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SHORT FORM ORDER

INDEX No. 05-8146

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 3-16-09 (#002 & #003)
MOTION DATE 7-16-09 (#004)
MOTION DATE 11-6-09 (#005)
MOTION DATE 12-9-09 (006)
ADJ. DATE 1-27-10(#002,#003,#004,#005)
ADJ. DATE 12-9-09 (# 006)
MNEMONIC: #002 - MD #003 - XMD
#004 - Mot D #005 - MG #006 - XMD

CLAUDE E. JAYCOX AND MARIE JAYCOX,

Plaintiffs,

- against -

J.C. PENNEYS, WESTLAND SOUTH SHORE MALL, L.P., V.R.D. CONTRACTING, INC., and: LOCAL CONCRETE, M. CAREY, INC. and NATIONAL CONSTRUCTION RENTALS, INC., d/b/a NATIONAL RENT-A-FENCE,

Defendants.

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WESTLAND SOUTH SHORE MALL, L.P.,

Third-Party Plaintiff,

- against -

M. CAREY, INC.,

Third-Party Defendant.

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M. CAREY, INC.,

Fourth-Party Plaintiff,

- against -

NATIONAL CONSTRUCTION RENTALS, INC. d/b/a NATIONAL RENT-A-FENCE and V.R.D. CONTRACTING, INC.,

Fourth-Party Defendants.

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Upon the following papers numbered 1 to 146 read on these motions and cross motions for summary judgment and for amending answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 31; 32 - 42; Notice of Cross-Motion and supporting papers 43 - 48; 49 - 60; Answering Affidavits and supporting papers 61 - 108; Replying Affidavits and supporting papers 109 - 146; Other ____; and after hearing counsel in support and opposed to the motion it is,

ORDERED that for the purposes of this determination the motion (# 002) by the plaintiffs for summary judgment, the motion (# 004) by J.C. Penney Corporation Inc. s/h/a J.C. Penneys and Westland South Shore Mall, L.P. for summary judgment, and the motion (# 005) by National Construction Rentals, Inc. d/b/a National Rent-A-Fence for leave to amend its answer are consolidated and decided together with the cross motion (# 003) by M. Carey, Inc. for summary judgment and the cross-motion (# 006) by National Construction Rentals, Inc. d/b/a National Rent-A-Fence for summary judgment; and it is further

ORDERED that the motion (# 002) by the plaintiffs for summary judgment on the issue of liability is denied; and it is further

ORDERED that the cross-motion (# 003) by M. Carey, Inc. for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the motion (# 004) by J.C. Penney Corporation Inc. s/h/a J.C. Penneys and Westland South Shore Mall, L.P. for summary judgment dismissing the complaint and all cross claims against them is determined as follows; and it is further

ORDERED that the motion (# 005) by National Construction Rentals, Inc. d/b/a National Rent-A-Fence for an order pursuant to CPLR §3025 (b) amending its answer to include cross-claims against M. Carey, Inc. is granted; and it is further

ORDERED that the cross-motion (# 006) by National Construction Rentals, Inc. d/b/a National Rent-A-Fence for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by Claude E. Jaycox (hereinafter plaintiff) on October 16, 2004 at approximately 10:30 a.m. While he was exiting a store operated by J.C. Penney Corporation Inc. s/h/a J.C. Penneys (hereinafter J.C. Penney) and walking on a parking lot owned by Westland South Shore Mall, L.P. (hereinafter Westland) in Bay Shore, Suffolk County, New York, the plaintiff was struck by a 30-feet long, 6-feet high wire fence separating a construction area from the adjoining parking lot. The plaintiffs complain that the defendants were negligent in failing to properly maintain, manage and control their property, creating a hazardous condition which injured the plaintiff. The plaintiffs' complaint alleges, *inter alia*, that the defendants improperly installed the construction fence and failed to maintain it in a reasonably safe condition. The plaintiffs also allege that the doctrine of res ipsa loquitur applies herein.

Prior to the subject accident, on July 9, 2004, Westland entered into a contract for the renovation of the exterior of the J.C. Penney building with V.R.D. Contracting, Inc. (hereinafter V.R.D.) for V.R.D. to be the general contractor. Westland also entered into a contract for the installation of construction barriers and barricades in the work site with M. Carey, Inc. (hereinafter

Carey). Carey subcontracted with National Construction Rentals, Inc. d/b/a National Rent-A-Fence (hereinafter National) to install and remove the construction wire fence in the construction area.

