[* 1] SCANNED ON 2/14/2007

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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 112768/2003
RODRIGUEZ, ONELIA
VS
LILLY CONSTRUCTION
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE 9/21/07
MOTION SEQ. NO. 01
MOTION CAL. NO. 124

The following papers, numbered 1 to 10 were read on this motion to/for Summary judgment

Full papers read on seq 02

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-EE	1-5
Answering Affidavits — Exhibits	6-7
Replying Affidavits	8-9
Sur-Reply	10

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion and motion on seq 02 are decided as per the Memorandum Decision filed herewith.

FILED
DEC 14 2007
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN J.S.C.

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

Dated: 12/10/07

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 7

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ONELIA RODRIGUEZ,

Plaintiff,

-against-

LILLY CONSTRUCTION CORP.,

Defendant.

---x

Index No.: 112768/03

Decision and Order

LILLY CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Defendant.

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Hon. Michael D. Stallman, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages sustained by plaintiff Onelia Rodriguez when she tripped and fell in the doorway of a building located at 218 East 104th Street, New York, New York (the building) on November 29, 2002. In motion sequence number 001, third-party defendant New York City Housing Authority (NYCHA) moves, pursuant to CPLR 3212, for summary judgment (a) dismissing plaintiff's complaint as against defendant Lilly Construction Corporation (Lilly); (b) dismissing defendant and third-party plaintiff Lilly's third-party complaint as against third-party defendant NYCHA; (c) striking the third-party complaint on the ground that Lilly failed to fully comply with prior court orders, or in the alternative, precluding

Lilly from referring to such outstanding discovery; and (d) granting summary judgment in favor of third-party defendant NYCHA on its counterclaim for contractual indemnification and directing third-party plaintiff Lilly to reimburse NYCHA for attorney's fees, disbursements and costs incurred in its defense of the above-captioned action, as well as setting this matter down for a hearing on the amount of that reimbursement.

In motion sequence number 002, defendant and third-party plaintiff Lilly moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it. Plaintiff cross-moves, pursuant to CPLR 203 (b), for leave to serve a supplemental summons and amended complaint adding Quantum Security, Inc. (Quantum) as a direct party defendant.

BACKGROUND

On the day of her accident, plaintiff was injured as she was exiting a building which was part of the Washington Houses complex (the premises), owned by third-party defendant NYCHA. Plaintiff, a tenant in the premises, testified that, as she was exiting the rear of the building, she tripped over a metal bar that was sticking up from the door frame. The metal bar, which was approximately three-feet long, was located in the middle of the door, about a half an inch off the ground. Plaintiff noted that she had not seen the metal bar at issue prior to the date of her accident, though she had used the same door the day before.

Plaintiff also testified that she had noticed contractors, who did not wear any particular uniforms, installing door frames at the premises for a couple of weeks prior to her accident. Plaintiff claimed that these contractors had erected scaffolding with the words "Lilly Construction" labeled on it (Defendant's Notice of Motion, Exhibit E, Rodriguez Deposition, at 24). Hence, plaintiff maintained that the contractors worked for defendant Lilly.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S COMMON-LAW NEGLIGENCE CLAIM AS AGAINST LILLY

Plaintiff's sole cause of action is for common-law negligence. "To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (Kenney v City of New York, 30 AD3d 261, 262 [1st Dept 2006]). "One who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site" (id.; see Manson v Consolidated Edison Company of New York, 220 AD2d 374, 374 [1st Dept 1995] [defendant's cross motion for summary judgment dismissing the complaint granted where record failed to reveal any connection whatsoever between the defendant and the trench into which plaintiff fell]).

Jasvinder Saini (Saini), a comptroller for Lilly, testified that, in April of 2002, NYCHA

hired Lilly, pursuant to a contract, to erect sidewalk sheds at the entrances of the premises for the purpose of protecting pedestrians who were exiting the buildings. Importantly, Saini stated that the erection, maintenance and dismantling of the sidewalk sheds at the premises did not include work to any of the rear doors of the buildings at the premises. Upon inspection of the metal bar at issue, Saini maintained that he had never seen the metal bar before, and that the metal poles Lilly workers used to erect the sidewalk sheds did not resemble the metal bar.

Leonardo Ortiz (Ortiz), employed by NYCHA as a supervisor of housing caretakers, testified that NYCHA hired non-party Quantum to install new doors for the rear of the buildings, and that it was Quantum who installed the new rear door which allegedly caused plaintiff to fall. Particularly, Quantum was installing new door frames. Ortiz stated that two of NYCHA's superintendents supervised the work that was performed by Quantum.

