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

PRESENT: HON. JUDITH J. GISCHE Justice PART 10

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

Index Number : 104016/2004
SANQUINI, RONALD
VS
AGBCW 85 TENTH
Sequence Number : 003
SUMMARY JUDGMENT

this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED

JUL 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: JUN 25 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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Ronald Sanquini,

Plaintiff,

-against-

AGBCW 85 Tenth, LLC, Level 3 Communications, LLC, ATC Management, Inc., ATC Management, LLC and R&L Construction, Inc.,

Defendants.

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AGBCW 85 Tenth, LLC, Level 3 Communications, LLC, ATC Management, Inc., and ATC Management, LLC

3rd Party Plaintiffs

-against-

R&L Construction, Inc.,

3rd Party Defendants.

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DECISION/ORDER

Index No.: 104016/04
Seq. No.: 003

Present:
Hon. Judith J. Gische, JSC

TP Index No.
590151/05

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

Papers	Numbered
R&L n/m (3212) w/ EDB affirm, exhs	1
ABGCW and ATC x/motion w/ LCR affirm, exhs	2
Pltff opp w/PSA affirm, JM affid, exhs	3
R&L partial opp to x/motion w/EDB affirm	4
R&L reply w/EDB affirm	5
ABGCW and ATC reply w/KGF affirm	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Ronald Sanquini to recover monetary damages for the personal injuries he alleges to have sustained on February 24, 2004 in the lobby of the building owned by ABGCW 85 Tenth, LLC ("ABGCW"). Defendants ATC Management, Inc. and ATC Management, LLC (collectively "ATC") manage the building for ABGCW. The ABGCW and/or ATC defendants hired defendant R&L Construction, Inc. ("R&L") to do construction work at the premises. All claims against defendant Level 3 Communications, LLC ("Level 3") were discontinued, as per written stipulation by the parties dated September 22, 2005.

The court has before it R&L's motion for summary judgment on plaintiff's complaint as well as on the cross claims by the other remaining defendants against it. ABGCW and ATC have cross moved for summary judgment on plaintiff's complaint and in connection with all cross claims against them. ABGCW and ATC have also cross moved for summary judgment on their common law indemnification claims against R&L in their 3rd party action against that 3rd party defendant.

Plaintiff opposes both the motion and cross motion on the basis that there are factual disputes that require a trial of the action.

Although R&L supports ABGCW and ATC's cross motion, in that all the defendants seek summary judgment in their favor on the plaintiff's complaint, R&L opposes their cross motion to the extent they seek summary judgment on their third party claims for common law indemnification.

Issue has been joined. Discovery is now complete and the note of issue of has been filed. Since these motions are timely, they will be decided. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision and order is as follows.

Background

At the time of his accident, plaintiff was employed by Computer Cool Ice Age ("Computer Cool"), a non party to this action, and a tenant of the building with an office on the first or lobby floor. It is undisputed that parts of the building were undergoing renovations, including the lobby.

Plaintiff contends that on February 24, 2004, he entered Computer Cool's office without incident. Approximately 15 minutes later when he exited the office, however, he contends his foot got caught in and he tripped over wire mesh or "durawall" located just outside the door. A co-worker, Justin Morris, witnessed his accident. He has provided a sworn affidavit in support of plaintiff's opposition to both motions. Mr. Morris states that at the time of the accident he observed debris outside the door of the office, and that he saw plaintiff trip over something, twist and fall. Mr. Morris further states that he had previously complained to James Somoza, the president of ATC (the managing agent) about debris in the lobby. Mr. Morris further states that ATC did a walkthrough of the area thereafter, but that the debris was not removed.

Plaintiff contends that the defendants were negligent in that they created the dangerous condition or had notice of it. He also contends that Labor Law § 241 (6) extends to persons employed in or lawfully frequenting a place undergoing construction,

renovation or demolition work, and the durawall obstructed a doorway or passageway, within the meaning of the Industrial Code.

R&L seeks summary judgment dismissing the complaint. R&L contends that although it was a contractor on the construction project, hired to do demolition work, it neither created, nor had notice of, the dangerous condition alleged. Michael Brady, R&L's project manager at the time, was deposed. He testified at his EBT that R&L was not doing any work in the lobby area, but had completed the first phase of the demolition work some 4 or 5 days prior to the date of plaintiff's accident. He contends that all work in the lobby had come to a stand still because R&L was waiting for other workers (e.g. electricians) to complete their tasks before it could continue doing any further work in that area. Mr. Brady stated that R&L does not have any logs or other documentation that would prove it had no workers or was not doing any work in the area where plaintiff fell on the date of the accident. He also testified that only R&L was engaged in demolishing concrete block on this particular project. According to Mr. Brady, other contractors (including ATC) did some of their own demolition work on the project, albeit "light stuff" or "small stuff."