The plaintiffs now move (# 002) for summary judgment on the issue of liability based upon a theory of res ipsa loquitur.

To rely on the doctrine of res ipsa loquitur, a plaintiff must demonstrate that (1) the injury is of a kind that does not ordinarily occur in the absence of someone's negligence, (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendants, and (3) the injury is not due to any voluntary action on the part of the injured plaintiff (*see*, ***Morejon v Rais Constr. Co.***, 7 NY3d 203, 818 NYS2d 792 [2006]; ***Gaspard v Barkly Coverage Corp.***, 65 AD3d 1188, 885 NYS2d 542 [2009]). Only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would occur only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable (*see*, ***Morejon v Rais Constr. Co.***, *supra*; ***Lau v Ky***, 63 AD3d 801, 880 NYS2d 510 [2009]; ***Simmons v Neuman***, 50 AD3d 666, 855 NYS2d 189 [2008]).

Here, the plaintiffs failed to establish their entitlement to judgment as a matter of law. In his April 11, 2008 deposition testimony (hereinafter EBT), Mark Roosa, a J.C. Penney loss prevention manager stated that J.C. Penney had no responsibility for maintaining the walkways outside of the store and that he did not know whether J.C. Penney had any direct connection with the actual construction arrangements made outside the J.C. Penney store at the mall. Under the circumstances, there is a triable issue of fact as to the liability of J.C. Penney for the plaintiff's injuries under the doctrine of res ipsa loquitur (*see*, ***Morejon v Rais Constr. Co.***, *supra*; ***Gaspard v Barkly Coverage Corp.***, *supra*). Thus, the plaintiffs' motion for summary judgment on the issue of liability is denied.

Carey cross-moves (# 003) for summary judgment dismissing the complaint against it because it owed no duty to the plaintiff.

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (*see*, ***Quick v G.G.'s Pizza & Pasta***, 53 AD3d 535, 861 NYS2d 762 [2008]; ***Nappi v Incorporated Vil. of Lynbrook***, 19 AD3d 565, 796 NYS2d 537 [2005]). Liability for a dangerous condition on property is generally predicated upon occupancy, ownership, control or special use of the property (*see*, ***Quick v G.G.'s Pizza & Pasta***, *supra*; ***Comack v VBK Realty Assocs.***, 48 AD3d 611, 852 NYS2d 370 [2008]; ***Nappi v Incorporated Vil. of Lynbrook***, *supra*). The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (*see*, ***Quick v G.G.'s Pizza & Pasta***, *supra*; ***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 578 NYS2d 724 [1992]). A landowner or general contractor has a nondelegable duty to provide the public with a reasonable safe premises (*see*, ***Scott v Redl***, 43 AD3d 1031, 842 NYS2d 485 [2007]; ***Soderman v Stone Bar Assocs.***, 3 AD2d 680, 159 NYS2d 50 [1957]).

Here, Carey has failed to establish its entitlement to judgment as a matter of law. According to the contract between Carey and Westland, Carey was hired to furnish, install and remove temporary concrete barriers and was responsible for the repair and maintenance of the barriers. In the incomplete copy of the October 10, 2008 EBTof William Tucker (hereinafter Tucker), the sole owner of Carey, he stated that the aforementioned service was subcontracted to National to furnish, install and remove the barrier including the subject wire fence. Although he testified that he ordered the six feet high chain link panels and gates and that, upon completion of installing the fence, he inspected the fence, the incomplete copy of his EBT testimony did not indicate who installed the fence. There are several triable issues of fact as to who installed the subject fence and whether Carey has entirely displaced the other party's duty to maintain the premises (*see*, ***Hernandez v Racanelli Constr. Co.***, 21 Misc 3d 1137A, 875 NYS2d 820 [2005]).

J.C. Penney and Westland move (# 004) for summary judgment dismissing the complaint and all cross-claims against them. J.C. Penney contends that there was no allegation that it was negligent or had any involvement with the ownership, management or control of the premises.

