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

PRESENT: RAKOWER PART 5

Index Number : 114736/2004

CRISALLI, LUKE

VS

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 - Exhibits	1, 2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 11/7/07

EILEEN A. RAKOWER 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: PART 5

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LUKE CRISALLI,

Plaintiff,

Index No.
114736/04

- against -

DECISION/ORDER

THE CITY OF NEW YORK, TISHMAN REALTY CORPORATION, TRACCO REALTY CORPORATION TISHMAN HARRIS WHITEHALL FERRY TERMINAL JOINT VENTURE, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and DMJM+HARRIS, INC.,

Motion Seq. 3

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he slipped and fell on accumulated water over a smooth cement surface inside a temporary walkway at the Whitehall Ferry Terminal New York, New York on August 5, 2003. Defendants Tishman Realty Corporation, Tracco Realty Corporation, Tishman Harris Whitehall Ferry Terminal Joint Venture, Tishman Construction Corporation of New York and DMJM+Harris, Inc. ("Tishman") move for summary judgment pursuant to CPLR 3212. Plaintiff opposes Tishman's motion. Defendant the City of New York ("City") cross-moves to dismiss plaintiff's complaint pursuant to CPLR 3211 and CPLR 3212. Plaintiff opposes City's cross-motion.

Tishman contracted with City in 1998 to begin the long-term reconstruction of the Whitehall Ferry Terminal ("the terminal"). The terminal is owned by City and operated by the Department of Transportation ("DOT"). During the course of the project, which was to be done in phases, portions of the terminal remained functional to avoid interruption to ferry service. The location of plaintiff's accident was a public walkway:

> It's a walkway inside of what we call a cattle run or temporary shed. It's a pedestrian walkway. I see pedestrians on it. We call it a cattle run. Everything that needs to be in place to be compliant with the City of New York to issue a temporary certificate of occupancy everyone. There would be fire sprinklers. There's an exit sign. There's lighting up to a standard that the City will issue a temporary certificate of occupancy. There are metal partitions separating the public from the work that would be ongoing on the other side of that shed. You have eight by seven timbers to hold the shed off the concrete to distribute the load. I see plywood. And that's to stop people from going through the south end of the shed. And also flashing for water. The timbers are flushed to the concrete to stop water from coming in from underneath(Gilmore Deposition, Page 15, Lines 5-22)

Plaintiff claims that he was walking through the terminal, and as he approached the area at the end of the walkway, he slipped on what he described as "some sort of puddle" and fell. He states that the puddle had a water-like consistency, had no smell to it and was dirty. The puddle was about three feet in length, five inches wide and one quarter to one half of an inch deep (plaintiff was unable to state the depth of the puddle at examination before trial, but was conclusive about the depth of the puddle in his affidavit prepared in response to the instant motion). The ground beneath the puddle was smooth cement, and was made slippery by the water. Plaintiff states that it was not raining that day and that he had never seen any water in the walkway prior to his accident. Photographs taken 3 weeks after the accident reveal a stain where plaintiff asserts the water he slipped on was permitted to accumulate.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Tishman submits the following evidence in support of its motion: the contract between it and the City; the pleadings; the deposition transcript of plaintiff; plaintiff's 50-h transcript (including eight black and white photocopies of photographs taken at the accident site, a photocopy of plaintiff's driver's license, and HIPPA forms); the deposition transcript of Luis Gilmore, project superintendent of the Whitehall Project for Tishman; and the deposition transcript of Frank Nicolosi, employee of the DOT Staten Island Ferry. In opposition, plaintiff submits: the affidavit of plaintiff; three color photocopies of the temporary wall adjacent to claimed hazardous condition; local climatological data for the month of August, 2003; a portion of the contract between City and Tishman; and the deposition transcripts of Gilmore and Nicolosi. City, in support of it's cross-motion, submits a computer printout of work orders for approximately thirty days prior to plaintiff's accident.

Tishman argues that it had no duty to inspect or maintain the walkway, which was not part of the construction site, and that it owed no duty to plaintiff, a non contracting third party. Plaintiff's attorney argues, in opposition, that the puddle was caused by several days of rain leaking into the ferry terminal due to open gaps in the ceiling and floor along a temporary wall next to the walkway. Plaintiff, to support this theory, supplies local climatological data. Plaintiff's theory is that Tishman negligently constructed the shed, and is liable to plaintiff for the slippery condition.

