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

PRESENT: HON. CAROL EDMEAD PART 55

Index Number : 109248/2004
NEEDLE, NANCY
VS.
TEMCO SERVICE INDUSTRIES
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/17/08
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

The within motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant/Third-Party Plaintiff Temco Service Industries, Inc., for an order pursuant to CPLR 3212, granting summary judgment in its favor as against the plaintiff Nancy Needle, dismissing plaintiff's complaint as well as any cross claims or third-party claims against Temco, is **denied**; and it is further

ORDERED that counsel for defendant Temco shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 3/24/08

HON. CAROL EDMEAD J.S.C.

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

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 35

NANCY NEEDLE,

Plaintiff

Index No. 109248/04

-against-

TEMCO SERVICE INDUSTRIES, INC., NATIONAL ENVIRONMENTAL ASSOCIATES, INC., and NATIONAL ENVIRONMENTAL SAFETY CO., INC.,[1]

DECISION/ORDER

Defendants.

TEMCO SERVICE INDUSTRIES, INC.,

Third-Party Plaintiff,

Third-Party Index No. 590299/06

-against-

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Third-Party Defendant.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant/Third-Party Plaintiff Temco Service Industries, Inc. ("Temco"), moves for an order pursuant to CPLR 3212, granting summary judgment in its favor as against the plaintiff Nancy Needle ("plaintiff") dismissing plaintiff's complaint as well as any cross claims or third-party claims against Temco.

On December 4, 2003, plaintiff, an employee of the New York City Department of Education (the "Board"), was injured while she sat at a table in her assigned workspace on the

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[1] Pursuant to a Stipulation filed with the Court on December 7, 2007, this case was discontinued as against defendants National Environmental Safety Co., Inc., and the New York City School Construction Authority.

fifth floor of a New York City-owned office building located at 28-11 Queens Plaza North, Long Island City, New York (the "subject location").

Summary of Relevant Deposition Testimony

Plaintiff's Deposition dated 11/8/05

Plaintiff was struck in the head with a fluorescent light fixture cover while sitting at a small conference table. (p. 10) Within one year period before the accident, plaintiff was aware of more than one occasion when covers had fallen off of light fixtures within room 501. (pp. 13-14) Within a six month period before her accident, plaintiff had seen light fixture covers fallen off of the light fixtures on two or three occasions. (p. 15) On two or three occasions before her accident, plaintiff had made complaints to Robert Blacknick, the head of custodial services with Temco, about the light covers within room 501. She told him that she represented the staff and that people had seen covers on the grounds where they had not seen them before. Mr. Blacknick told her he would fix them and put them back up. After the complaints were made to Mr. Blacknick, the covers were reattached to the light fixtures. (pp. 16-18) Within a two month period before her accident, plaintiff worked in the area of her accident on a daily basis. And, within a six month period before her accident, she had not noticed any problems with the cover or the light fixtures. (p. 23) She never asked Temco to notify the owner of the building, and she has no knowledge of anyone notifying the owner of the building of the problem with the light fixture covers. (p. 87)

After her accident, Mr. Blacknick spoke with plaintiff and said it was a shame that this had happened, that he had told people that the light fixtures should have been replaced, they were risky. (p. 26)

Plaintiff's Deposition dated 3/9/07

Plaintiff is not aware whether the specific light fixture that fell on her had ever fallen previously. (p. 23) In the late Spring of 2003 and continuing and then into the Summer before her accident, plaintiff observed repair or renovation work being performed on the fifth floor. This was before she and her staff moved in. She was touring the facility. (pp. 31-32) When she began work in July of 2003, the renovation work was not complete. They were still snaking or stringing many wires in the ceiling. They were working on putting the cubicles up, and plaintiff is not sure if the carpeting was down yet. (pp. 33-34)

Deposition of Jay M. Klahr dated 1/17/06

Mr. Klahr witnessed plaintiff's accident. (p. 11) When he first started working in the building sometime around July of 2003, there was a lot of construction ongoing, wiring in the ceiling, etc. (p. 15) Temco was responsible for custodial services in the building, including replacement of lights. (p. 17) There were times the staff would come into the office and find the light fixture covers on the floor or ceiling tiles on the floor. (p. 19)

