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SCANNED ON 3/25/2008

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 111955/2004
COOPER, HARRIET
VS.
MAJESTIC HOTEL
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 2/19/07
MOTION SEQ. NO. 008
MOTION CAL. NO.

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

FILED
FEB 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Spring Scaffolding, Inc. for summary judgment (CPLR 3212) dismissing the complaint and all cross-claims is granted; and it is further

ORDERED that the complaint and all cross-claims as asserted against Spring Scaffolding, Inc. are severed and dismissed; and it is further

ORDERED that Spring Scaffolding, Inc. shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

Dated: 2/20/08 This constitutes the decision and order of the Court.

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

HARRIET COOPER,

Plaintiff,

-against-

MAJESTIC HOTEL, INC., SURREY HOTEL ASSOCIATES, LLC, HAMPSHIRE HOTEL & RESORTS, LLC, CONNECTIONS CONTRACTOR, INC. AND SPRING SCAFFOLDING, INC.,

Defendants.

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Index No. 111955/2004

Motion Sequence #008

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this trip and fall action, defendant Spring Scaffolding, Inc. ("Spring") moves for summary judgment (CPLR 3212) dismissing the complaint of the plaintiff, Harriet Cooper ("plaintiff") and all cross-claims against Spring.

Factual Background

Plaintiff claims that on April 24, 2004, she tripped and fell over a concrete construction block left on the sidewalk while walking underneath a sidewalk bridge in front of the premises located at 210 West 55th Street, New York, New York (the "premises"). According to plaintiff, the concrete block was greyish in color, and approximately 12 inches high, seven inches wide, and seven inches deep, with several holes in it. Plaintiff also claims that there was insufficient lighting beneath the sidewalk bridge. Plaintiff allegedly observed light fixtures with bulbs installed on the roof of the bridge, and that the bulbs were not lit at the time of her accident. At the time of her accident, plaintiff did not observe any construction workers in the area or anyone

erecting the sidewalk bridge or scaffolding. Plaintiff claims that defendants, including Spring, were responsible for the concrete block which caused her to fall and failed to properly illuminate the subject area.

Motion for Summary Judgment

In support of dismissal, Spring contends that defendants Majestic Hotel, Inc., Surrey Hotel Associates, LLC ("Surrey"), and Hampshire Hotel & Resorts, LLC ("Hampshire Hotel") (collectively, "Majestic"), owns and/or manages the premises. Spring submits the deposition testimony of Hampshire Hotel's Regional Director of Engineering, Harry Persaud ("Persaud"), wherein he states that prior to the date of the accident, Majestic entered into one of three contracts with Spring, the first of which involved the construction of a sidewalk bridge and pipe scaffolding at the premises. Persaud supervised the construction of the sidewalk bridge and the work being done at the premises. Spring installed lights every 10 to 15 feet on the ceiling the scaffold, which were on for twenty-four hours a day. Further, no concrete blocks were used in the construction of the sidewalk bridge. Pursuant to Majestic's contract with Spring, it was Majestic's responsibility to maintain the lighting, including bulb replacement, on the sidewalk bridge. After the sidewalk bridge was constructed, Persaud inspected the area, including looking for the lights in the roof of the sidewalk bridge, and found that the bridge was constructed properly pursuant to contract specifications. Further, in addition to the lights under the sidewalk bridge, there were two lights located on the side of the hotel premises, which operated on a timer and a sensor.

According to Persaud, Majestic's second contract with Spring was for the installation of a 10 foot high parapet wall, which was to be attached to the concrete building wall by aluminum

rods. Persaud observed the installation of the parapet wall, which was completed in one day, and states that no pieces of the concrete wall were chipped out. Persaud also inspected the sidewalk and did not find any pieces of concrete. Further, Spring did not use any concrete blocks during its work on the site.

As to the third contract, Persaud states that such contract, which was for the installation of two levels of planking, was dated one month after the alleged accident. None of the work performed by Spring under the third contract was done before April 24, 2004, the date of plaintiff's accident.

Spring also submits the deposition testimony of Virgil Lupu, an Estimator at Spring, responsible for estimating the amount of sidewalk bridge necessary and the scope of the of work. According to Lupu, the sidewalk bridge was constructed by first erecting the steel frame and two columns with header beams. The columns were then connected with horizontal and diagonal pipes, followed by the installation of a deck made of corrugated sheet metal and planks. Spring then installed a ply wall.

According to Lupu, after Spring installs the lighting on the sidewalk bridge, its maintenance becomes the responsibility of the contractor that signed the proposal with Spring. Lupu further stated that Spring does not use any cement during the construction of a sidewalk bridge, and collects all of the debris accumulated during the construction of a sidewalk bridge at the end of the day. Spring was then asked to install a higher parapet wall on the sidewalk bridge, and after the accident, was asked to furnish two additional levels of planks for the pipe scaffold.

