ARI's motion for summary judgment

ARI seeks summary judgment on the basis that there is no proof that DP subcontracted the installation of the handrail to it, as DP claims. Mr. Barone, ARI's vice

president, has testified that ARI has no records available from the mid-1990's, and that they have been purged. He has also testified, however, that he would have been the person responsible for negotiating the contract between DP and ARI which would have entailed the raising of a platform in the in the 8th floor computer room, installation of stairs and an attendant handrail. Mr. Barone also acknowledges that it is possible that ARI may have installed the handrail, even if that had not been expressly written into the contract between these two companies because this was a "package" deal, and in other instances where the companies had worked together this is how it had been done. Thus, the agreement to install the handrail could have been set forth in the proposal ARI submitted to DP to win the contract, but not the contract itself.

ARI has moved for summary judgment on the basis that because there is no conclusive documentary evidence that it did install the handrail, plaintiff cannot prove his case, that ARI may have negligently installed it in the first place. Alternatively, ARI contends that even if it did install the handrail, it did so properly and did not create a hazardous condition. As a third alternative, ARI contends that even if plaintiff could prove it was negligent, subsequent repairs to the handrail thereafter by either Tramel Crow or Triangle - or any one else - are superseding, intervening acts that break any causal connection between its (alleged) negligence and plaintiff's injury.

Plaintiff and DP each oppose ARI's motion as does Trammel Crow which has separately cross moved for summary judgment. Plaintiff and DP each argue that because there is inconclusive evidence that ARI did not install the handrail, ARI is not entitled to summary judgment. Plaintiff contends that assuming ARI did install the

handrail, it did so in a manner that violated the Building Code, as amended in 1972, and therefore evidence of ARI's negligence. Alternatively, plaintiff argues that even if ARI did not violate any code, ordinance or rule, it nonetheless deviated from standard industry practice by choosing to install a two piece handrail when a seamless, one piece rail, was the standard industry practice in 1994. Plaintiff points out that the renovation plans drafted by the architect in 1994-1995 did not call for the installation of a two piece handrail, but ARI simply decided to use a two piece rail. Plaintiff contends that this is why the rail split in two. Plaintiff offers the EBT testimony by Mr. Bolger. DP's senior project manager who testified that it was standard industry practice in 1994 to use a one piece rail, that a one piece rail is stronger and safer, and that the use of a seamed rail is why it split into two. Plaintiff also offers the affidavit of its own architect Mr. Dickinson, who opines that the handrail violated the building code.

Although Triangle has filed an affidavit in connection with ARI's motion for summary judgment stating that it "takes no position with respect to [that motion]," in actuality it has, and it opposes that motion as well when its arguments are examined in context and considered as a whole.

Trammel Crow's Cross Motion

Trammel Crow has cross moved for summary judgment on the basis that it was not negligent, it did not have prior notice of a dangerous condition on the 8th floor steps, and that it was ARI that created a dangerous condition when it negligently installed the handrail in 1994 - 1995. For this argument, Trammel Crow offers the testimony of various present and former managers it employed at or about the time of the accident

(*i.e.*, Ms. Tullar, Mr. D'Angelo and Ms. Kazimir). They have testified that no complaints were made to Trammel Crow about the handrail before 2002. Trammel Crow also relies upon the EBT testimony of Mr. Nasso, an HSBC employee. Mr. Nasso testified that the subject handrail fell off twice before 2002. He reported the first occurrence (in 1997) to Mr. Cantone, a Triangle employee. Mr. Nasso reported the second occurrence, in 1999, to Mr. Lusha, also a Triangle employee. Thus, Trammel Crow contends that any negligent acts were by Triangle.

Triangle's cross motion

Triangle has cross moved for summary judgment on the basis that its service contract called for it to only perform janitorial and cleaning services at the building and that it did not agree to, nor did it, perform any repairs at the building. It also separately opposes Trammel Crow's motion for summary judgment. Its arguments in opposition to Trammel Crow's motion for summary judgment and in support of its own cross motion for summary judgment are closely aligned.