J.C. Penney has established its prima facie entitlement to summary judgment by presenting the affidavit, dated May 26, 2009, of David Shore, the general manager of Westland, stating that, although J.C. Penney was located in the building owned by Westland, J.C. Penney was neither required to maintain the exterior of the building nor was it involved in the construction of the facade of the J.C. Penney building. The affidavit, dated June 9, 2009, of Mark Rooda, the J.C. Penney loss prevention manager, also indicated that the subject fence which struck the plaintiff was outside of J.C. Penney's entrance and was not within the control of J.C. Penney. No other parties submitted evidence to demonstrate that J.C. Penney was negligent or had any involvement with either the construction or the control of the subject area. Thus, that branch of the motion by J.C. Penney and Westland for summary judgment dismissing the complaint and all cross-claims against J.C. Penney is granted.

Westland also seeks summary judgment dismissing the complaint against it because it did not have any control over the subject fence. Westland contends that, pursuant to the contract between Westland and V.R.D., V.R.D. was responsible for all aspects of the construction including maintaining safety at the work site.

When an alleged defect or dangerous condition arises from a contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law (*see*, ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). That is, if an injury is caused by the manner in which a subcontractor performs its work, an owner or general contractor will be liable only it had the authority to control the activity bringing about the injuries so as to enable it to avoid or correct an unsafe condition (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Fassett v Wegmans Food Mkts.***, 66 AD3d 1274, 888 NYS2d 635 [2009]; ***Nelson v Sweet Assocs., Inc.***, 15 AD3d 714, 788 NYS2d 705 [2005]). Moreover, an owner who retains control over the premises has a general duty to maintain its premises in a safe condition (*see*, ***Cook v Orchard Park Estates, Inc.***, 2010 NY Slip Op 3822, 2010 NY App Div Lexis 3855 [2010]; ***Weinberg v Alpine Improvements, LLC***, 48 AD3d 915, 851 NYS2d 692 [2008]).

Here, Westland has failed to establish its entitlement to judgment as a matter of law. At his EBT Tucker of Carey stated that he knew that, at the time of the accident, the subject fence "blew over" and landed on the plaintiff while he was walking adjacent to the fence. Tucker further stated that he did not make a determination as to what caused the fence to blow over. Moreover, while Tucker stated that the subject fence was installed in March 2004 by National, the contract between Westland and V.R.D. for V.R.D. to be the general contractor was entered on July 9, 2004. There are several triable issues of fact in this case whether Westland retained control over the parking lot including the subject fence prior to the July 9, 2004 contract between Westland and V.R.D.; what caused the fence to fall over on the plaintiff and whether the plaintiff's injury was caused by the manner in which National installed the fence. Thus, that branch of the motion for summary judgment dismissing the complaint against Westland is denied.

Westland also seeks summary judgment dismissing the complaint against it because an act of God caused the accident. For a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree (*see*, ***Moore v Gottlieb***, 46 AD3d 775, 848 NYS2d 328 [2007]; ***Cangialosi v Hallen Constr. Corp.***, 282 AD2d 565, 723 NYS2d 387 [2001]). It cannot be determined at this time if the fall of the subject fence was a consequence of negligent maintenance or repair, as the plaintiffs claim, or an act of God, as Westland contends (*see*, ***Fulgum v Town of Cortland***, 2 AD3d 775, 770 NYS2d 416 [2003]; ***Zeltmann v Town of Islip***, 265 AD2d 407, 696 NYS2d 231 [1999]). Proximate cause is a jury question (*see*, ***Nowlin v City of New York***, 81 NY2d 81, 595 NYS2d 927 [1993]; ***Moore v Gottlieb***, *supra*). Here, Westland has failed to produce any evidence concerning the strength of the winds (*see*, ***Goeddertz v Petit***, 265 AD2d 899, 696 NYS2d 917 [1999]). The uncertified climatological report submitted by Westland is inadmissible (*see*, ***Kasem v Price-Rite Off. & Home Furniture***, 21 AD3d 799, 800 NYS2d 713 [2005]; ***Sangiacomo v State of New York***, 13 Misc 3d 1246A, 831 NYS2d 362 [2006]). Thus, the branch of motion for summary judgment dismissing the complaint against Westland because of an act of God is denied.

