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

PRESENT: WALTER B. TOLUB PART 6

Justice

Index Number : 101851/2005

KLAHR, ANN D.

vs.

SWEET CONSTRUCTION

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 is decided with and consolidated with motion seq. 003

FILED

MAY 01 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

_____ J.S.C.

WALTER B. TOLUB

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

----------X

ANN D. KLAHR,

Plaintiff,

-against- Index No. 101851/05

SWEET CONSTRUCTION CORP., SWEET CONSTRUCTION OF LONG ISLAND, LLC, 754 FIFTH AVENUE, INC., 754 FIFTH AVENUE ASSOCIATES, L.P., LWC, INC., LWC BUILDERS, LLC, LWC DESIGN, INC. and LWC/HALPERN, LLC,

Defendants.

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WALTER B. TOLUB, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

The defendants 754 Fifth Avenue, Inc. and 754 Fifth Avenue Associates, L.P. (collectively the 754 Fifth Avenue defendants) move, pursuant to CPLR 3212, for an order granting summary judgment: against the plaintiff Ann D. Klahr (Klahr) dismissing the amended complaint; against the codefendants Sweet Construction Corp. and Sweet Construction of Long Island, LLC (collectively Sweet Construction) dismissing their cross claims and; in favor of the 754 Fifth Avenue defendants on their sixth, seventh and eighth cross claims against Sweet Construction for indemnification and declaratory relief.

Sweet Construction moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and the cross claims.

Facts

This is an action to recover damages for personal injuries Plaintiff claims she suffered on

April 12, 2003, when she slipped and fell on the eighth floor in the employee locker area of the Bergdorf Goodman department store. Ms. Klahr slipped on a puddle of water created by a leak from an air conditioning chiller replacement project on the roof. The leaking was an ongoing problem. Buckets were kept on the floor and tarps were erected, in an attempt to catch the leaking water.

The 754 Fifth Avenue defendants are the landlord of the building, and Sweet Construction was a contractor performing an ongoing renovation project. The 754 Fifth Avenue defendants, and Sweet Construction, have cross-claimed against each other for indemnification and contribution.

In support of their motion for summary judgment, the 754 Fifth Avenue defendants argue that they were an out-of-possession landlord, uninvolved in the accident.

In support of its motion for summary judgment, Sweet Construction alleges that it was not overseeing any work on the eighth floor where the accident occurred.

In opposition to the 754 Fifth Avenue defendants' motion for summary judgment, the plaintiff argues that the 754 Fifth Avenue defendants retained control of the building by engaging a real estate management firm to collect rents, and by engaging a design firm to supervise renovations and alterations. It is alleged that the lease provides that 754 Fifth Avenue, as landlord, retains the right to approve and supervise any substantial alterations costing $250,000 or more, affecting the envelope of the building, and affecting the amount of floor space devoted to sales. It is also argued that the 754 Fifth Avenue defendants were not out-of-possession because the lease reserved the right to enter for the purpose of inspecting or making repairs.

The plaintiff concedes that one of the two Sweet defendants, Sweet Construction of Long Island, LLC, had no involvement in the accident. However, in opposition to the codefendant Sweet Construction Corp.'s (Sweet Construction) motion for summary judgment, the plaintiff argues that a prior motion for summary judgment was denied by this court on the ground that there exists a question of fact as to whether defendant Sweet Construction's admitted working on the building and whether it caused the leak on the 8th floor.

The Court notes that the motion is improperly supported by, an attorney's affirmation and that the absence of a contract for Sweet Construction to perform work does not preclude a finding that Sweet Construction negligently performed remedial efforts to cure the leak. Sweet Construction's laborers were observed performing remedial work at the scene of the leak. A series of Buildings Department work permits issued between 1999 and 2003 that describe the work as "to install new mechanical ductwork with new ac units " and "to replace chiller unit," name Sweet Construction, as the contractor for the project. Sweet Construction's web site claims credit for installing the new chiller unit on the roof of Bergdorf Goodman.

In reply, Sweet Construction, apparently abandoning its argument that it performed no work on the chiller project, alleges that its work was complete before the accident.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion,

regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action, even where the facts are uncontroverted (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]; *Andre v Pomeroy*, 35 NY2d 361, 366-367 [1974]).

The Court will first dispose of the 754 Fifth Avenue defendants' and the Sweet Construction's motions for summary judgment dismissing the complaint, before turning to the motions to dismiss the cross claims.

"A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord: (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]).

