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

PRESENT: JUDITH J. GISCHE PART 10

Justice

Senatass

-v-

Consolidated Investing et al

INDEX NO. 113875-01

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

and third Party Actions

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

FILED
AUG 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: August 8, 2008

HON. JUDITH J. GISCHE 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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Christopher Sanatass and Cynthia Sanatass,

Plaintiffs,

-against-

Consolidated Investing Company, Inc., Consolidated Investing Company, Norbert Natanson, Herbert Rosenberg *as trustee of the last will and testament of* Nathan Shulman, Marion Feldman, Chroma Copy and Dazian, LLC.,

Defendants.

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DECISION/ ORDER
Index No.: 113875-2001
Seq. No.: 007

PRESENT:
Hon. Judith J. Gische
J.S.C.

Consolidated Investing Company, Inc., Consolidated Investing Company,

3rd party Plaintiffs

-against-

Chroma Copy International, Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc., and C2 Media, LLC.,

3rd party Defendants.

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T.P. Index No.:
591423/03

Chroma Copy International, Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc., and C2 Media, LLC.,

2nd- 3rd party Plaintiffs

-against-

Commercial Cooling Service, Inc.,

2nd-3rd party Defendant.

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T.P. Index No.:
591038/04

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Δ Consolidated's OSC (§3212) w/MSL affirm, exhs	1
Δ C2 Media's opp w/ JGR affirm	2
Ct of Appeals decision 4/24/08 (sep back)	3

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

This is a negligence action by Christopher Sanatass ("plaintiff") who asserts he sustained damages because the defendant violated the Labor Laws. There are two third party actions for indemnification. At bar is the motion by defendant/3rd party plaintiff Consolidated Investing Company, Inc. and Consolidated Investing Company ("Consolidated" or "owner") on its third party claims against 3rd party defendant/3rd party plaintiff C2 Media, LLC ("C2" or "tenant").

This case was dismissed by Hon. Saralee Evans in her decision of February 22, 2005. That decision was affirmed by the Appellate Division, First Department. In its decision dated April 24, 2008, the Court of Appeals reversed the Appellate Division, restoring the Labor Law section 240 (1) cause of action, and granting plaintiff partial summary judgment as to liability on that claim. Sanatass v. Consolidated Investing Company, Inc., et al, 10 NY3d 333 (2008) ("Court of Appeals decision"). The case was remitted to Supreme Court for further proceedings.

Following the Court of Appeals decision, Consolidated brought a motion before this court for permission to renew its motion for summary judgment on its 3rd party claims for indemnification, defense, and breach of contract against C2. This court

granted the motion, for the reasons stated in its decision dated May 22, 2008, finding that the owner had shown "good cause" why the motion at bar was being made more than 120 days after the Note of Issue was filed. Consequently, this motion is properly before the court and it will be decided on the merits.

Arguments

The facts of the underlying accident, involving a 1,500 pound air conditioner that fell on plaintiff, are set forth in extensive detail in the Court of Appeals' decision and also in the decision by Hon. Saralee Evans. They will not be repeated here, except as necessary.

Plaintiff was working at the building owned by Consolidated on the 11th floor ("premises"). It is now the law of this case that the work plaintiff was doing was an "alteration" within the meaning, and protections of, Labor Law § 240 (1). It is now also the law of this case that Consolidated, even though it was an out-of-possession owner at the time of plaintiff's accident, is nonetheless an "owner," also within the meaning of Labor Law § 240 (1), and therefore liable to the plaintiff for his damages, even if it did not know about, or approve of, the alterations. Sanatass v. Consolidated Investing Company, Inc., et al, *supra*.

This motion renews the motion that was before Justice Evans to decide, but she did not reach, because she granted defendants summary judgment dismissing plaintiff's complaint. The motion incorporates all the papers that were before Justice Evans (and the appellate courts) when the parties brought their motions in 2004. Thus, this motion consists of an attorney's affirmation, the pleadings, sworn affidavits, deposition transcripts, and exhibits.

The supporting affidavits are by David Segal, Esq., an attorney, who was the outside counsel for the owner at the time of the accident. Segal was also deposed on behalf of the owner. At the deposition, Consolidated's attorney in this case stated the following on the record:

> "Based upon prior agreement with plaintiff's attorney . . . We are providing here today David Segal who is outside counsel for Consolidated Investing Company. We notified [plaintiff's counsel] that no one within Consolidated Investing Company has any particular knowledge as to the specifics or any knowledge whatsoever of the actual incident taking place. He was in agreement that Mr. Segal would be the best witness to provide, because his office would be familiar with any lease work that might be relevant to this particular lawsuit."

