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

PRESENT: JUDITH J. GISCHE PART 10

Justice

WARRICK

INDEX NO. 117606/05

MOTION DATE

- v -

MOTION SEQ. NO. # 001

THC REALTY DEVELOPMENT

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
DEC 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/14/07

JUDITH J. GISCHE, J.S.C. 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 10

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PAULINAS WARRICK and LUCILLE WARRICK,

Plaintiffs,

-against-

THC REALTY DEVELOPMENT, L.P., CASHIN ASSOCIATES, P.C., JKB CONTRACTING, INC., GOSHOW ARCHITECTS, L.L.P., and HIRSCH PLUMBING, CO.,

Defendants.

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Decision/Order
Index No.: 117606/05
Seq. No. : 001, 002

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):

Motion Sequence 001 - Papers	**Numbered**
Def JKB N/M (change venue) w/EDB affirm, exhs	1
Def Cashin w/TL affirm in support, exh	2
Pltf opp w/JCM affirm, exhs	3
Def JKB, reply w/REO affirm	4

Motion Sequence 002 - Papers	**Numbered**
Def Goshow N/M (sj) w/TBM affirm, exhs, memo	1
Def THC oppose w/CFM affirm, exhs	2
Def Goshow reply w/TBM affirm, exh	3

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

This is an action by plaintiff to recover for her alleged personal injuries. Defendant JKB Contracting, Inc. ("JKB") now moves (motion sequence 001) for an order changing the venue of this action from New York County to Suffolk County. CPLR §§ 510, 511. Defendant Cashin Associates, P.C. ("Cashin") has submitted an affirmation in support and Plaintiffs oppose motion sequence 001.

In motion sequence 002, defendant Goshow Architects, LLP ("Goshow") moves for

summary judgment dismissing the cross-claims by THC Realty Development, LP ("THC") against it. THC opposes Goshow's motion.

These motions are hereby consolidated for consideration since the court's disposition of motion sequence 002 impacts the disposition of motion sequence 001.

Issue has been joined, and the note of issue has not yet been filed; therefore summary judgment relief is available. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004).

Relevant Facts

The State University of New York ("SUNY") hired several entities in connection with the renovation of Tabler Cafeteria, a part of Stony Brook University, located in Suffolk County, New York (the "project"). Plaintiff Paulinas Warrick ("Warrick") was an employee of Warrick Mechanical, a New York corporation that was a sub-contractor for JKB. JKB was hired to remove and re-install air-conditioning and heating units at the project. THC and Cashin were the general contractor and construction manager at the project, respectively. Goshow provided architectural services in connection with the project. Co-plaintiff Lucille Warrick is married to Warrick. Hirsch Plumbing, Co. has not appeared in this action.

Plaintiffs claim that on February 9, 2004, Warrick fell from a ladder while working at the project. Plaintiffs allege that the defendants, including Goshow, were negligent in supervising the work and failing to provide a safe place for Warrick to work. Labor Law §§ 200, 240 and 241; 12 NYCRR 23, *et seq.* Warrick was evaluated and treated in the Stony Brook University Hospital emergency department.

Plaintiffs allege that, as Warrick descended the ladder, his foot became entangled in

a rope hanging therefrom. The ladder was affixed to the structure of the work-site to allow access to a mechanical room. The ladder was the only way to access the mechanical room. During his deposition, Warrick claimed that he was unable to safely position his feet on the rungs of the ladder because the ladder itself was affixed too close to the wall. As a result, when he attempted to kick the rope off his foot, he fell from the ladder and sustained injuries.

On July 28, 2006, plaintiffs served their supplemental summons and amended verified complaint. The basis of venue in New York County was the place of business of defendant Goshow Architects, LLP. None of the other appearing defendants reside in New York County and plaintiff resides in Ocala, Florida. On June 18, 2007, plaintiff and all appearing defendants, other than THC, have voluntarily executed a stipulation discontinuing their respective claims and cross-claims against Goshow.

The only remaining claims against Goshow, arising from Paulinas' accident, are those asserted by THC. THC has alleged claims against Cashin, JKB and Goshow for indemnification and contribution.

The court considers the motion for summary judgment first.

Goshow's motion for summary judgment

Goshow has moved for summary judgment dismissing THC's cross-claims. Goshow argues that it cannot be held liable for Warrick's injuries arising from the project, as a matter of law, because there is no evidence of its liability with respect to Warrick's injuries. Goshow specifically argues that: [1] it did not commit an affirmative act of negligence; [2] it lacked authority or control to supervise the work giving rise to Paulinas' injuries; and [3] it had no contractual responsibility for site safety, so it cannot be responsible for personal

injuries sustained by a worker at the construction site.

