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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 100485/2008

DAVIS, SYLVIA

VS.

CPS 1 REALTY GP LLC

SEQUENCE NUMBER : 001

COMPEL

INDEX NO. _____

MOTION DATE 5-20-10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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~~ motion and cross motion are decided in accordance with the annexed Memorandum Decision + Order

FILED

JAN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 4, 2011

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: IAS PART 11

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SYLVIA DAVIS, Index No.: 100485/08

Plaintiff,

-against-

CPS REALTY GP, LLC and TISHMAN CONSTRUCTION CORP.,

Defendants.

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CPS REALTY GP, LLC and TISHMAN CONSTRUCTION CORP,

Third-Party Index No.: 590247/08

Third-Party Plaintiffs,

-against-

VENETIAN ENTERPRISES, INC..,

Third-Party Defendant.

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JOAN A. MADDEN, J.

In this action arising out of a workplace injury defendants/third-party plaintiffs CPS 1 Realty Group ("CPS") and Tishman Construction Co. ("Tishman") cross move for an order granting them conditional summary judgment on their third party claim for contractual indemnification against third-party defendant, Venetian Enterprises, Inc ("Venetian").[1] Venetian and plaintiff oppose the cross motion, which is denied for the reasons below.

Background

Plaintiff alleges that she was injured on February 6, 2006, at about 11:00 am, while she was working on the 10th floor at a project involving the renovation of the Plaza Hotel ("the Project") located at 768 Fifth Avenue, New York, NY ("the Hotel"). CPS owns the Hotel and hired Tishman as the Construction Manager for the Project. On or about December 7, 2005,

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[1]The cross motion was made in connection with a motion by Venetian to compel discovery. That motion was resolved by so-ordered stipulation dated July 8, 2010.

Tishman, as agent for CPS, entered into a contract with Venetian to act as a demolition contractor on the Project ("the Venetian Contract"). At the time of the accident, plaintiff was assigned through her union to work for Venetian,

Paragraph 7 of the Venetian Contract contains the following indemnification language:

> To the fullest extent permitted by law, the Contractor [i.e. Venetian] shall indemnify and hold harmless the Owner [i.e. CPS], Construction Manager [i.e. Tishman]... from and against all claims, causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal costs and expenses, arising out of or resulting from the performance of Contractor's Work, or the Contractor's operations, or the condition of the Site ... or by the condition of any other place where work incidental to the Project is being performed or operations are being conducted including ... bodily injury, sickness, disease or death...whether or not it is alleged that the Owner, Construction Manager ....in any way contributed to the alleged wrongdoing....

(emphasis in original).

According to plaintiff, prior to the accident she used an exterior hoist to bring her back to the tenth floor of the Hotel after getting tools she need to perform her work duties there. As she got off the hoist, she turned right to go down a ramp made of wooden planks and when she placed her right foot on the ramp her "foot went through the hole where the plank had given way." (Plaintiff Dep., at 73). The plank then caught the front of plaintiff's boot causing her to fall forward until the brim of her hard hat hit the ground. (Id, at 76). After the accident plaintiff was sitting on a crate about five feet from the ramp and noticed that the planks "were not nailed into a foundation"(Id, at 90). Plaintiff was not sure who employed the foremen who directed her work, but later testified that she believed that they were employed by Venetian (Id., at 40, 47).

Anthony Fedor ("Fedor"), is currently employed by Tishman, but was working as a site

safety manager for Site Safety, LLC ("Site Safety") on the Project at the time of the accident.[2] Site Safety was retained by Tishman to maintain safety at the Project. Fedor's duties included ensuring the safety of workers and working conditions at the Project and he would perform walk throughs on a daily basis to determine if conditions were safe (Fedor Dep. at 10, 12). If Fedor noticed an unsafe condition he would report to a supervisor at Tishman (Id, at 11). Fedor testified that non-party Atlantic Heydt Corporation ("Atlantic Heydt") was responsible for constructed the exterior hoists and the ramps that workers, like the plaintiff, used to access the floors (Id, at 20, 25). Fedor testified that Atlantic Heydt was responsible for inspecting the hoists and ramps but that he if he noticed that a plank was dislodged or out of place that he would inform Tishman to get it fixed (Id, at 69, 71). Fedor testified that he recalled that there were nails in the planks but he did not know if the nails were used to secure them to the wood base and he did not recall whether the planks were secured together (Id, at 29, 35). He could not recall when he had last been on the relevant ramp. Fedor also could not recall whether, when walking down the relevant ramp, he had noticed that planking was loose or the ramp was shaky; he also did not recall whether he received any complaints about the ramps leading from the exterior hoists to the floors (Id, at 55, 72, 79).