The managing agent and owner have together cross moved together for summary judgment on the basis that they were not negligent. They contend that it was R&L that created the dangerous condition that resulted in the accident alleged.

James Somoza, ATC's president was deposed on behalf of the ATC and ABGCW defendants. He testified that ATC hired R&L to handle the demolition work on

the project. Their agreement was oral, not written, but Mr. Somoza alleges that not only did R&L create the dangerous condition (by generating the debris, consisting of durawall, etc.) R&L was also contractually responsible for its removal and containment, etc. Mr. Somoza also testified at his deposition (contrary to Mr. Brady's EBT testimony) that R&L was present and still doing work in the lobby on the date of the accident. Mr. Somoza also deposed that following the accident, he personally observed materials in that area (durawall, etc.) and that no other contractor, except R&L, would have been working with or have generated that kind of debris.

R&L opposes the cross motion by ABGCW and ATC for common law indemnification on the basis that neither of these defendants have proved their freedom from negligence, therefore the indemnification claims have to be tried as well. R&L contends that unless all defendants are granted summary judgment, there are factual disputes that preclude the grant of summary judgment to just ABGCW and/or ATC because there is conflicting testimony about who created the dangerous condition, whether any of the defendants had notice of the condition, and how long it had existed.

Discussion

On a motion for summary judgment, the moving party bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if each meets their burden will it then shift to the party opposing

summary judgment to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponents fails to make out their respective *prima facie* cases for summary judgment, then that motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Although each defendant claims that it did not create the dangerous alleged, none of them have proved their prima facie case, that they were not negligent.

On the one hand, the owner and managing agent contend that it was R&L that created the dangerous condition because it was doing heavy demolition that would have involved durawall and been responsible for properly storing/removing/containing such debris. Thus, they contend that R&L left debris that it should have had removed. However, R&L contends it had completed its work in the lobby and therefore did not leave anything in that area. This factual dispute can only be resolved at trial. A reasonable jury could decide that even if it believes R&L had, in fact, finished working in the lobby area, it still created a dangerous condition by leaving debris (like the wire meshing or "durawall," described by plaintiff) in the lobby.

There is also the factual dispute of whether ATC and/or the owner had notice (either constructive or actual) of a dangerous condition. There is testimony that complaints were made to the managing agent and the owner about debris in the lobby, but the debris was not removed.

There are also factual disputes about how the debris that caused plaintiff's accident wound up in front of the door to Computer Cool's office. Plaintiff's testimony is that he did not notice the wire mesh when he entered his office, but that it was there when he came out only a few minutes later. No one who was deposed personally observed the durawall being placed or pushed there, or even if it was there before the alleged accident.

The defendants have not met their burden on these motions of setting forth evidentiary facts to prove a *prima facie* case that would entitle each one of them to judgment in their favor, without the need for a trial. In any event, plaintiff has come forward with factual disputes that need to be tried in order to be resolved. The function of the court on a motion for summary judgment is issue finding, not issue determination. Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Therefore, the motion and cross motion for summary judgment on the complaint and all cross claims among the defendants must be denied.

Although in opposition plaintiff has also asserted a number of legal arguments under the labor law and whether it applies to the particular facts of this case, the court does not go on to address them because the defendants have not sustained their initial burden on these motions.

ABGCW and ATC's motion for common law indemnification is premature and must be denied because neither the owner nor managing agent has established its freedom from negligence. *See*: Correia v. Professional Data Mgt., Inc., 259 AD2d 60,

65 (1st Dept 1999); Sledz v. 333 E. 68 St. Corp., 254 AD2d 196 (1st Dept 1998); Odom v. Bridge View II Company, 291 AD2d 280 (1st Dept. 2002). Therefore, their claims to being entitled to common law indemnification remain to be decided at trial as well.

Conclusion

The motion by R&L and the cross motion by ABGCW and ATC for summary judgment are each denied in their entirety. Since the note of issue was already filed, this case is trial ready. Plaintiff shall serve a copy of this decision/order on the clerk in the Trial Support Office so that the case can be scheduled 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
June 25, 2007

So Ordered:

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