Spring argues that since it did not own, occupy, control or make special use of the premises, no duty of care can be attributed to Spring. Spring did not maintain or repair the

subject premises, did not have a contractual obligation to do so, nor did it create the condition which is the subject of this action. Nor is there any evidence that plaintiff detrimentally relied on the continued performance of Spring's contractual obligations, that Spring comprehensively agreed to assume and displace all safety related obligations of Majestic, or that Spring exacerbated or created any risk or defective condition. Thus, as Spring did not have a duty to the plaintiff or to maintain the premises, it cannot be held liable for the plaintiff's injuries.

In opposition, plaintiff argues that Persaud's testimony is not credible. Although Spring's Estimator Lupu testified that the scaffolding was erected in preparation for facade work that was to be done on the outside of the building at the premises, Majestic's Engineer Persaud testified that no work was being done on the outside of the building.

Plaintiff notes that Hamphire, Surrey and Majestic produced records indicating that a contractor was performing electrical work on the outside of the building, which would not have required the sidewalk bridge to be erected. Further, depositions of the electrical contractors indicate that no pieces of concrete were taken from the wall. Thus, according to plaintiff, "there is still a missing ingredient in this case."

Plaintiff contends that she has a pending summary judgment motion against Hampshire, Surrey and Majestic based on spoliation of evidence and false testimony given by Persaud. Thus, plaintiff has no objection to summary judgment in favor of Spring so long as plaintiff is awarded summary judgment against such three defendants. It is inconceivable that "nobody from Spring Scaffolding would know the name of the facade contractor who was on the same construction site as their scaffold." While it is true that with respect to the insufficient lighting claim, "both fingers are pointed towards Majestic, Hampshire and Surrey . . . it is 90% likely that this block

was placed by the facade contractor."

Further, since Spring erected the sidewalk bridge on a public sidewalk, including the lights thereon, it retains the responsibility to ensure that the lights are working properly. If Spring gave this duty over to Majestic, Hampshire, or Surrey, then Spring would have a good cross-claim, but that does not relieve it of the responsibility to the plaintiff as a pedestrian walking on the sidewalk. An entity that encumbers a public sidewalk with a device that would be dangerous unless kept up properly retains a duty to the public at large to make sure that the device is properly maintained.

Majestic also opposes the motion, arguing that Spring was the only entity that owned, installed, and constructed the sidewalk bridge, as well as the lights on the sidewalk bridge. NYC Building Code § 27-1021 requires that either the top of the deck of the sidewalk shed be built against the face of the structure so that no material can fall onto the sidewalk, or that side of the shed be sealed with wood. There is an issue of fact as to whether Spring's violation of such Building Code caused plaintiff's accident. Even if the Court finds that Spring is not liable to the plaintiff, the cross-claims of Majestic must remain. Further, any new claim Spring raises in response to Majestic's opposition to correct the inadequacies of Spring's submission should not be considered by the Court.

In reply, Spring contends that Persaud unequivocally testified to his direct involvement in the erection of the sidewalk bridge. Persaud did not recall whether there was any work being done on the facade of the building, and stated that this information would be within the knowledge of Vice President of the Development, Riyaz Akhtar. Rather than requesting Majestic to produce a witness with knowledge of the construction work, or Akhtar, however,

plaintiff attacks the lack of knowledge of Persaud. Further, Spring's contract was with Majestic, and thus, Spring would have no reason to have had any contact with the renovation contractor at the site. Spring was not involved in that contractor's work, and was never involved in any meetings with same. Lupu of Spring also established the fact that Spring did not place the concrete block in the walkway and installed the lighting pursuant to NYC Building Code standards. Spring's contract with Majestic provides that maintenance of the lighting rests squarely with Majestic. Spring installs the bridge and light fixtures and then leaves the site. Spring does not return unless and until it is notified of a problem. Even then, the contract specifically excludes the maintenance of the light bulbs, which is the responsibility of Majestic.

In reply to Majestic's arguments, Spring argues that the sidewalk bridge was not the cause of plaintiff's accident, and thus, the only issue is the lighting. There is no question that the lighting on the sidewalk bridge was properly installed, and that when Spring left the site, they were in working order as testified to by Majestic's witness. Since Spring erects the sidewalk bridge, leases it to Majestic, and leaves the site until called to remove it, Spring is an absentee owner. As an absentee or out-of-possession owner, Spring retained no control over the sidewalk bridge, and thus, is not liable for plaintiff's injuries. Maintenance of lights is not a non-delegable duty for which Spring must remain responsible. Further, Majestic's claim that Spring failed to comply with NYC Building Code § 27-1021 is speculative. And, any suggestion that such a sizeable concrete block could have been placed in the middle of the sidewalk due to some unnamed failure to comply with such Building Code is speculative. Notably, an electric contractor testified that the sidewalk bridge was "safe," and the Court has discretion to consider such testimony since Majestic was fully aware of this testimony and can be permitted to submit a

sur-reply.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the

existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premise (*Balsam v Delma Engineering Corp.*, 139 A.D.2d 292, 532 N.Y.S.2d 105 [1st Dept 1988] *citing Gilbert Props. v City of New York*, 33 AD2d 175, 178, *affd* 27 NY2d 594). The existence of one or more of these elements is sufficient to give rise to a duty of care (*Balsam v Delma Engineering Corp, supra*). Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property (*Dick v Sunbright Steam Laundry Corp.*, 307 NY 422, 424). Here, it cannot be said that Spring either owned, occupied, controlled or made special use of the premises where plaintiff fell. Thus, Spring cannot be held liable under such theories of negligence.