Ortiz noted that he spoke to the superintendents upon hearing of plaintiff's accident, and they told him that plaintiff was caused to fall due to a piece of metal which was part of the door frame. Ortiz noted that he conducted general inspections of the building once a week in October and November of 2002, and that he only first observed the metal bar on the date of plaintiff's accident. Ortiz stated that the frame of the door at issue did not touch the sidewalk shed, and that the metal pipes which were used to install the sidewalk sheds do not resemble the metal bar that caused plaintiff's accident.

In his affidavit, dated March 26, 2007, Roman Dubrovin (Dubrovin), president of Quantum at the time of plaintiff's accident, stated that NYCHA hired Quantum, pursuant to a contract in effect on November 29, 2002, to replace the rear exit doors at the premises on an as-needed basis as requested and required by NYCHA. Dubrovin stated that Quantum employees,

who were not wearing any uniforms, installed the doorframe and the door at issue in this case.

Here, evidence in the record clearly establishes that Lilly was not involved in the installation of the rear door or rear door frame that caused plaintiff's accident. In fact, the evidence in the record clearly establishes that the subject door was installed by Quantum. Therefore, Lilly owed no duty to plaintiff which was breached, proximately causing plaintiff's accident. Thus, defendant and third-party plaintiff Lilly is entitled to summary judgment dismissing plaintiff's claim for common-law negligence against it. Accordingly, the dismissal of plaintiff's claim for common-law negligence as against defendant and third-party plaintiff Lilly also mandates a dismissal of Lilly's third-party action as against third-party plaintiff NYCHA, as the third-party action is moot (see Zehnick v Meadowbrook II Associates, 20 AD3d 793, 795 [3d Dept 2005]; Decotes v Merritt Meridian Corporation, 245 AD2d 864, 866 [3d Dept 1997]). As such, it is not necessary for the court to address third-party defendant NYCHA's arguments to dismiss the third-party action on the grounds of the anti-subrogation doctrine or Lilly's alleged failure to comply with various court orders.

THIRD-PARTY DEFENDANT NYCHA'S COUNTERCLAIM FOR CONTRACTUAL INDEMNIFICATION FOR REIMBURSEMENT OF ITS ATTORNEY'S FEES, DISBURSEMENTS AND COSTS INCURRED IN DEFENSE OF THIS ACTION

Third-party defendant NYCHA asserts that it is entitled to judgment in its favor on its counterclaim seeking indemnification from Lilly for all attorney's fees, disbursements and costs incurred in defending the instant action. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Ins. Co.,

32 NY2d 149, 153 [1973]; see Torres v Morse Diesel Intl., 14 AD3d 401, 402 [1st Dept 2005]).

The indemnification provision of the contract between Lilly and NYCHA states that:

> (a) Generally. The Contractor shall at all times be liable for, and indemnify and save harmless the Authority, its members, officers, agents, and employees against and from any and all claim or damage arising from, upon or by reason of breach by the Contractor of any covenants herein contained.
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> * * *
>
> (c) Indemnification. If any persons sustains injury or death, or loss or damage to property occurs, resulting directly or indirectly from the Work of the Contractor, or his subcontractors, in their performance of this Contract, or from the Contractor's failure to comply with any of the provisions of this Contract or of law, or for any other reason whatsoever, the Contractor shall indemnify and hold the Authority harmless from any and all claims and judgments for damages and from costs and expenses to which the Authority may be subjected or which it may suffer or incur by reason thereof

(NYCHA Notice of Motion, Exhibit T, Lilly/NYCHA Contract, General Conditions, at 7-8).

Third-party defendant NYCHA argues that, despite the fact that plaintiff's injuries did not arise from any work performed by Lilly, as the indemnification provision at issue contains the language, "for any other reason whatsoever," Lilly is obligated to indemnify and hold harmless NYCHA from any and all claims and judgments and from any costs and expenses that NYCHA incurred in defense of the instant action. However, when read in the context of the agreement, it is clear that the indemnification provision is limited to incidents arising directly or indirectly from the work performed by Lilly and its subcontractors. As plaintiff's accident did not arise directly or indirectly from work performed by Lilly or its subcontractors, as discussed previously, the indemnification provision does not apply. Thus, third-party defendant NYCHA is not entitled to summary judgment in its favor on its counterclaim for reimbursement of its attorney's fees, disbursements and costs incurred in defending this action.

PLAINTIFF'S CROSS MOTION TO ADD QUANTUM AS A DIRECT DEFENDANT

Insofar as a claim against Quantum for common-law negligence is now time-barred, plaintiff seeks to establish the applicability of the relation-back doctrine in support of his cross motion for an order permitting him to serve a supplemental summons and amended complaint adding Quantum as a direct defendant. "The relation-back doctrine, which is codified in CPLR 203 (b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are 'united in interest'" (Shapiro v Good Samaritan Regional Hospital Medical Center, 42 AD3d 443, 444 [2d Dept 2007] quoting Buran v Coupal, 87 NY2d 173, 177 [1995]).