Triangle relies upon the testimony of Mr. Lusha who denies that he or anyone else on the janitorial staff of Triangle tightened the bolts of the handrail or repaired it. He contends that Triangle only cleaned the building and did not perform any kind of maintenance activities. Triangle argues that although it "employed" the engineers, these employees were on its payroll merely as a convenience for or courtesy to HSBC. Triangle offers the sworn affidavit of Mr. Heller, its Director of Operations, to support this claim. He has described an unwritten oral agreement between Triangle and HSBC. Mr. Heller has also testified that Triangle was powerless to hire or fire these individuals,

and they were neither supervised nor instructed how to do their jobs by Triangle.

Mr. Henessey, Triangle's Chief Engineer, has testified the engineers were responsible for routine maintenance and repairs to the building. He also testified that his staff repaired the handrail following the 2002 incident and that he and the rest of the engineering staff reported directly to Trammel Crow, not Triangle.

Triangle argues that the presence of the service contract between itself and Trammel Crow is insufficient to relieve Trammel Crow of its overarching responsibility as property manager for the building to keep the premises safe. Triangle further contends that because Trammel Crow exercised actual supervision and control over the engineers, the mere formality of their being on Triangle's payroll is insufficient, as a matter of law, to impose liability upon Triangle. Thus, Triangle contends that these individuals were actually "special employees" of Trammel Crow. In opposition, Trammel Crow argues that if its own motion for summary judgment is not granted, then Triangle's motion must be denied because there are factual disputes to be tried.

Plaintiff opposes Trammel Crow and Triangle's cross motions on several bases. He argues that because of the factual dispute about whether the engineers reported to Trammel Crow or Triangle - or both companies - neither of these moving defendants has proved its entitlement to summary judgment. Plaintiff further contends that because Mr. Henessey and Mr. Cantone had each worked at the building for many years (Mr. Henessey for 16 years and Mr. Cantone for 21 years) regardless of who their actual employer was, Triangle and Trammel Crow each had constructive and possibly actual notice of the defective condition of the handrail. Plaintiff relies upon the

testimony of Mr. Henessey who testified he was stationed at this particular building since 1986 even though property managers and service contracts had changed over time.

Although he has not moved or cross moved for summary judgment, plaintiff urges the court to consider the application of the doctrine of *res ipsa loquitor* to the facts of this case. He argues that Trammel Crow and Triangle had exclusive control of the subject handrail, and the accident was not due to any negligence on his part. Thus, he contends that in the absence of negligence, the handrail would not have split up as it did.

DP also opposes Triangle's cross motion, based upon the EBT testimony of Mr. Henessey and the existence of Triangle's service contract with Trammel Crow.

Law applicable to motions for summary judgment

On a motion for summary judgment. it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

If the burden is met then the party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v.

NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, supra at 562. Once the court identifies a disputed issue of fact, the inquiry ends and the parties must wait to resolve their disputes at trial. Brunetti v. Musallam, 11 AD3d 280 (1st dept. 2004).

Since Trammel Crow, ARI and Triangle are the moving defendants, each bears the initial burden of proving its entitlement to summary judgment on its own motion and the secondary burden of opposing the other moving parties' right to same.

Discussion

ARI has the initial burden on its motion for summary judgment to prove it has a complete defense to plaintiff's claims. ARI contends because there is no proof that it did install the handrail. plaintiff will also be unable to prove his case against ARI. The absence of documentary evidence however does not warrant the grant of summary judgment to ARI against plaintiff or on any of the cross claims against it. Rather, the absence of documents, under the facts of this case, only highlights a disputed issue of fact as to whether ARI did, in fact, install the handrail, as DP has alleged. ARI cannot point to deficiencies in the opposition papers to bolster its own motion or to meet its burden on its own motion for summary judgment. Therefore, ARI's motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Propect Hospital, *supra*; Ayotte v. Gervasio, *supra*.