Deposition of Robert Blacknick dated 3/1/06

Mr. Blacknick is employed by Temco. He manages the subject premises, and has done so since 1998. He runs the building addressing problems with lights, fixtures, cleaning; everything in the building, including making minor repairs. (pp. 4-7) Temco did not have anything to do with the renovation of the premises. (p. 14) In 2003, he knew that National Environmental Safety Co., Inc. ("National Environmental") was working in the premises because he had contact with its staff. (p. 15) Maybe October or November 2003 the renovation work on the fifth floor was complete. (pp. 20-21) During the renovation, the light fixtures were kept. Either SCA or

National Environmental put new ballasts in them, new bulbs, new covers, and the guards that clip onto the fixture, starters. (pp. 21-23)

For a period of time the work had been completed on the fifth floor before the employees of the Board moved in. After the work was completed it was Temco's responsibility to maintain them. (pp. 23-24) After the work was completed, no one ever complained to him about the fixture covers falling. (p. 25) He never assigned anyone to replace any of the fixture covers on the fixtures after the work had been completed and before December 2003. (pp. 25-26) He does not recall speaking to plaintiff at all on the date of her accident. (pp. 32-33) It was his job to replace the light fixture cover. After plaintiff's accident, he had one of his men replace the cover. (p. 35) None of his employees replaced any of the light fixture covers prior to December 2003. (pp. 36-37) If a light fixture cover fell, it would break and have to be repaired. Temco did not have replacement covers. He would have to contact National Environmental to obtain a cover. He requested such replacement covers prior to plaintiff's accident on a few occasions. (pp. 37-38) Subsequent to plaintiff's accident his staff secured the light fixture covers. (p. 40) He maintains records of repairs. (p. 41) A computer record is created for all repair work done. (pp. 42-43) He is positive that when he called National Environmental to say a fixture cover had fallen, it was not for the cover that caused plaintiff's accident. (p. 52) He never made complaints to National Environmental employees about falling light covers. (p. 55) He is unaware of anyone from Temco making such a complaint. (p. 56)

Deposition of Frank Matriciano dated 9/24/07

He has worked for National Environmental for 18 years. He is a field supervisor for construction. (p. 5) While on the job at the subject premises, he never noticed any fluorescent

light cover falling on the fifth floor. (p. 15) Making sure that the fluorescent light covers were affixed properly was not National Environmental's job. (p. 18)

Deposition of Michael Eitingon dated 9/27/07

Mr. Eitingon is the chief project officer for the SCA and has been so for the past five years. (p. 5) The company that performed the work on the light fixtures at the subject premises was Milad electric. (p. 13) While the renovation project was underway, no one complained to him about light fixture covers falling off on the fifth floor. (pp. 26-27) He is not aware of Temco doing any type of work related to the new light fixtures. (p. 30)

Deposition of Marvin Stober dated 1/7/08

In July 2003 he worked at the subject premises and construction was taking place at that time. (p. 12) He does not recollect work being done overhead with the lighting at the time they moved in. (p. 14) The problem he recalls with the light fixtures at the time was that a few of the "bonnets" (covers) had fallen. (p. 16) Relatively soon after moving into the subject premises, he witnessed a cover fall. (pp. 16-17) Building maintenance was notified to replace the cover. (p. 19) After the incident with plaintiff, he spoke with "Bob" (Mr. Blacknick) who said that the Department of Education had asked him to put this construction up as quickly and as cheaply as possible, which is why they did not replace the fixtures. (p. 28) Mr. Blacknick did not say who put the fixtures up. (p. 29)

Temco's Contentions

At the time of plaintiff's accident, Temco provided certain janitorial services at the premises pursuant to a Service Agreement between Temco and the Department of Education, dated January 29, 2002. Prior to plaintiff's accident, third-party defendant New York City

School Construction Authority ("SCA") hired a contractor or contractors to perform a renovation project on the fifth floor of the premises for plaintiff's employer, the Board. Part of the renovation project allegedly involved the replacement of certain parts of the subject overhead fluorescent fixtures which were located on the fifth floor of the premises. Temco was not involved in the renovation project and Temco did not install, modify, alter or perform any work with respect to the subject lighting fixtures and/or covers to the fixtures at any time prior to the alleged incident.

Upon information and belief, defendant National Environmental or TDX Construction Corporation ("TDX") installed, modified and/or performed work on the subject lighting fixtures prior to the accident and provided a replacement cover for the fixture at the subject location.

