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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 108449/2008

HOPEWELL, TIMOTHY

VS.

BETHEL GOSPEL ASSEMBLY, INC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 5/27/10

MOTION SEQ. NO. 002

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
JUN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Helene Fuld College of Nursing s/h/a Helen Fuld College of Nursing pursuant to CPLR §3212 for summary judgment, dismissing the Complaint of the plaintiffs and any cross-claims against it is denied; and it is further

ORDERED that Helene Fuld College of Nursing s/h/a Helen Fuld College of Nursing 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: 6/4/10

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

----------X

TIMOTHY HOPEWELL and LONETTE HOPEWELL,

Index No. 108449/08

Plaintiff,

-against-

BETHEL GOSPEL ASSEMBLY, INC. and HELEN FULD COLLEGE OF NURSING,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant, Helene Fuld College of Nursing s/h/a Helen Fuld College of Nursing ("HFCN") moves pursuant to CPLR §3212 for summary judgment, dismissing the Complaint of the plaintiffs Timothy Hopewell ("plaintiff") and Lonette Hopewell (collectively, "plaintiffs") and any cross-claims against it.[1]

Factual Background

HFCN was the lessee of the third floor of the building located at 2-26 East 120th Street, New York, New York (the "Premises"), which is owned by defendant Bethel Gospel Assembly ("Bethel"). On November 6, 2006, HFCN entered into a contract with Aegis, U.S.A., Inc. ("Aegis"), plaintiff's employer, for Aegis to renovate the fourth floor of the building so that HFCN could expand from the third to the fourth floor.

It is alleged that on November 10, 2006, plaintiff was working as a demolition worker on the fourth floor of the premises, when a trash shoot he was holding onto slipped and fell on him.

[1] The Court previously granted summary judgment dismissing another complaint arising from this accident against Fifth on the Park Condo, LLC and Artimus Construction, LLC.

In their Complaint, plaintiffs allege that the accident was the result of the negligence of defendants, in their ownership, operation, maintenance, control, supervision, direction, construction, inspection, management, renovation and rehabilitation, and/or alteration of the premises, and that they violated Labor Law §200, §240(1), and §241(6) and certain provisions of the Industrial Code. Bethel asserts a cross claim against HFCN, seeking common law and contractual contribution and indemnification.

In support of dismissal, HFCN submits the affidavit of Margaret Vines, R.N., PhD., President of HFCN. Nurse Vines attests that, until July of 2007, HFCN was not an independent legal agency, but rather, a division of North General Hospital ('NGH'). On August 14, 1996, Bethel, as landlord and NGH, as tenant, entered into a Lease Agreement pursuant to which NGH leased certain space at the premises, for the occupancy of HFCN. Pursuant to the terms of this Lease, as well as a Lease Agreement between Bethel and HFCN of NGH, as Amended by a Rider thereto dated November 1, 2001, a First Amendment to the Lease dated as of January 1, 2005, and a Second Amendment to the Lease dated as of October 4, 2006, HFCN of NGH leased approximately 17,000 square feet of space on the third floor of the premises for the operation of the HFCN. On November 6, 2006, HFCN entered into a construction contract with Aegis pursuant to which Aegis was retained to renovate the fourth floor of the premises, in order to expand the HFCN to include the third and fourth floors of the premises.

Nurse Vines further attests that on November 17, 2006, Bethel and HFCN entered into a Third Amendment to the Lease Agreement pursuant to which the HFCN was to occupy an additional space consisting of approximately 6,500 feet on the fourth floor of the premises. According to Nurse Vines, at the time of plaintiff's alleged accident, the HFCN neither owned,

leased, possessed, occupied or controlled the fourth floor of the building. She further states that HFCN neither directed, supervised or controlled plaintiff in the performance of his work. HFCN did not have a representative present on the 4th floor while the construction work was being performed. HFCN did not exercise control over the maintenance of proper safety practices for workers such as plaintiff performing construction work on the 4th floor. Moreover, HFCN provided no equipment to plaintiff and did not own or lease the subject trash chute.

Thus, HFCN argues that it is entitled to summary judgment as it did not own, lease, operate, manage or control the fourth floor where plaintiff's accident occurred, nor supervised plaintiff in the performance of his work. Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or a special use of such premises. When none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property.

