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| Robles v Merrill Lynch/WFC/L, Inc. |
| 2007 NY Slip Op 32102(U) |
| July 9, 2007 |
| Supreme Court, New York County |
| Docket Number: 0124362/2001 |
| Judge: Doris Ling-Cohan |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN

PART 36

Justice

Maria J. Robles

INDEX NO. 124362/01

MOTION DATE _____

- v -

MOTION SEQ. NO. 004

Merrill Lynch et al

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 ... | <u>1, 2</u> |
| Answering Affidavits - Exhibits _____ | <u>5, 6</u> |
| Replying Affidavits _____ | <u>7</u> |

Cross-Motion: Yes No 3, 4

Upon the foregoing papers, it is ordered that this motion ~~by eighth party~~ by eighth party ~~third-party defendants~~ Structure-Tone Inc & Structure Tone Global Suc., Inc & cross-motion by defendants Merrill Lynch/WFC/Inc, Merrill Lynch WFC/ID Properties Inc. & Merrill Lynch & Co., Inc ~~for~~ for Summary judgment are granted in accordance with the attached memorandum decision.

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

FILED

JUL 13 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/9/07

[Signature]
HON. DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----x
MARIA J. ROBLES,

Plaintiff,

Index No.
124362/01

-against-

Motion Sequence No.
004

MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Defendants.

-----x
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Third-Party Plaintiffs,

Index No.
590625/02

-against-

PINNACLE ENVIRONMENTAL CORP.,

Third-Party Defendant.

-----x
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Second Third-Party Plaintiffs,

Index No.
591385/02

-against-

ENVIROTECH CLEAN AIR, INC.,

Second Third-Party Defendants.
-----x

FILED
JUL 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----x
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Third Third-Party Plaintiffs,

Index No.
590160/03

-against-

BLACKMON-MOORING-STEAMATIC CATASTROPHE,
INC. d/b/a and a/k/a BMS CAT,

Third Third-Party Defendants.

-----x
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Fourth Third-Party Plaintiffs,

Index No.
590554/03

-against-

KASCO RESTORATION SERVICES, KASCO and
KASCO, INC.,

Fourth Third-Party Defendants.

-----x
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Fifth Third-Party Plaintiffs,

Index No.
591083/03

-against-

ROY F. WESTON, INC.,

Fifth Third-Party Defendants.

-----x

-----X
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Sixth Third-Party Plaintiffs,

Index No.
591180/03

-against-

TRI-DIM FILTER CORPORATION, INDOOR
ENVIRONMENTAL TECHNOLOGY, INC., and GPS
ENVIRONMENTAL CONSULTANTS, INC.,

Sixth Third-Party Defendants.

-----X
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Seventh Third-Party Plaintiffs,

Index No.
591282/03

-against-

ALAN KASMAN, individually, ALAN KASMAN t/a
KASCO, ALAN KASMAN d/b/a KASCO, ALAN KASMAN
d/b/a KASCO RESTORATION SERVICES, ALAN
KASMAN d/b/a S.E.S. RESTORATION SERVICES,
ALAN KASMAN d/b/a KASCO RESTORATION SERVICE,
CO., and SPECIALIZED ENVIRONMENTAL SERVICES,
INC.,

Seventh Third-Party Defendants.

-----X

-----X
MERRILL LYNCH/WFC/L, INC., MERRILL LYNCH/
WFC/D PROPERTIES, INC., and MERRILL LYNCH
& CO., INC.,

Eighth Third-Party Plaintiffs,

Index No.
590986/04

-against-

STRUCTURE-TONE, INC. and STRUCTURE TONE
GLOBAL SERVICES, INC.,

Eighth Third-Party Defendants.
-----X

DORIS LING-COHAN, J.:

In this action to recover monetary damages for a workplace injury, the eighth third-party defendants, Structure-Tone Inc. and Structure Tone Global Services, Inc. (together, Structure Tone) move for summary judgment dismissing the eighth third-party complaint and all cross claims as against it.¹ Defendants Merrill Lynch/WFC/L, Inc., Merrill Lynch WFC/D Properties, Inc., and Merrill Lynch & Co., Inc. (together, Merrill Lynch) cross-move for partial summary judgment dismissing that portion of plaintiff's first-party complaint that seeks recovery for common-law negligence, as well as violations of Labor Law § 200.

For the reasons stated below, the instant motion and cross motion are granted.

¹Although originally framed as a motion to dismiss the plaintiff's complaint, the motion was subsequently amended to seek dismissal of the eighth third-party complaint. All parties had the opportunity to respond to the amendment.

Background

Plaintiff alleges that, on November 30, 2001, she was an employee of Pinnacle Environmental Corp. (Pinnacle) and was injured while working on an asbestos abatement project at one of the World Financial Center buildings in lower Manhattan. According to plaintiff, she was hired to clean up asbestos contamination at 225 Liberty Street, New York, New York, following the destruction of the World Trade Center. Plaintiff asserts that, while attempting to construct a scaffold within the gymnasium of the building, a portion of it collapsed and hit her in the head, causing injuries that form the basis of this action.

Plaintiff seeks monetary damages based upon common-law negligence, as well as violations of Labor Law §§ 200, 240 (1), and 241 (6). In the instant cross motion, Merrill Lynch seeks dismissal of the portion of plaintiff's complaint that alleges common-law negligence and violations of Labor Law § 200. Merrill Lynch, the lessee of the building,² contends that it neither supervised plaintiff, nor caused or had notice of any defective condition at plaintiff's work site.