Although plaintiff speculates that a dangerous condition existed at the specific location where the incident occurred, there is no evidence that Temco caused, created or had either actual or constructive notice of the specific condition, that purportedly caused or contributed to the alleged incident.

Temco performed certain custodial duties at the premises pursuant to the service contract with the Board, plaintiff's employer. However, Temco was not involved in the demolition and renovation project which occurred on the fifth floor of the premises shortly before and during the time that the Board took over the occupancy of the area. Further, Temco did not install and/or supervise the installation of the lighting fixtures and/or covers to those fixtures. Either SCA and/or National Environmental performed the demolition and renovation work, or a contractor or contractors hired by one or both of those entities performed the subject demolition and renovation work.

Temco did not owe plaintiff a duty of care as a maintenance contractor such as Temco, does not owe a duty of care to a third party such as plaintiff. Plaintiff was not an intended third-party beneficiary of the Temco's contract.

Plaintiff's Opposition

It is undisputed that some degree of renovation work had been performed at the subject location between December 2002 and June or July 2003. However, the precise nature and extent of that work has not been established or presented by Temco, since the work contract appended as Exhibit "T" to its motion is silent about this space or location. That contract does not contain any specifications, plans, drawings, or work orders, of any kind or description, relevant or appertaining to the subject location. The only evidence about the work comes from the general, clearly unrefreshed testimonial recollection of a subcontractor (National Environmental), the SCA's chief project officer, and Temco's own employee, Mr. Blacknick.

Temco asserts that the renovation work involved salvaging the existing lighting fixtures (suspension pole, wiring and the part that the bulbs hook into, the reflector), replacing the ballast device (the starter), the bulbs themselves, and the fixture cover (also referred to as a lens). To that extent only, testimony of other witnesses would generally corroborate this basic work. What Temco has not established in this motion is whether that work involved every single lighting fixture or only some, or if it involved the fixtures above the plaintiff's work area. In fact, Mr. Matriciano denied that his company (National Environmental) did any lighting work at all. So he could add nothing of value to our fund of knowledge. And, Mr. Eitingon, the SCA official responsible for the work, testified that to the best of his recollection, while only "some" lenses were replaced, he thought the replacements only involved ceiling mounted, rather than suspended

light fixtures. It is undisputed that the fixture immediately above plaintiff's head that morning was a suspended fixture.

Although there is some confusion about when the renovation work started and ended, Mr. Blacknick was certain that it had been completed before the Board employees moved into the fifth floor.

Under Temco's contract with the Board, Temco, specifically Article 6A, Temco would undertake to do general construction work valued at less than $1000 and mechanical, electrical and plumbing work valued at less than $2000.

Given the nature and scope of the responsibilities Temco had for this building, and the people in it, a jury would certainly be entitled to conclude from the present evidence that Temco was negligent in failing to investigate the cause, explore ways to prevent it, check every cover for safety and integrity, or remove the covers until suitable solutions could be devised. It was reasonably foreseeable that sooner or later, an unsecured loose or poorly fitted cover would fall on someone. And since we know that Temco immediately secured all of the covers with wire plastic clips immediately after the accident, that Temco had authority to take such steps and that Temco had the means to fashion a solution that would enhance the safety of everyone working in the building.

With respect to Temco's argument that it did not have actual or constructive notice of a problem with the light fixtures, Mr. Blacknick's deposition testimony contradicts that position. Mr. Blacknick stated in his deposition that he was aware that light covers had fallen before this accident, and that he had called the people he thought were responsible (National Environmental). However, the National Environmental witness specifically testified that his

company had nothing to do at all with the lighting part of the renovation work.

Plaintiff testified that she spoke directly to Mr. Blacknick on 2 or 3 separate occasions before the accident to communicate reports she had received from people on her floor about finding light covers lying on the floor. She even saw one on the floor herself. She explained that she made these reports to the building manager on behalf of staff that she was directly responsible for supervising.

And, Temco has not come forward with any affirmative evidence by way of affidavit or document, to establish that a search of their work records for six months before the accident revealed an absence of repair or replacement to any ceiling light fixture on the fourth or fifth floor. These work records were identified during Mr. Blacknick's deposition and a demand for them was placed on the record. They have never been produced or exchanged.

Temco's Reply

Temco does not have to prove that work was performed on every single lighting fixture at the premises; Temco must prove that it had not duty to plaintiff and/or that it never had notice of the subject condition, either actual or constructive.

