SHORT FORM ORDER

INDEX No. 04-26012
CAL. No. 07-02355-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 3-13-08
ADJ. DATE 6-2-08
Mot. Seq. # 002 - MD

KATHY MARX,	:	ROSENBERG & GLUCK, L.L.P.
	:	Attorneys for Plaintiff
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Plaintiff,	:	Holtsville, New York 11742
	:	
- against -	:	PEREZ & VARVARO
	:	Attorneys for Defendant Reckson
	:	333 Earle Ovington Blvd., P.O. Box 9372
RECKSON ASSOCIATES REALTY CORP. and	:	Uniondale, New York 11553-3644
APOLLO H.V.A.C. CORPORATION,	:	
	:	FRENCH & RAFTER, LLP
	:	Attorneys for Defendant Apollo
Defendants.	:	29 Broadway
	:	New York, New York 10006

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 23; 24 - 25; Replying Affidavits and supporting papers 26 - 27; 28; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Apollo H.V.A.C. Corporation for summary judgment dismissing the complaint and all cross claims against it, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on September 12, 2003, when, as she was exiting the lobby of a building owned by defendant Reckson Associates Realty Corp. (hereinafter Reckson), she was struck by a linear diffuser[1]. At the time of the accident, the plaintiff was an employee of the building's sole tenant. The linear diffuser had been installed by defendant Apollo H.V.A.C. Corporation (hereinafter Apollo). It was located above the west lobby doors and allegedly fell approximately fifteen feet from a ceiling soffit. The plaintiff's verified amended bill of particulars alleges, *inter alia*, that the defendants were negligent in that the linear

[1] A linear diffuser is also referred to as a vent cover.

diffuser was improperly installed and improperly maintained. It also alleges that the doctrine of res ipsa loquitur applies herein.

Defendant Apollo now moves for summary judgment dismissing the complaint and all cross claims against it. In support thereof, Apollo submits, among other things, the plaintiff's deposition testimony wherein she explained that on September 12, 2003, she was going outside to get some air, using the west entrance. She stated that as she put her hand on the door, she felt a blow from behind on the left side of her body. The plaintiff alleged that the force of the blow projected her forward through the doorway and that she went down on her hands and knees on the concrete outside. The plaintiff testified that she turned to see what hit her and saw a six foot long metal grate with sharp pointed ends. She also stated that when she looked up, she saw a hole in the ceiling.

Defendant Apollo, in further support, submits the deposition testimony and affidavit of Walter Van Dyke, who has worked in the heating and air conditioning industry for more than 28 years, and who has been a supervisor for Apollo for at least 15 years. At his deposition, Mr. Van Dyke testified that in September, 2003, Reckson had an agreement with Apollo for Apollo to perform maintenance on their heating and air conditioning equipment and to respond to service calls. He also explained that a linear diffuser is made up of a frame (which goes into and covers up the raw edge of the sheetrock and gets screwed into the duct work), and the core (which is the grill portion that goes into the frame and gets secured by plastic clips). He testified to the effect that the amount of clips used to secure the grill varies depending upon the size of the grill, and only clips were used to attach the core to the frame. He also stated that he could not say how many clips would be used to attach a six-foot long diffuser because each manufacturer has a different method and number of clips. In addition, Mr. Van Dyke testified that after he was notified of the accident, and upon arriving at the building and meeting with Reckson's maintenance man and property manager, he got up on a ladder to try and figure out why the incident happened. He stated that when he got up on the ladder, he saw the empty frame with maybe three or four clips still in the frame. He also testified in pertinent part that he could not tell if the clips were broken and that he could not remember seeing any silicone or other substance on the frame.

In his affidavit, Mr. Van Dyke alleges that Apollo installed the HVAC (heating, ventilation, and air conditioning) system at the premises in or about May or June of 2002. He states that after the installation of the HVAC system, however, Apollo only performed maintenance to the mechanical components of the HVAC system and did not maintain the ducts and linear diffusers after they were installed. He further alleges that Apollo did not provide any maintenance to the ducts, and in particular, to the linear diffuser in the west lobby that purportedly fell on the plaintiff. Mr. Van Dyke states that Apollo did not service this linear diffuser or do any work that would have impacted the linear diffuser in the west lobby. He alleges that Apollo is not at the premises on a daily basis; that the linear diffuser that fell on the plaintiff was not within the exclusive control of Apollo; and that Apollo not did receive any service calls or complaints prior to the date of the accident.