In opposition, Bethel argues that the Contract between HFCN and Aegis, which was signed by HFCN, states that HFCN was the owner of the property as of November 6, 2006. Bethel submits the affidavit of its Facilities Operations Director, Vincent Williams ("Williams"). Pursuant to Williams' Affidavit, prior to November 6, 2006, Bethel and HFCN agreed to enter into a further amended lease agreement to allow for HFCN to take over the fourth floor and perform renovation of same prior thereto. Williams further averred that Bethel was made aware of the agreement between HFCN and Aegis, and that such was pursuant to the agreement between Bethel and HFCN to amend the lease although said amendment had not yet been formally executed. Williams further states that Bethel did not participate in any way in the hiring of any construction contractors, including Aegis, nor did it participate in the construction on the

fourth floor.

HFCN clearly acted as an independent legal entity, having entered into Lease Agreements on October 4, 2006 and November 17, 2006, and particularly having entered into the construction agreement of November 6, 2006 and should be estopped from contending that it was not an independent legal entity at all times relevant herein.

Even if there was a minimal lapse in the time frame between when HFCN entered into the construction contract and when it formally signed the third amendment to the lease to allow for its taking over the fourth floor of the subject property, HFCN had already assumed full control of the fourth floor as of November 6, 2006 pursuant to its prior albeit unwritten agreement with Bethel. Further, HFCN should be estopped from claiming that it did not "own" that portion of the property, based upon its presentation in the construction contract with Aegis that it did indeed "own" the property and as HFCN clearly controlled that portion of the property based upon its being in a position to enter into a construction contract for the renovation thereof.

Bethel submits that HFCN's claim that it was not negligent as a matter of law in the hiring of Aegis to do the subject construction work, nor potentially in any acts or omissions in its directions, instructions, monitoring and/or supervising of the subject construction, must be denied. From a Labor Law standpoint, Bethel was the *de facto* out of possession landlord, which should not be subject to Labor Law provisions. Rather, HFCN, in possession of the fourth floor of the subject premises and having hired the contractor to do the construction work, was clearly the "owner," if not the general contractor, for Labor Law purposes in regard to this matter.

Finally, Bethel argues that it only recently received a copy of the pleadings concerning HFCN. There has not been a single deposition to date, and there is still a significant amount of

outstanding discovery. Thus, argues Bethel, HFCN's motion is premature pursuant to CPLR Section 3212(f), as additional evidence to oppose the motion is likely to be ascertained from depositions and other discovery that has yet to be conducted.

Plaintiff also opposes dismissal, arguing that the motion is premature.

Specifically, the Third Amendment to the Lease Agreement paragraph 3(a) provides that the "Landlord and Tenant have agreed on a plan . . . to build out and alter the Additional Space (The "Work") in accordance with Tenants requirements. . . ." and at issue is the question of what the "plan" consisted of. There is also the question of what the "Tenant's requirements" were. HFCN presumably knows the answers to these questions, and plaintiff did not have an opportunity to question witnesses and request documents, including the "plan." It is entirely possible that the plan contains information that would indicate who was to control the worksite and be responsible for the construction. Even if the "plan" itself is exchanged, depositions regarding the specifics of how it was implemented will be needed in order to fully answer all questions of fact. Further, paragraph 3(c) provides that the "Tenant shall keep accurate and complete records relating to the performance and cost of the Work . . .," and plaintiff is entitled to see the "complete and accurate records" referred to in this paragraph. Summary judgment should not be granted at this time, prior to having all documents exchanged and all witnesses questioned.

Plaintiff further argues that based on the items of discovery in plaintiff's possession, there are questions of fact regarding the contract between HFCN and Aegis. The "owner" is listed as Helene Fuld College of Nursing. HFCN's claim that it was not the owner of the property on November 6, 2006 in and of itself is a question of fact to preclude summary judgment. HFCN

should not be able to chose which title it holds with respect to the property in question

Further, while Nurse Vines avers that HFCN has no nexus to the worksite on the date of the accident, paragraph 3(b) of the Third Amendment to the Lease indicates that HFCN was responsible to make sure that the worksite was safe and that all laws were conformed to. Clearly there is a question of fact as to the ownership, leasing, possession, occupation and control of the 4th floor. And, there is case law to the effect that one can be an "owner" within the meaning of the Labor Law even if you do not have legal title.

Finally, plaintiff argues, HFCN failed to establish its entitlement to judgment as a matter of law. Although HFCN annexed an affidavit of Nurse Vines, she merely makes conclusory statements that HFCN did not own, lease, possess occupy or control the fourth floor of the building without actually proving that allegation. Nurse Vines could not have contracted for work to be performed on the 4th floor unless HFCN maintained some degree of control over the 4th floor. Issues regarding who let the contractor on to the floor, who inspected the work, what the "plan" was for the work referred to in the third amendment to the lease, and the production of "accurate and complete records" of the work that was being performed that HFCN was required to keep, demonstrate that HFCN has not produced competent proof that it was not responsible for the worksite.