In the alternative, Westland seeks summary judgment for contractual and/or common-law indemnification against V.R.D., Carey and National. V.R.D., Carey and National may be liable to Westland for common-law indemnification even in the absence of a duty running to the plaintiff, if the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of V.R.D., Carey and National (*see*, ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2003]). Since there is a question of fact as to whether Westland retained control over the parking lot including the subject wire fence, a question of fact also exists as to whether the plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of V.R.D., Carey and/or National (*see, **Franklin v Omni Sagamore Hotel***, 5 AD3d 348, 772 NYS2d 534 [2004]; ***Mitchell v Fiorini Landscape***, 284 AD2d 313, 726 NYS2d 673 [2001]). Moreover, Westland failed to establish its entitlement to summary judgment for contractual indemnification against V.R.D. and Carey since a question of fact exists with respect to whether V.R.D. and Carey breached the contract by failing to perform one or more of the services for which they were retained (*see*, ***Peycke v***

Newport Media Acquisition II, *supra*; ***Baratta v Home Depot USA***, *supra*). These questions of fact preclude the granting of Westland's request for summary judgment for contractual and/or common-law indemnification against V.R.D., Carey and National.

National moves (# 005) for an order pursuant to CPLR §3025 (b) for leave to amend its answer to include cross-claims against Carey.

CPLR §3025 [b] provides that leave to amend pleadings should be freely given. While the decision to permit or deny an amendment is entrusted to the sound discretion of the court, in the absence of prejudice, mere lateness in seeking leave to amend a pleading does not bar an amendment (*see*, ***Edenwald Contr. Co. v City of New York***, 60 NY2d 957, 471 NYS2d 55 [1983]; ***Arcuri v Ramos***, 7 AD3d 741, 776 NYS2d 895 [2004]). In fact, prejudice to the adverse party is the main barrier which prevents granting a motion to amend an answer (see, ***Arcuri v Ramos***, *supra*; ***Schiavone v Victory Mem's Hosp.***, 300 AD2d 294, 751 NYS2d 287 [2002]).

Here, the plaintiffs and Carey have failed to establish that any prejudice would result if National's request for leave to amend its answer is granted although National's counsel has provided no explanation for the delay. Also, as Carey admitted in its opposition, discovery has not been completed. Under the circumstances, National is permitted to amend its answer to add the affirmative defense of contractual and common law indemnification, contribution and failure to procure insurance coverage against Carey.

National cross-moves (# 006) for summary judgment dismissing the complaint and all cross-claims against it as there is no triable issue of fact as to its negligence. National contends that it neither created the allegedly dangerous condition nor had actual or constructive notice of the condition.

A subcontractor may be held liable for negligence if the work it performed created the condition that caused the plaintiff's injury (*see*, ***Tabickman v Matchelder St. Condominiums By the Bay***, 52 AD3d 593, 859 NYS2d 721 [2008]; ***Stevenson v Alfredo***, 277 AD2d 218, 715 NYS2d 444 [2000]).

Here, National has failed to establish its entitlement to judgment as a matter of law. At his September 18, 2009 EBT, Paul Indomenico (hereinafter Indomenico), a regional manager employed by National, stated that he reviewed the video depicting the plaintiff's accident and saw that wind knocked down one section of the subject wire fence, which fell over on the plaintiff. Indomenico concluded that panel clamps, which secure fence sections to each other and prevent them from falling, were missing in places on the fence section which fell and that the fence section was not properly secured. Indomenico also stated that clamps could not be removed without a tool. At his October 10, 2008 EBT, Tucker stated that, upon completion of installing the fence, he inspected the fence and observed that the fence was set on stands which were secured with sandbags. Tucker did not mention panel clamps. There are questions of fact as to whether the subject fence was adequately secured with clamps when it was installed by National;

whether a dangerous condition existed on the subject fence so as to create liability on the part of National and whether it exercised reasonable care (*see*, ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). Thus, the branch of cross-motion for summary judgment dismissing the complaint and all cross-claims against National is denied.

In the alternative, National seeks summary judgment for contractual indemnification against Carey. Since, as noted, *supra*, a question of fact exists with respect to whether National breached its contract by failing to perform one or more of the services for which it was retained, National failed to establish its entitlement to summary judgment for contractual indemnification against Carey (*see*, ***Peycke v Newport Media Acquisition II***, *supra*; ***Baratta v Home Depot USA***, *supra*).

Accordingly, the plaintiffs' motion (# 002) for summary judgment is denied; Carey's cross-motion (# 003) for summary judgment is denied; the branch of the motion (# 004) for summary judgment dismissing the complaint and all cross-claims against J.C. Penney is granted and the action is severed and shall continue against the remaining defendants; those branches of Westland's motion (# 004) for summary judgment are denied; National's motion (# 005) for an order amending its answer is granted; and National's cross-motion (# 006) for summary judgment is denied.

Dated: June 7, 2010

Peter Sluss
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**