THC, in opposition, argues that Goshow's motion should be denied because there are material questions of fact as to whether Goshow: [1] had a duty to properly design the building where Warrick's accident took place; [2] breached that duty by failing to design a proper means of ingress/egress for the building's mechanical room; and [3] caused or contributed to Warrick's accident by failing to design a proper means of ingress/egress from the building's mechanical room. THC specifically argues that, even if Goshow had no duty for site safety or to supervise and control the project, Goshow owed a duty to Warrick, and consequently THC, to exercise a degree of care in its plan or design of the ingress/egress to the mechanical room so as to avoid any unreasonable risk of harm to anyone likely to be exposed to the danger.

THC argues that even if Goshow has satisfied its burden on this motion, THC has raised material issues of fact as to whether Warrick's accident can be attributed to Goshow's failure to design a proper means of ingress/egress for the mechanical room. THC additionally argues that Goshow's motion is premature because Goshow has not produced a deposition witness, and in light of plaintiff's testimony, the testimony of Goshow is "highly likely to reveal that it neglected to confirm that the existing access ladder was consistent with industry standards" prior to implementing it in the decision of the project.

In reply, Goshow argues that THC has merely asserted the "unfounded, conclusory allegation" that "Goshow's design for the project was flawed or defective and that such alleged flawed design contributed to Warrick's accident." Goshow states that the absence of any affidavit or other testimony of an engineer, architect, design professional or other expert that the ladder was defective or that it violated any rules, regulations, industry

standards or industrial codes renders such opposition ineffective.

Discussion

The moving party, here Goshow, has the initial burden of proving its *prima facie* case as a basis for summary judgment. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets the initial burden of proving entitlement to summary judgment, as a matter of law, does the burden then shift to THC, which must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to achieve summary judgment in its favor, Goshow is obligated to affirmatively prove its own freedom from liability, as a matter of law. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993); Scansarole v. MSG, 33 A.D.3d 517 (1st Dept. 2006).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003).

THC's common law indemnification claim is premised on the proposition that if it is found liable for plaintiff's injuries, such liability is due to Goshow's negligence. A party held liable only vicariously or by imputation of law may seek indemnification from the party wholly at fault for the injury. Chapel v. Mitchell, 84 N.Y.2d 345 (1994). There is no need to

establish a pre-existing duty or relationship as a basis for an action involving indemnification. Mauro v. McCrindle, 70 A.D.2d 77 (2d Dept. 1979).

In order to sustain a negligence cause of action, a plaintiff must show: [1] that defendant owed plaintiff a duty of care; [2] that said duty was breached; and [3] that the breach of this duty proximately caused plaintiff's damages. Havas v. Victor Paper Stock Co., 49 N.Y.2d 381 (1980).

Labor Law § 200 mandates that all workplaces be equipped, operated and conducted so as to provide reasonable and adequate protection to the workers employed there. In the absence of any contractual right to supervise and control the construction work, as well as site safety, an architect, cannot be held liable in negligence for plaintiff's injuries. Davis v. Lenox School, 151 A.D.2d 230 (1st Dept. 1989); Domenech v. Associated Engineers, 257 A.D.2d 403 (1st Dept. 1999). See generally: Rizzutto v. L.A. Wenger Contracting Co. Inc., 91 N.Y.2d 343 (1998); DeBlase v. Herbert Const. Co., Inc., 5 A.D.3d 624 (2d Dept. 2004). An architect must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," to be held liable under the Labor Law. Russin v. Picciano & Son, 54 NY2d 311, 318 (1981) ("[o]nly [by] obtaining the authority to supervise and control" does an architect have a nondelegable duty as an agent under Labor Law §§ 240 and 241).

Goshow's contract with SUNY dated September 18, 2002 for the services it provided in connection with the project is devoid of any provision which would make Goshow responsible for site safety and/or supervision of the work. Indeed, the contract provides, in connection with Goshow's construction phase services, that Goshow "shall use all reasonable care and diligence and exercise its best efforts to see that the project is

constructed in accordance with the drawings and specifications."