In reply, plaintiff contends that Nurse Vines attested that HFCN "was not even an independent
legal entity in July 2007, approximately eight months after the alleged accident" and Bethel cited no legal authority wherein a non-legal entity may be deemed a premises owner pursuant to an oral agreement for Labor Law purposes.

Plaintiff also contends that the "mere hope" that further discovery may reveal evidence favorable to the claim is insufficient to defeat a motion for summary judgment. HFCN, has already responded to plaintiffs' Notice for Discovery and Inspection and Combined Demands. Moreover, HFCN submitted documentary evidence in support of the motion that HFCN did not, own, lease, possess, occupy or control the fourth floor of the building and did not direct plaintiff in the performance of his work. The Third Amendment to the Lease Agreement pertaining to the HFCN's expansion to the fourth floor was not entered into until November 17, 2006, following the accident. Plaintiff's reference to the "Plan" and "Tenants' Requirements" of paragraph 3 of the Lease does not alter the fact that the Lease did not take effect until after the accident. That the "Plan" could provide information as to who controlled the worksite and was responsible for construction, is based on the conjecture rather than any evidence. Furthermore, with respect to "complete and accurate work records" referred to by plaintiffs, HFCN have already responded to plaintiffs' discovery demand that HFCN is not in possession of any inspection, maintenance and/or repair records regarding the construction site.

Discussion

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, 2003]). Thus, 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.*, *supra*; *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]). 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, *supra* 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). The 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]).

In this case, HFCN failed to establish, as a matter of law, that it neither owned, possessed, occupied, or controlled the fourth floor of the premises where the accident occurred. The

affidavit of HFCN's President, Nurse Vines, and the pertinent Lease Agreements, indicate that HFCN did own the fourth floor; Nurse Vines also states that HFCN did not direct, supervise, or control plaintiff in the performance of his work, have a representative on site while the work was being performed, exercise control over the maintenance of proper safety practices for workers such as plaintiff performing construction work on the fourth floor, provide any equipment to plaintiff, or own or lease the trash shoot which allegedly fell upon plaintiff, when plaintiff's alleged accident occurred.

However, Nurse Vines also stated that HFCN engaged plaintiff's employer to perform construction work on the 4th floor of the premises. And, in opposition, plaintiff and Bethel sufficiently raised an issue as to HFCN's control over the 4th floor.

It has been stated that "the term 'owner' has even been expanded to include those, who although not fee owners, either had some interest in or exercised some control over the property. *Holman v City of New York*, 181 Misc 2d 15, 691 NYS2d 739 [N.Y. City Civ. Ct. 1999] (holding that "Having arrogated to itself the mantle of ownership, having "exercised some control over the property," and having hired Blandford to demolish McDowell's premises, the City should not now be permitted to divorce itself from the obligations which ordinarily accompany such rights and privileges of ownership") *citing DeFreece v Penny Bag Inc.*, 137 AD2d 744, 524 NYS2d 825 (2d Dept 1988] (contract vendee held to be an owner because he was provided with access and contracted to have repairs made); *Marks v Morehouse*, 222 AD2d 785, 634 NYS2d 835 [3d Dept 1995] ("ownership", as contemplated by these statutes, is not always limited to the titleholder, and a contract vendee may be considered an "owner")).

Therefore, that the Lease documents indicate that HFCN's lease with Bethel for the 4th

floor was dated as of November 17, 2006, after the accident does not, at this juncture, overcome the fact that HFCN contracted with Aegis to perform work on the 4th floor *prior to the alleged accident*. As issues of fact exist as to whether HFCN possessed and exercised sufficient control over the 4th floor, summary judgment is unwarranted at this juncture.

Further, plaintiff and Bethel demonstrated that there was a likelihood of discovery leading to evidence indicating that HFCN possessed a sufficient level of control to be deemed an "owner" for purposes of liability (CPLR 3212[f]). Plaintiff and Bethel are entitled to depose all parties in this action concerning the Lease documents, the contract between HFCN and Aegis, and the circumstances surrounding the work plaintiff was performing at the time of his alleged accident.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Helene Fuld College of Nursing s/h/a Helen Fuld College of Nursing pursuant to CPLR §3212 for summary judgment, dismissing the Complaint of the plaintiffs and any cross-claims against it is denied without prejudice as premature; and it is further

ORDERED that Helene Fuld College of Nursing s/h/a Helen Fuld College of Nursing 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: June 4, 2010

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