Because various other entities were performing ongoing construction work at the premises on behalf of the premises owner, the City of New York, this fact precludes any claim that Temco had taken control of the premises to such an extent that it displaced New York City as the owner of the building.

Plaintiff's claim that Temco's work post accident, in applying plastic wire clips to the light fixtures at the premises, also bears no relevance to whether Temco is entitled to summary judgment. In fact, post-accident remediations are not admissible and must be disregarded by the

court.

There is no evidence that Temco had either actual or constructive notice of any problem pertaining to the specific light cover which struck plaintiff.

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] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). 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]).

Duty

As artfully articulated by Judge Bellacosa, in *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 585:

> a duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence (see, Eiseman v State of New York, 70 NY2d 175, 187; Turcotte v Fell, 68 NY2d 432, 437; Akins v Glens Falls City School Dist., 53 NY2d 325; Pulka v Edelman, 40 NY2d 781). Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting

> anything to fact-finding or jury consideration (see, Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 226, supra; Waters v New York City Hous. Auth., 69 NY2d 225, 229; De Angelis v Lutheran Med. Ctr., 58 NY2d 1053, 1055). Common-law experience teaches that duty is not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis (see, De Angelis v Lutheran Med. Ctr., supra; Micallef v Miehle Co., 39 NY2d 376, 385; Codling v Paglia, 32 NY2d 330, 340).

A contractual obligation, standing alone, does not impose a duty of care and, thus, tort liability in favor of third persons (*see Espinal v Melville Snow Contrs.*, 98 N.Y.2d 136, 138 [2002] citing *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 [1990]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579 [1994]). A contracting party may be found to have assumed a duty of care, and potential tort liability, where the contracting party, fails to exercise reasonable care in the performance of his duties, "launch[es] a force or instrument of harm", or 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 duty to safely maintain the premises (*Espinal v Melville Snow Contrs.*, 98 N.Y.2d at 140 [citations omitted]).

Temco admits that Temco performed certain custodial duties at the premises pursuant to the service contract with the Board, plaintiff's employer. Temco's head of custodial services admits that once the renovation work was complete, Temco was responsible for maintaining and replacing the light fixtures. Because of the nature, breadth and context of the full service maintenance contract Temco had with the City, an issue of fact exists as to Temco's responsibilities for the fixtures that caused plaintiff's accident, and as to the nature and scope of

Temco's duties.

Notice

The depositions of plaintiff and nonparty witnesses raise issues of fact as to whether Temco had notice that the falling light fixture covers were a dangerous and recurring condition that caused this injury (*Irizarry v 15 Mosholu Four, LLC,* 24 A.D.3d 373, 806 N.Y.S.2d 534 [2005]; *Uhlich v Canada Dry Bottling Co. of N.Y.,* 305 A.D.2d 107, 758 N.Y.S.2d 650 [2003]). Plaintiff did not have to prove that Temco knew or should have known the existence of a problem with the light fixture cover on the exact cover that fell on her and caused her accident (*Benn v Municipal Hous. Auth. for City of Yonkers,* 275 A.D.2d 755, 756, 713 N.Y.S.2d 544 [2000]).

In fact, Temco's head of custodial services admits that he was aware of the light fixture covers falling off. Although he further states that he notified National Environmental, that does not establish, as a matter of law, that Temco had no actionable duty.

Further plaintiff states in her deposition that she specifically notified Blacknick - Temco's head of custodial services - on more than one occasion, about falling light fixture covers. That Blacknick.

Post Accident Repairs

Evidence of post-accident repairs and remedial measures is not discoverable or admissible in a negligence case unless there is an issue of maintenance or control (*see, Cleland v 60-02 Woodside Corp.*, 221 AD2d 307, 308; *Klatz v Armor El. Co.*, 93 AD2d 633). An issue of maintenance and control exists in the instant case.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant/Third-Party Plaintiff Temco Service Industries, Inc., for an order pursuant to CPLR 3212, granting summary judgment in its favor as against the plaintiff Nancy Needle, dismissing plaintiff's complaint as well as any cross claims or third-party claims against Temco, is **denied**; and it is further

ORDERED that counsel for defendant Temco shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of this court.

Dated: March 24, 2008

Carol Robinson Edmead, J.S.C.