THC has not provided any support for its allegation that Gowshow failed to exercise that degree of care in its plan or design of the project so as "to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger." Micallef v. Miehle Co., 39 N.Y.2d 376 (1976); see also Cubito v. Kreisberg, 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dept. 1979). Moreover, THC has failed to raise any material issue of fact as to whether Goshow was exercising any actual supervision or control over its work at the project, and, whether Goshow had any contractual obligation to do so.

THC's opposition papers are devoid of any affidavits from individuals with personal knowledge of the matters at issue in the case. The affidavit of George Brenseke, who is employed by Brenseke Welding, does not relate to the relevant issues nor does it relate to THC's allegations that the ladder was defective or that Goshow's design of the means of egress/ingress for the mechanical room were flawed. THC's arguments are merely supported by the hearsay affirmation of Attorney Mansfield, which alone is insufficient to satisfy THC's burden to demonstrate, through admissible evidence, the existence of a factual issue requiring trial. Zuckerman, *supra*.

The court finds that THC has failed to successfully oppose this motion. THC points to Warrick's deposition testimony that the ladder was too close to the wall and the rungs were too close together Brenseke's testimony that he removed the ladder in order to sand and paint it, and he subsequently reinstalled the ladder in exactly the same location it was in at the time he removed it. This testimony is insufficient to raise a material issue of fact as to whether Goshow owed a duty to Warrick as a matter of law. In addition, THC does not need discovery from Goshow to put proof before the court in support of its naked allegation

that a design defect existed. At this stage, THC could have had its own expert opine on the matter.

Having failed to raise any material facts that have to be tried, Goshow is entitled to summary judgment against THC dismissing the cross-claims.

JKB's motion for change of venue

JKB contends this case is improperly venued because none of the remaining defendants in the action reside in New York County, the accident Warrick alleges he was injured in occurred in Suffolk County, and after the alleged accident, Warrick was treated in Suffolk County.

Cashin has adopted JKB's arguments. Plaintiffs oppose the motion on the grounds that JKB has not set forth any basis to grant the relief it seeks. Specifically, Plaintiffs contend that granting a motion to change venue is not in the interest of justice and would merely delay the present proceedings. Plaintiffs further argue that New York County should retain venue in this case because "defendants are potentially strictly liable for plaintiff's injuries." Plaintiff's rely on Sherman v. Babylon Recyling Center, Inc., 218 A.D.2d 631 (1st Dept. 1995), which held that where summary judgment on the issue of liability had been decided in favor of plaintiff, "the convenience of plaintiff's damage witnesses no longer need be subordinated to the convenience of defendants' liability witnesses."

The court rejects plaintiffs' contention that New York County should retain venue because defendants' may be held strictly liable for Warrick's injuries. Generally, the venue of a transitory action lies in the county where the cause of action arose. Slavin v. Whispell, 5 AD2d 296 (1st dept. 1958). The facts in Sherman are clearly distinguishable from the case at bar. Plaintiff has not yet filed a motion for summary judgment. Further, it is clear

that venue was based on the principal place of business of an improper party. A motion to change venue should be granted after the action is dismissed against the improper party Clase v. Sidoti, 20 A.D.3d 330 (1st Dept. 2005). Moreover, the convenience of material witness and the ends of justice will be promoted by transfer of venue to Suffolk county, where, none of the remaining defendants in this case reside in New York County, the accident took place in Suffolk County and Warrick was treated in Suffolk County.

The court also rejects plaintiffs' argument that this court should retain venue because it has presided over the discovery in this case. Even though discovery proceeded in this case, the court ordered on June 7, 2007 that "defendants proceed with discovery... and that such discovery will be without prejudice to the pending motion to change venue currently returnable 6/25/07." The mere fact that discovery began in this county does not justify maintaining the aforesaid action in said county.

Accordingly, the motion by JKB to change for a change of venue of this action is granted.

Conclusion

In accordance herewith, it is hereby

ORDERED that the motion by Goshow Architects, LLP, for summary judgment dismissing the cross-claims asserted by THC Realty Development, LP, is hereby granted; and it is further

ORDERED that the motion by JKB Contracting, Inc. For a change of venue of this action is hereby granted; and it is further

ORDERED that the Clerk of the Supreme Court, New York County shall, upon service of a copy of this Order with notice of entry, transfer all the papers in this case to the Clerk of

the Supreme Court, Suffolk County; and it is further

ORDERED that upon receipt of such papers, the Clerk of the Supreme Court of Suffolk County shall assign an index number to this case and place it on its rightful place on the calendar.

Any requested 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
December 14, 2007

So Ordered:

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