Even assuming that ARI has tendered an acceptable excuse why it cannot disprove they installed the handrail (the unavailability of documents), ARI's own witness has testified that even though the contract between DP and ARI could not be located, it

is possible the agreement to install the rail was reduced to a contract, but part of the bid or proposal it submitted to win the DP contract. Thus ARI could not rule out the possibility that it did install the handrail and there is testimony by Mr. Gerard on behalf of DP that it was part of the package that ARI had bid on and won.

ARI's further argument, that even if it did install the handrail in a negligent manner, there were subsequent repairs (superceding and intervening events) breaking the causal connection between its (alleged) negligence and plaintiff's injuries, it not a basis upon which to enter summary judgment in its favor. This only frames a further factual dispute for the jury to decide after trial. Equitable Life Assurance Society of the United States v. Nico Construction Co., Inc. et al, 245 AD2d 194 (1st Dept 1997).

Finally, although ARI contends that it did not violate the building code or deviate from standard industry practice when it installed a seamed handrail instead of a seamless one, plaintiff has raised disputed issues of fact through the sworn affidavit of its architect. He opines that a seamless rail should have been installed, as per the Building Code, and using a seamed rail created a dangerous condition.

Given these disputed issues of fact, and ARI's failure to prove its defenses, its motion for summary judgment must be, and is, denied.

Neither Trammel Crow nor Triangle have sustained their respective burdens in connection with their own motions for summary judgment. Moreover, each has raised disputed issues of fact that must be decided at trial. The testimony of Mr. Lusha and Mr. Henessey conflict on whether Triangle employees performed anything more than janitorial services. Although on the one hand Mr. Henessey and the other engineers

were Triangle employees, there is factual dispute as to whether the engineers reported to, and were supervised and controlled by Trammel Crow, making them "special employees." Torres v. Allied Tube & Conduit, 281 A.D.2d 243 (1st Dept. 2001).

Other factual disputes include whether Triangle or Trammel Crow had actual or constructive knowledge of the dangerous condition on the handrail on the 8th floor steps. Though there is testimony that Trammel Crow property manager checked the stairs (and the handrail) once a month, it has not proved that the inspections would have revealed the existence of a dangerous condition. Further, there is inconclusive testimony by Mr. D'Angelo about whether complaints were made about the handrail before plaintiff's accident.

Mr. Lusha testified that if the janitorial staff noticed the handrail needed repairs, the person would have notified the property the property managers (Ms. Kazimir or Mr. D'Angelo), or possibly the engineers.

Given Mr. Henessey's testimony, that he had worked at this particular building for 16 years, and Mr. Nasso's testimony, that the handrail was fixed twice before plaintiff's accident, there is a factual dispute about whether Mr. Henessey's staff fixed the handrail, or would have been responsible for doing so. Moreover, the factual dispute over who the engineers "really" work for also frames the factual dispute over whether Trammel Crow and/or Triangle had actual or constructive knowledge of a dangerous condition.

Plaintiff urges the court to, at this stage of the litigation, decide whether the

doctrine of *res ipsa loquitur* is applicable to the facts of this case. This is a special charge to the jury, permitting it to draw an inference of negligence from the circumstances of an occurrence where the actual or specific cause of an accident is unknown. Kambat v. Saint Francis Hospital, 89 NY2d 489 (1997). "Once a plaintiff's proof establishes the following three conditions, a prima facie case of negligence exists and plaintiff is entitled to have res ipsa loquitur charged to the jury." Kambat v. Saint Francis Hospital, supra at 494. "First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff." Id. It is for the trial judge to decide whether plaintiff has established the necessary elements for the charge to be given to the jury. Therefore the issue of whether the doctrine is applicable is not ripe for decision, but deferred to the trial judge to consider.

Other arguments and claims by the defendants who have moved for summary judgment have also been considered. None of these claims or arguments, however, either individually or collectively, would lead the court to award any of them summary judgment dismissing the complaint or the cross claims. They only frame other factual disputes for trial.

Conclusion

The motions for summary judgment are each denied. None of the moving defendants have proved their entitlement to summary judgment. Since the note of issue has already been filed, and the case certified for trial, plaintiff shall serve a copy of this decision/order upon the Trial Support Office so that it may be scheduled and assigned for trial.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 27, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.