Structure Tone seeks dismissal of Merrill Lynch's eighth third-party complaint, which alleges that: (1) Structure Tone failed to procure insurance on Merrill Lynch's behalf for the

²According to Merrill Lynch, the owner of the building is the entity know as Brookfield Properties. See Anthony Ponzo (Ponzo) EBT, at 18.

construction project at the World Financial Center; (2) Merrill Lynch is entitled to common-law and contractual indemnification from Structure Tone for any liability assessed against Merrill Lynch as the result of plaintiff's accident; and (3) contribution to any monetary damages as assessed against Merrill Lynch in the first-party action.

Discussion

Dismissal of Eighth Third-Party Complaint

According to Structure Tone, it is entitled to dismissal of the eighth third-party complaint, because it did not perform any asbestos abatement work, was not permitted on the site while such asbestos abatement was being performed, and did not begin their portion of the project until the asbestos abatement at the site had been completed.³ Merrill Lynch has not opposed Structure Tone's motion to dispute Structure Tone's claims; thus, the motion is granted and the eighth third-party action is dismissed.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of

³Structure Tone contends that although it was the construction manager for the clean-up project, it did not hire plaintiff's employer, Pinnacle, for the asbestos abatement portion of the project. See Robert Connors, Examination Before Trial (EBT), at 40.

fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Plaintiff contends that Merrill Lynch has not satisfied its burden of proof, entitling it to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action. To fulfill its burden of proof, a movant must proffer either affidavits by one who has knowledge of the facts or documents to support its contention that it is entitled to dismissal of a plaintiff's claims. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); see also McCatty v Creations Associates, 260 AD2d 315 (1st Dept 1999).

The Merrill Lynch defendants have proffered EBTs of the relevant parties to this action as evidence supporting their cross motion. Such documentation, if persuasive, meets the required burden of proof. See Thomas v Hampton Exp., Inc., 208 AD2d 824 (2d Dept 1994), lv denied 85 NY2d 803 (1995) (where even unexecuted EBT transcripts were held to be sufficient to support a summary judgment motion.)

Common-law negligence requires a plaintiff to show that: (1) a defendant either created or had notice of the alleged dangerous

or defective condition, as well as (2) that the alleged dangerous condition was the proximate cause of the injury. See Pouso v City of New York, 177 AD2d 560 (2d Dept 1991). These common-law negligence requirements have been codified in Labor Law § 200, where an owner and a general contractor's duty to maintain a safe workplace for those involved in construction is detailed. See Gasper v Ford Motor Co., 13 NY2d 104 (1963).

In the context of a Labor Law § 200 case, if a defective condition is alleged to be the cause of a worker's injuries, the worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it. See Higgins v 1790 Broadway Assocs., 261 AD2d 223 (1st Dept 1999); see also Balaj v Equitable Life Assur. Soc. of U.S., 211 AD2d 487 (1st Dept), lv denied 85 NY2d 811 (1995). However, when it is the worker's methods that are at issue, to establish liability under the common law and Labor Law § 200, supervision and control of the injured worker are required. See Favia v Weatherby Constr. Corp., 26 AD3d 165 (1st Dept 2006).

At issue in this action is the worker's methods, not a defective condition, in that plaintiff alleges that she was helping to construct the scaffolding and while doing so, a portion of it collapsed on her. See Plaintiff's EBT, at 37. Therefore, supervision and control by Merrill Lynch was required for liability under common-law negligence or Labor Law § 200

theories.

In this context, supervision and control are more than a "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept), lv denied 100 NY2 508 (2003). "[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200[,n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003).

Merrill Lynch has proffered testimony that, although plaintiff is not sure exactly what happened during the accident, immediately before the scaffolding hit her on the head, plaintiff states that she was placing wheels on it and the scaffolding was being hoisted. (see Plaintiff's EBT, at 37). Additionally, she testifies that she did not take instructions from anyone other than her supervisors during her employment at the construction site. See Plaintiff's EBT, at 49, 93. While plaintiff testified that she did not remember which company her supervisors worked for (see Plaintiff's EBT, at 128), there is no proffered evidence that it was Merrill Lynch. Merrill Lynch contends

that it managed the clean-up work at 225 Liberty Street, New York, New York, after the fall of the World Trade Center towers (see Ponzo EBT, at 20); however, contractors and subcontractors were hired to perform the actual clean-up duties. See Ponzo EBT, at 23. Specifically, Ponzo testified that he, as Merrill Lynch's representative on the site, "[h]ired the contractors, attended meetings and weekly construction meetings, set up an indoor air quality program for the employees coming back to work." See Ponzo EBT, at 28. There is no evidence that Merrill Lynch, the lessee of the property in question, did anything more than general monitoring or oversight of all the clean-up work being done at 225 Liberty Street, New York, New York. Thus, the Merrill Lynch defendants are entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims.

Order

Accordingly, it is hereby

ORDERED that Structure-Tone Inc. and Structure Tone Global Services, Inc.'s motion for summary judgment dismissing Merrill Lynch/WFC/L, Inc., Merrill Lynch/WFC/D Properties, Inc., and Merrill Lynch & Co., Inc.'s eighth third-party complaint is granted, and the eighth third-party complaint is hereby dismissed with costs and disbursements to Structure-Tone Inc. and Structure Tone Global Services, Inc., as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is

further

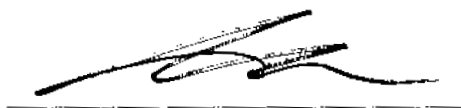
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Merrill Lynch/WFC/L, Inc., Merrill Lynch WFC/D Properties, Inc., and Merrill Lynch & Co., Inc.'s cross motion for partial summary judgment dismissing that portion of plaintiff's first-party complaint that seeks recovery for common-law negligence and violations of Labor Law § 200 is granted; it is further

ORDERED that within 30 days of entry of this order, movants shall serve a copy upon all parties with notice of entry.

Dated:

7/7/07



Hon. Doris Ling-Cohan, J. S. C.

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FILED
JUL 13 2007
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