Additionally, defendant Apollo submits the deposition testimony of Diane Dorsi, the property manager for defendant Reckson. Ms. Dorsi testified that in September, 2003, there was a contract in effect between Apollo and Reckson for HVAC maintenance. Ms. Dorsi states that she was not aware of any work being performed on that linear diffuser on September 12, 2003 and that she assumed that the

diffuser was the original. Ms. Dorsi also testified that prior to September 12, 2003, there was never an occasion where linear diffusers fell from their placement, nor did Reckson receive any complaints of the diffusers falling out of their placement.

Lastly, defendant Apollo submits the deposition testimony of Edwin Ebanks, defendant Reckson's maintenance person, and highlights that portion of Mr. Ebanks testimony wherein he stated that Apollo would perform routine maintenance on the HVAC units, which included changing filters and cleaning coils every three months and changing fan belts every six months. Mr. Ebanks testified that he could not recall the ducts ever being cleaned prior to the plaintiff's accident; he never observed the vent cover that fell on the plaintiff being removed prior to the plaintiff's accident; and he never received any complaints regarding the subject linear diffuser prior to the plaintiff's accident. Mr. Ebanks also testified that on the day of the accident, when he examined the vent that fell, he observed something like silicone on the longer end of the vent, closer to the corner. Mr. Ebanks alleged that he asked Apollo employees why the vent cover had silicone, but he did not get an answer.

Apollo argues that it is undisputed that it did not service and/or maintain the subject linear diffuser at any time prior to the plaintiff's accident. It contends that merely because it installed the linear diffuser, but did no maintenance or service prior to the plaintiff's accident, is an insufficient basis to support a negligence claim against it. Apollo maintains that there is no evidence that it created the condition that caused the plaintiff's accident or that it had any duty to maintain or inspect the subject linear diffuser. It asserts that the record is devoid of any evidence that it had either actual or constructive notice of any problems with the linear diffuser in the west lobby at any time prior to September 12, 2003. Apollo further argues it was not in possession and control of the linear diffuser in the west lobby and that it was not at the premises on a daily basis. Apollo claims that based upon the foregoing, it is entitled to summary judgment dismissing the complaint and all cross-claims against it.

Defendant Reckson opposes Apollo's motion, arguing that Apollo installed the linear diffuser a mere fifteen months prior to the date of the plaintiff's accident. Reckson maintains that it was incumbent upon Apollo to see that the diffuser was properly and securely installed. Reckson asserts that there is no evidence that any other party or entity had anything to do with the diffuser from the time it was installed until the date of the accident. It points to the portion of Mr. Ebank's deposition testimony submitted by Apollo, wherein Mr. Ebanks testified that he never performed any work on the vent covers/linear diffusers, nor did he know of any other Reckson maintenance people who performed work on the vent covers/linear diffusers. Reckson alleges that there are questions of fact herein as to how this diffuser was attached; whether it was done properly; and whether, as the last known entity to have touched the diffuser, Apollo can escape liability simply because it alleges that the diffuser was a "non-serviceable item."

The plaintiff also opposes Apollo's motion for summary judgment, and contends that Apollo failed to prove that it did not create the dangerous condition that caused her injuries. The plaintiff asserts that it is unrefuted that Apollo installed the linear diffuser and that no one touched the diffuser up to the date of the incident. In further opposition, the plaintiff submits the affidavit of Joseph Zinman, a professional engineer, and an expert in the field of mechanical engineering and building design, as well as the design, installation and analysis of heating, ventilation, and air conditioning systems.