Here, the 754 Fifth Avenue defendants' lease retained the right to reenter, inspect and make repairs, and there is a triable issue of fact whether the allegedly defective condition involved a significant structural or design defect contrary to a specific statutory safety provision. The plaintiff's evidence demonstrates, among other things, that the chiller project did affect the structural integrity of the building. Although Administrative Code of the City of New York §§

27-127 (general requirement to maintain buildings and their parts in a safe condition) and 27-128 (owner responsibility for safe maintenance of a building and its facilities) were both repealed effective July 1, 2008, they were applicable to this accumulation of water defect in 2003 that led to Klahr's accident (*Lynch v City of New York*, 14 AD3d 347 [1st Dept 2005]; *Kelly v City of New York*, 6 AD3d 188 [1st Dept 2004]). The 754 Fifth Avenue defendants, as out-of-possession landlords that reserved the right of re-entry to inspect and make structural repairs can be charged with constructive notice of a dangerous condition, can be held liable for the failure to remedy the condition, and fail to demonstrate their entitlement to judgment as a matter of law (*Cortes v 1515 Williamsbridge Assocs.*, 295 AD2d 188 [1st Dept 2002]).

In addition, at common law, a property owner who has engaged an independent contractor to perform construction on its premises is not liable for the latter's negligence while the work is in progress (*Kojic v City of New York*, 76 AD2d 828 [2d Dept 1980]). However, liablity has been found where a property owner had actual or constructive notice of the dangerous condition (*Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145 [1943]). Whether the work is inherently dangerous is ordinarily a question of fact to be determined by a jury (*Rosenberg v Equitable Life Assurance Soc. of U.S.*, 79 NY2d 663, 670 [1992] New York imposes a special duty on property owners to keep the passageways of a public building safe for tenants, their visitors, and their employees, and all people who come onto the premises for reasonably foreseeable purposes (*Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554 [1968]; *Podlaski v Long Island Paneling Center of Centereach, Inc.*, 58 AD3d 825 [2d Dept 2009]; *Backiel v Citibank, N.A.*, 299 AD2d 504, 506-507 [2d Dept 2002]; *Ancess v Trebuhs Realty Co.*, 18 AD2d 118 [1st Dept 1963] *affd* 16 NY2d 1031 [1965]; *Hume v Ten Eyck*, 245 App Div 794 [3d Dept 1935]; *Murphy v*

Broadway Improvement Co., 189 App Div 692 [1st Dept 1919]). Especially where, as here, the plaintiff is a passerby uninvolved with the dangerous activity being conducted (*Nagy v State*, 89 AD2d 199, 200 [3d Dept 1982]).

Generally speaking, installing a new chiller tower on a building's roof is not an inherently dangerous activity. However, the evidence in this case demonstrates a long term ongoing heavy water leak onto a passageway floor, sufficient to take the case to a jury. Also, a question of fact exists whether the condition complained of existed for a sufficient period of time to permit the 754 Fifth Avenue defendants to discover it and take remedial measures.

Turning to Sweet Construction's motion to dismiss the complaint, the existence of a series of Buildings Department work permits, dated both before and after the accident, naming Sweet Construction as general contractor for the chiller project, and the conflicting testimony about Sweet Construction's laborers managing the ongoing leak on the eighth floor where the plaintiff Klahr slipped and fell, merely raise a question of fact requiring a trial (*Greenidge v HRH Construction Corp.*, 279 AD2d 400, 403 [1st Dept 2001]).

Turning to the motions for judgment on the cross claims, the 754 Fifth Avenue defendants argue that Sweet Construction's contract require Sweet to indemnify the 754 Fifth Avenue defendants. Sweet Construction makes no argument in support of its motion to dismiss the cross claims against it.

Generally, when two or more tortfeasors share the responsibility for an injury, the rule is to apportion liability among them, based on their respective duties to the injured person, rather than shifting the entire loss through indemnification (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565 [1987]). Whether the 754 Fifth Avenue defendants are entitled to

indemnification from Sweet Construction depends upon whether or not Sweet Construction undertook to do the work (*Lopez v Consolidated Edison Co. of N.Y.*, 40 NY2d 605 [1976]). Although Sweet Construction may have assumed responsibility for the work it was to perform, notwithstanding any fault by the 754 Fifth Avenue defendants, it did not assume liability for work it did not perform. It is premature to find that the trip and fall arose from Sweet Construction's work.

Accordingly, it is

ORDERED that the motions are denied.

Counsel are directed to appear for a pre-trial conference on June 12, 2009 at 11:00 AM in room 335 at 60 Centre Street.

Dated: 4/30/09

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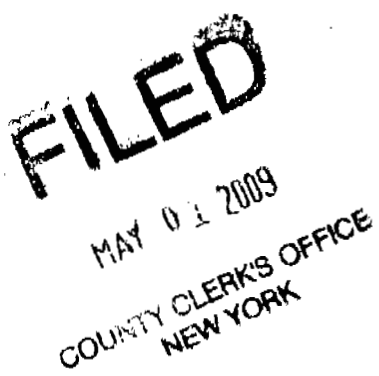

Walter B. Tolub J.S.C.