> In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well

(Shapiro v Good Samaritan Regional Hospital Medical Center, 42 AD3d at 444; Buran v Coupal, 87 NY2d at 178; Nani v Gould, 39 AD3d 508, 509 [2d Dept 2007]; Porter v Annabi, 38 AD3d 869, 870 [2d Dept 2007]).

"Parties are united in interest only where 'the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other'" (Gatto v Smith-Eisenberg, 280 AD2d 640, 641 [2d Dept 2001] quoting Prudential Insurance Company v Stone, 270 NY 154, 159 [1936]; Moller v Taliuaga, 255 AD2d 563, 564 [2d Dept 1998]). "The question of unity of interest requires consideration of '(1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim

asserted against them'" (Hilliard v Roc-Newark Associates, 287 AD2d 691, 692 [2d Dept 2001] quoting Connell v Hayden, 83 AD2d 30, 41 [2d Dept 1981]). "In a negligence action, the 'defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other'" (Hilliard v Roc-Newark Associates, 287 AD2d at 691; Desiderio v Rubin, 234 AD2d 581, 583 [2d Dept 1996]; Moller v Taliuaga, 255 AD2d at 564).

Here, as plaintiff has failed to establish any relationship or connection between Quantum and Lilly giving rise to the vicarious liability of one for the conduct of the other, so as to afford the plaintiff the benefit of the relation-back doctrine, plaintiff's cross motion for leave to serve a supplemental summons and amended complaint naming Quantum as a direct defendant to this action is denied (see 27th Street Block Association v Dormitory Authority of the State of New York, 302 AD2d 155, 165 [1st Dept 2002]; Mercer v 203 East 72 Street Corporation, 300 AD2d 105, 106 [1st Dept 2002] [plaintiff's showing that the proposed defendant and a named defendant had common shareholders, officers and a comptroller was insufficient to establish that the two entities were united in interest]; compare Schiavone v Victory Memorial Hospital, 300 AD2d 294, 295 [2d Dept 2002] [where hospital could be held vicariously liable for physician's alleged negligence in providing care to patient, physician was united in interest with the hospital]).

Plaintiff mistakenly asserts that the relation-back doctrine is applicable in this case, because Quantum was united in interest with third-party defendant NYCHA. To that effect, plaintiff maintains that, as Quantum performed work on the rear door pursuant to a contract with NYCHA, Quantum and NYCHA are united in interest. However, as NYCHA was not a named defendant in the original complaint, as the relation-back doctrine requires, whether Quantum and

NYCHA are united in interest is irrelevant.

"For the rule allowing relation back to the original date of filing under CPLR 203 (b) to be operative in an action in which the parties are added beyond the applicable limitations period, a plaintiff is required to prove that the originally-named defendant and the later-added party or parties are united in interest" (Desiderio v Rubin, 234 AD2d at 582; Hilliard v Roc-Newark Associates, 287 AD2d at 692 [after statute of limitations had expired, it was plaintiff's burden to prove that the relation-back doctrine applied by demonstrating that the party sought to be added was united in interest with defendant named in the original complaint (see Hilliard v Roc-Newark Associates, 287 AD2d at 692).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant and third-party plaintiff Lilly Construction Corporation's (Lilly) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it is granted, and the complaint is dismissed with costs and disbursements as taxed by the Clerk of Court; and it is further

ORDERED that third-party defendant New York City Housing Authority's motion, pursuant to CPLR 3212, for summary judgment dismissing defendant and third-party plaintiff Lilly's third-party complaint against it is granted; and the third-party complaint is dismissed with costs and disbursements as taxed by the Clerk of Court; and it is further

ORDERED that third-party defendant NYCHA's counterclaim for contractual indemnification and directing third-party plaintiff Lilly to reimburse NYCHA for attorney's fees, disbursements and costs incurred in its defense of the above-captioned action, as well as setting

this matter down for a hearing on the amount of that reimbursement, is denied; and it is further

ORDERED that plaintiff's cross motion, pursuant to CPLR 203 (b), for leave to serve a supplemental summons and amended complaint adding Quantum Security, Inc. as a direct party defendant is denied; and it is further

ORDERED that the Clerk of Court shall enter judgment accordingly.

DATE: December 10, 2007
New York, NY

ENTER: _____
J.S.C.

MICHAEL D. STALLMAN
J.S.C.