Mr. Zinman alleges that in order to conduct his analysis of this accident, he examined and measured the core (the grill portion) of the linear diffuser involved in this action and reviewed the following: photographs of the core; photographs of the incident location; the deposition transcripts; the affidavit of Mr. Van Dyke; the HVAC plans; and the Sheet Metal and Air Conditioning Contractors' National Association, Incorporated (SMACNA) "HVAC Duct Construction Standards, Metal and Flexible," Second Edition-1995 and Addendum No.1 November 1997. Mr. Zinman states in pertinent part that the incident herein involved the core of the linear diffuser which is approximately 72 inches long, 5 to 6 inches wide and weighs approximately 6 pounds. He also alleges that upon examination of the complained of core he observed a silicone-like substance on the core in at least 3 places. Mr. Zinman states that SMACNA Standards show various grill and register connection details, and in none of these details do they show silicone or a silicone-like substance being used to support any part of the linear diffuser. He concludes within a reasonable degree of engineering certainty: if the linear diffuser was properly installed, it would never have fallen; in his 35 years of experience, he has never seen or heard of a diffuser core falling out of its frame; and the silicone-like substance on the core indicates to him that the installer may have had problems holding the core in place and that the installer decided to use an external substance (i.e. silicone) to help keep it in place. Mr. Zinman also concludes within a reasonable degree of engineering certainty: the use of the above-noted external substance is contrary to the SMACNA requirements; and based upon the deposition testimony, the linear diffuser had never been touched or cleaned from the date of installation up to the date of the within incident. The plaintiff alleges that based upon its expert's affidavit, there are questions of fact as to whether Apollo improperly installed the linear diffuser and created an unreasonable risk of harm.

"Generally, a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a non-contracting third party" (***Ragone v Spring Scaffolding, Inc.***, 46 AD3d 652, 848 NYS2d 230 [2007]). However, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care, and therefore may be potentially liable in tort to third persons: "(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 duty to maintain the premises safely" (***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136,140; 746 NYS2d 120, 123 [2002] [internal citations omitted]). In this case, there is no claim that the plaintiff detrimentally relied on the continued performance of Apollo, so the second exception is not applicable herein. Further, the court finds that Apollo has met its prima facie burden of establishing that it did not displace building owner Reckson's duty to maintain its premises safely. Both Mr. Van Dyke's and Mr. Ebank's deposition testimony indicated that Apollo did scheduled maintenance of only certain parts of the HVAC system, or made service calls only when specifically requested. (*see*, ***Espinal v Melville Snow Contractors, Inc.***, *supra*).

However, the court finds that Apollo has failed to meet its prima facie burden concerning whether its installation of the linear diffuser launched a force or instrument of harm (*see*, ***Ragone v Spring Scaffolding, Inc.***, *supra*; ***Grant v Caprice Management Corp.***, 43 AD3d 708, 841 NYS2d 555 [2007]; ***Bienaime v Reyer***, 41 AD3d 400, 837 NYS2d 737 [2007]). The deposition testimony of Mr. Van Dyke revealed that he had no knowledge as to how many clips were required to properly secure this linear diffuser. Nor is there any poof as to how many clips were actually used during the diffuser's

installation. Moreover, the deposition testimony of Mr. Ebanks, that there was a silicone-like substance on the vent, appears to be inconsistent with Mr. Van Dyke's testimony that nothing else, other than the clips, is used to attach the core to the frame. Therefore, based upon the proof submitted by Apollo, an issue of fact exists as to whether the linear diffused was properly installed. Furthermore, it is unclear from the evidence submitted whether anyone else touched this linear diffuser since Apollo's installation. Exclusive control over the instrumentality of the accident is not an absolute rigid concept, but it, "implies that the possession and control of the defendant over the instrumentality are of such a character that the probability that the negligent act was caused by someone other than the defendant is so remote that it is fair to permit an inference that the defendant is the negligent party" (***Cameron v H. C. Bohack Co.***, 27 AD2d 362, 364; 280 NYS2d 483, 485 [1967]). Thus, there exists triable issues of fact as to whether Apollo had exclusive control of the linear diffuser at issue and whether the doctrine of res ipsa loquitur is applicable (*see*, ***Ostuni v East Rockaway Village Tavern, Inc.***, 238 AD2d 558, 657 NYS2d 954 [1997]).

Accordingly, Apollo's motion for summary judgment dismissing the complaint and all cross claims against it, is denied.

Dated: 7/31/08
Riverhead, NY

Emily Pines
HON. EMILY PINES J.S.C.