It has also been held, as a general rule under New York law, that a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 [1990]). There are, however, three recognized

exceptions to the general rule. In *Espinal v Melville Snow Contractors, Inc.*, 98 N.Y.S.2d 136 [2002], the Court of Appeals stated that a party who enters into a contract to render services may be said to have assumed a duty of care and thus be potentially liable in tort to third persons under the following circumstances:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duties to maintain the premises safely.

Espinal, 98 N.Y.2d at 140 (citations and internal quotation marks omitted).

Where a service contract is not a comprehensive and exclusive property maintenance obligation intended to displace a landowner's duty to maintain the property, the contractor owes no duty of reasonable care to prevent foreseeable harm to an injured plaintiff (see *Espinal v Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120, 773 N.E.2d 485). An exception to this rule is where the contractor's actions have "advanced to such a point as to have launched a force or instrument of harm" (*Moch Co. Inc. v Rensselaer Water Co.*, 247 N.Y. 160, 168, 159 N.E. 896; *see Espinal v Melville Snow Contrs., supra* at 140, 746 N.Y.S.2d 120, 773 N.E.2d 485). A contractor who "creates or exacerbates" a harmful condition may generally be said to have "launched" it (*Espinal v Melville Snow Contrs., supra* at 142, 746 N.Y.S.2d 120, 773 N.E.2d 485).

These exceptions to the general rule that a contractual obligation, alone, will not give rise to tort liability, do not apply to the facts herein.

There is no basis in the record, from which a reasonable fact finder may infer, that Spring launched a "force or instrument of harm" in the construction of the sidewalk bridge, pipe

scaffold, or parapet wall, or caused the concrete block to be placed upon the sidewalk where plaintiff's fell (*cf. Skolnick v Kalimian*, 184 A.D.2d 310, 584 N.Y.S.2d 567 [1st Dept 1992] [issue of fact precluded summary judgment where affidavit from store owner that the mound of concrete appeared to be the same concrete used to secure the scaffold poles rebutted claim by scaffold company that it did not use concrete in its work]). The deposition testimony submitted indicates that Spring did not place the concrete block on the sidewalk, and that the concrete block's presence on the sidewalk was not due to any act or failure to act on Spring's part (*see Tepper v City of New York,* 13 A.D.3d 124, 786 N.Y.S.2d 449 [1st Dept 2004]). Indeed, the record submitted by Spring in support of its motion establishes that prior to the plaintiff's alleged accident, Spring merely installed the sidewalk bridge and parapet wall, neither of which involved the use of any concrete, cement blocks, or involvement with the concrete building wall.

Further, there is no evidence indicating that plaintiff detrimentally relied on the performance of Spring's duties under Spring's contract with Majestic. The deposition testimony referred to above, and Spring's contracts with Majestic indicate, that Spring agreed to erect a sidewalk bridge and pipe scaffold, and then, a 10-feet high parapet wall at the premises. Plaintiff did not trip over any portion of the sidewalk bridge itself; nor were her injuries the result of the pipe scaffold or parapet wall. And, with respect to plaintiff's insufficient lighting claim, Spring was not responsible for the continued maintenance of the lighting, including replacement of the light bulbs, under the roof of the sidewalk bridge. The continued maintenance of the lighting under the sidewalk bridge fell squarely upon Majestic based on Spring's contracts with Majestic.

Nor is there any evidence that Spring had entirely displaced Majestic's duty to maintain the sidewalk in a reasonably safe condition. There is no indication that Spring agreed to

undertake or undertook an obligation to maintain the sidewalk or work site; again, Spring was solely engaged to construct the sidewalk bridge, pipe scaffold, and parapet wall.

Plaintiff's arguments regarding the lack of Spring's knowledge of other contractors at the worksite and motion for spoliation are insufficient to overcome Spring's entitlement to summary judgment. Further, there is no evidence in the record to support the claim that Spring violated NYC Building Code § 27-1021. Majestic's claim in this regard is based on pure speculation. Thus, plaintiff's and Majestic's mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*see Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]). Further, the mere hope that evidence sufficient to establish Spring's liability may be obtained or that discovery has not been completed or destroyed are insufficient reasons to deny Spring's motion for summary judgment (*see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]; *see also Steinberg v Abdul*, 230 AD2d 633 [1966]; *Jones v Gameray*, 153 AD2d 550 [1989]).

Based on the above, and as there is no evidence linking Spring to the concrete block at issue, the complaint as asserted against Spring is dismissed.

Consequently, the common law based cross-claims asserted against Spring Scaffolding, Inc. are dismissed.

Therefore, it is hereby

ORDERED that the motion by Spring Scaffolding, Inc. for summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED that the complaint and all cross-claims as asserted against Spring Scaffolding, Inc. are severed and dismissed; and it is further

ORDERED that Spring Scaffolding, Inc. shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 20, 2008

Hon. Carol Robinson Edmead, J.S.C.