No duty of care is owed to a non contracting third party except in three limited circumstances. Those circumstances are: first, where one engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk; second, where the plaintiff has suffered injury as a result of reasonable reliance upon defendant's continuing performance of a contractual obligation; and third, where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002])

The testimony of Mr. Gilmore reveals that the shed's metal panels protect the pedestrians from the construction work under way on the other side. He states that once the temporary walkway received a temporary certificate of occupancy from the City, the responsibility for that area would have been the City's. If there was a problem related to water getting onto the walkway after the TCO was granted, "[i]f they thought it was caused by any construction, they would contact me. And I would get the water off. If it was just, you know, somebody spilled something that was there, that's theirs." Gilmore went on to explain that there was a concrete roof

installed on the roof level approximately 6 feet passed the walkway, which was not visible from the vantage point of plaintiff's photographs. Thus, the roof of the walkway was not pulled all the way across the structure.

Plaintiff provides his own affidavit, photographs of the area where he fell taken some weeks later, local climatological data, portions of the applicable construction contract, the deposition of Luis Gilmore, and the April 24, 2006 deposition of plaintiff.

Plaintiff did not see rain, did not see rain leaking, and did not see where the offending puddle originated on the day that he fell. However, he noted later that "the temporary wall was not entirely closed there, but that there was a gap between the ceiling and the wall and the bottom of the wall which would allow water to come inside the ferry terminal walkway if it rained." Faced with climatological data that shows that approximately three inches of rain had accumulated within the five days preceding his accident in New York City, plaintiff concluded that the recent rain was the source of the water on which he slipped.

Neither the photographs nor the witness statements provided address slope, proximity, or even the actual ability of water to penetrate the area in light of the extended cement roof above the shed. Plaintiff fails to present anything more than a possible scenario. Conclusory, self-serving and highly speculative allegations proffered by the plaintiff are insufficient to a motion for summary judgment. (*Pagan v. Local 23-25 Intern. Ladies Garment Workers*, 234 A.D.2d 37[1st Dept. 1996]). There is no showing that the purpose of the shed construction was to protect the public from the elements. Rather, the stated purpose was to protect the public from the construction activities. Plaintiff is unable to support a cause of action as against Tishman by demonstrating it falls under either of the first two exceptions established by *Church*.

The third exception established by *Church* requires some showing that the contract between Tishman and City placed the "comprehensive and exclusive" obligation to inspect and maintain the subject area upon Tishman. No such showing is made. Plaintiff fails to contradict Tishman's assertion that it was the City that was responsible for the maintenance of the area, and the City alone owed a duty to plaintiff. City, although denying it had sole responsibility for maintaining the area,

also makes no showing that Tishman had a duty to maintain the area. City reasons that mere proximity to the construction site is enough to raise an issue of fact regading Tishman's responsibility for the area. The Court disagrees.

City, however, as owner of the transportation facility, has a duty to safely maintain the area, and fails to demonstrate, by proof in admissible form, that it did so. (*Joachim v. 1824 Church Ave., Inc.*, 12 AD3d 409 [App. Div. 2nd Dept., 2004]) Indeed, it makes no showing that it inspected or maintained the "cattle run." Rather, City, in support of its cross motion, submits a computer printout of work orders for the Terminal and argues that none of the orders pertain to the alleged puddle. However, City does not submit a supporting affidavit of the person who searched for the records. City's deposition witness saw the computer work order printout for the first time at his deposition and when questioned about the printout, he could not explain the meaning of several of the abbreviations or items listed. Mr. Nicolosi could only offer that, at the phase of the project for which he was familiar with the terminal, 98% completion, there are individuals who inspect and clean the terminal. There was no such assertion pertaining to the temporary structure in the area of the accident during the construction phase of the project as it existed at the time of plaintiff's accident. Thus, the City has failed to meet its initial burden of showing that it did not have actual or constructive notice of the offending condition. (*Baez-Sharp v. New York City Transit Authority*, 38 AD3d 229 [App Div 1st Dept., 2007]). Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendants Tishman Realty Corporation, Tracco Realty Corporation, Tishman Harris Whitehall Ferry Terminal Joint Venture, Tishman Construction Corporation of New York and DMJM+Harris, Inc., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that defendant the City of New York's cross- motion for summary judgment is denied, and the remainder of the action shall continue.

DATED: November 7, 2007

EILEEN A. RAKOWER, J.S.C.