Segal was re-deposed after the third party action was commenced by Consolidated. At the deposition, the attorney for 3rd party defendants C2 (and the other named defendants who are not the subject of this motion) objected:

> "It is [3rd party defendants'] position that Mr. Segal is a totally inappropriate witness for the defendant to be presenting. He is an attorney. He is not producing any principals. [Segal] is coming with knowledge, but he doesn't even know who the principals are [of Consolidated]. So we don't even know if [Segal is] the person with knowledge. [Segal] should at least have that information at hand. It is our position that the defendant and third party plaintiff has produced a totally inappropriate witness for the second time."

The parties nonetheless proceeded with Segal's deposition, and also discussed the possible production of another witness by Consolidated ("Schimmel"). Schimmel is a general partner in Consolidated. Schimmel was not deposed, but he provided two sworn affidavits. Like Segal, Schimmel states that he owner had no knowledge that alterations were being made at the premises. He also states:

"3. To the best of my knowledge, the sole tenant on the 11th floor of the [premises] back on January 17, 2000, was the Third-Party Defendant, C2 Media.

4. To best of my knowledge, no one from C2 Media ever asked for nor received permission from Consolidated Investing, its agents, servants, and/or employees, to perform any air conditioning work on the 11th floor of the [premises] back in January 2000.

5. Moreover, as stated in my previous Affidavit, no one affiliated with the building owners, its agents, servants and/or employee, ever exercised supervision or control over any air conditioning work being done on the 11th floor of the [premises] back in January 2000.

6. And no other persons affiliated with the building, including any of the owner defendants, has any awareness as to the facts and circumstances of this accident or the subsequent lawsuit herein.

7. Therefore, based upon my knowledge, to the extent any air conditioning work was being performed on the 11th floor of the [premises] back in January 2000, said work was done solely at the request of C2 Media and under the direction, supervision and control of C2 Media only."

C2 Media produced its director of operations, Craig Szelestey, for a deposition. At the time of plaintiff's accident, Szelestey was C2 production director responsible for printing facility functions, technical services, web based ordering applications, computer repairs and "building maintenance repair." He testified at his EBT that he had no HVAC training but had done some general construction work in 1978. He also testified at his EBT that C2 maintained office space on the 11th floor (and others). Szelestey testified that he was aware of the HVAC project, that it was a "special" project, but did not know the specifics of any agreements about the project. He testified he did not supervise the work or direct it.

The owner has provided a copy of its lease with defendant Chroma Copy International, Inc. ("Chroma") dated October 1, 1992 ("lease"). Although reference is made to a lease assignment by Chroma to C2, that the owner consented to, this statement is made by Consolidated's attorney's in his affirmation. No copy of that lease assignment, or proof that the landlord consented to it, is provided to the court.

The lease at paragraph 46 requires that the tenant obtain the owner's "prior written consent" for "all renovations, decorations, additions, installations, improvements and or alterations," and that the application for such consent be accompanied by detailed plans and specifications.

The lease at paragraph 58 also requires that the tenant obtain a comprehensive policy of general liability insurance for the owner's benefit in the amount of at least $2,000,000 as to personal injuries.

The lease has a separate indemnity provision (paragraph 59), requiring the tenant to indemnify the owner as follows:

> "against any and all Claims which either:
> (i) arise from or are in connection with the possession, use, occupation, management, repair, maintenance, or control of the Demised Premises, any portion thereof;
> (ii) arise from or are in connection with any act or omission of Tenant, or Tenant's agents;
> (iii) arise from or are in connection with any work Tenant is permitted to do hereunder;
> (iv) result from any default, breach, violation or non-performance of this Lease or any provision therein by Tenant; or
> (v) result in injury to person or property or loss of life sustained in or about the [premises] unless such injury is due to the fault or a breach of this Lease by Landlord [. . .][1]

[1]The use of "[. . .]" indicates some language was omitted for briefness.

> Tenant shall pay the costs of defending any actions, suits or proceedings which may be brought against the Landlord with respect to the foregoing [. . .]"

The owner claims that it has proved that C2 never asked for, nor obtained, permission from Consolidated to do any alterations on the 11th floor, and therefore seeks summary judgment against C2. Moreover, the owner claims that because the Court of Appeals resolved an initial dispute over whether plaintiff was doing "alteration" work, within the meaning of Labor Law § 240 (1), there are no issues of fact to be tried, and therefore, Consolidated is entitled to summary judgment, as a matter of law because C2 engaged in an unauthorized alteration of its premises, without the owner's knowledge or consent. Further, Consolidated argues that C2, as the assignee of the Chroma lease, assumed all of Chroma's lease obligations. Consequently, not only were the alterations unauthorized (Consolidated contends) but C2 had the work begin without obtaining the necessary insurance, a further breach of the lease.

The defendants oppose the motion for summary judgment against C2 on the basis that Consolidated has not met its burden of proving the work done on the 11th floor was without the owner's knowledge or consent. Further C2 argues that the owner has not proved C2 assumed all of Chroma's lease obligations, and that any statement to that effect by the owner's attorney in this case is not based upon personal knowledge. Without making any admissions, C2 contends that there are triable issues of fact about who was supervising the work being done on the 11th floor.

Discussion

In deciding whether Consolidated is entitled to the grant of summary judgment in its favor, the court considers whether its has tendered sufficient evidence to eliminate

any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Zuckerman v. City of New York., 49 NY2d 557, 562 (1980). If met, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact to defeat the motion. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, *supra*. However, if the proponent fails to make out its *prima facie* case for summary judgment, then that motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, supra; Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Consolidated has not tendered sufficient evidence to eliminate any material issues of fact from this case, and therefore its motion for summary judgment must be denied. The Court of Appeals did not decide whether the owner the knew about the alteration work or the 3rd party defendants breached their lease. Rather the Court of Appeals decided that regardless of notice, or lack of supervision, the owner is liable under Labor Law § 240 (1) to the plaintiff for his injuries.

It is well established law that the affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which themselves provide evidentiary proof in admissible form, such as documents and transcripts. Zuckerman v. City of New York, 49 NY2d at 563. Conversely, if the document or deposition testimony itself is inadmissible, then the attorney's affidavit or affirmation is insufficient proof to support a motion for the grant of summary judgment, unless the attorney has actual, personal knowledge, of the facts. Otherwise the affirmation is nothing more than speculation or a conclusory statement.

Consolidated's attorney makes statements in his affirmation that are not

supported by any facts of which he has personal knowledge of. He also makes other statements which are not supported by the documents provided on this motion or the accompanying deposition transcripts. First, there is no proof of a lease assignment between Chroma and C2, or even that the owner consented to such a lease assignment. The statement that C2 is a successor in interest to Chroma is, contrary to the attorney's affirmation, disputed. Absent proof of a lease assignment, or other transfer, assumption, etc., of the Chroma lease to C2, including, and in particular, the obligations to indemnify and obtain insurance for the owner's benefit, Consolidated has failed to prove a material element of its claims against C2 which stem from an alleged breach of contract. Ross v. Manhattan Chelsea Associates, 194 A.D.2d 332 (1st Dept 1993). Therefore, the burden which rests with Consolidated on this motion for summary judgment, remains with Consolidated to prove it is in privity with C2.

There are other hurdles for Consolidated. Consolidated did not produce a person with personal knowledge of the facts for a deposition. Although Consolidated produced Segal, he is an attorney. Consolidated's litigations attorney's statements, that Segal knows as much as anyone else affiliated with the owner, is insufficient, and does not make Segal's testimony admissible.

Even assuming Segal's testimony is admissible and he does have personal knowledge, he knows very little that is useful to Consolidated on its motion. His testimony is best summarized as being that his client did not know what was going on.

Schimmel, a principal of Consolidated was not deposed, but his sworn affidavits can be considered because, unlike Segal, he does have personal knowledge of the facts. Although he contends that he did not know about the alterations, and he does

not believe C2 asked for permission to perform the alterations that resulted in plaintiff's injuries, this does not eliminate issues of fact for trial so as to justify the grant of summary judgment to Consolidated. Moreover, his affidavit does not address, let alone resolve, the overarching privity issues addressed earlier in this decision.

Although the owner also relies upon the deposition testimony by Szelestey, and he does have personal knowledge of the facts, his testimony does not resolve the factual issue of who hired J. M. Haley, plaintiff's employer, to install the HVAC unit that fell.

Consolidated also cites a number of cases that involve issues of common law indemnification. Leaving aside the issue that Consolidated has not pled such a cause of action, and even assuming the owner has proved it was not actively negligent, there is no proof either that C2 supervised, directed or controlled the plaintiff's work either. see, Mangano v. American Stock Exch., 234 A.D.2d 198 (1st dept 1996). According to Szelestey, he did not supervise the work, and although he was a laborer 22 years ago, he was not working in that capacity for C2.

Having failed to meet its burden on this motion for summary judgment against C2 on its breach of contract, defense and indemnification claims, Consolidated's motion must be denied in its entirety. This case must be tried.

Conclusion

The motion by Consolidated for summary judgment on its 3rd party claims against the 3rd party defendant C2 Media, LLC is denied for the reasons stated. Since the note of issue has been filed, this case is ready to tried.

Consolidated shall serve a copy of this decision/order on the Office of Trial

Support so this case can be scheduled.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 8, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.