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[2]Plaintiff argues that Fedor's testimony is inadmissible as the transcript was never executed. See McDonald v. Mauss, 38 AD3d 727 (2d Dept 2007)(holding that deposition transcripts of non-party witnesses that were not executed or sworn are not admissible). Although the Fedor deposition transcript is not executed, it is certified as accurate by the court reporter and therefore properly considered by this court. White Knight Ltd. v. Shea, 10 AD3d 567, 567, 568 (1st Dept 2004). Furthermore, while as noted by plaintiff, defendants/third-party plaintiffs rely on Fedor's deposition testimony in support of their summary judgment motion, but fail to attach the deposition transcript to their moving papers, this error does not preclude the court from considering Fedor's testimony, particularly as the opposing parties each submit a copy of the relevant deposition transcript.

On February 8, 2006, Fedor completed an accident report. He did not recall whether he performed an investigation of the accident or who gave him the information for the report, which states, in part, that plaintiff "came off the hoist on the 10th floor, 58th Street side. As she began to walk down the ramp that leads into the building, one of the planks came loose and fell down off the steel supporting it. Her leg went into the hole about 8 inches (right leg) then she fell face down ... " (Plaintiff's opposition, Exhibit 2).

On January 18, 2008, plaintiff commenced this action against CPS and Tishman, asserting claims under Labor Law §§ 240(1), 241(6) and 200 and for common law negligence. CPS and Tishman subsequently brought a third-party action against Venetian seeking, *inter alia*, contractual indemnification.

Defendants/third-party plaintiffs now seek summary judgment on their claim for contractual indemnity against Venetian based on the indemnification provision in the Venetian Contract. They argue that summary judgment is warranted as there is no evidence that their negligence caused or contributed to plaintiff's injuries.

In opposition, Venetian asserts that the indemnification provision in the Venetian Agreement is void under General Obligations Law section 5-322.1 inasmuch as it indemnifies CPS and Tishman for their own negligence by allowing them to be indemnified "whether or not it is alleged that [they] ....in any way contributed to the alleged wrongdoing." Moreover, Venetian asserts that the motion is premature as there are triable issues of fact regarding whether CPS and Tishman knew or should have known that the planks were improperly secured.

Plaintiff also argues that the motion is premature and that there are triable issues of fact as to whether CPS and Tishman were negligent, particularly as Fedor is not employed by Tishman and no deposition testimony is submitted from a representative of Tishman.

In reply, defendants/third-party plaintiffs submit the deposition transcript of Michael Pinelli ("Pinelli"), a Vice President of Tishman, who was employed by Tishman as the general superintendent on the Project. Pinelli testified that his duties included walking through the site on a daily basis and that he was looking for "progress" "quality control" and "safety issues" (Pinelli Dep. ast 25). He also testified that each of the trades on the site was "required to have their own superintendents to oversee their workers" (Id, at 66). According to Pinelli, the relevant ramp was installed on February 1, 2006 by Atlantic Heydt (at 56). Pinelli could not recall whether he received any complaints about the condition of the ramps (also known as walkways) prior to the accident (Id., at 53). Pinelli testified that it was not Tishman's job to inspect the ramps or to make sure the planks were properly secured (Id, at 71).

Defendants/third-party plaintiffs argue that Pinelli's testimony establishes that they did not supervise or control plaintiff's work or have notice of the condition that caused her injuries. They also argue that Fedor's testimony demonstrates that he was an overall site safety manager who had no duty to supervise the work performed by subcontractors such as Venetian and thus his role at the work site is insufficient to raise an issue of fact as to Tishman's negligence. In addition, defendants/third-party plaintiffs argue that Fedor's testimony shows that he did not have any notice of a defect that gave rise to plaintiff's injuries.

Discussion

General Obligations Law §5-322.1 provides, in part, that:

> A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the . . . repair or maintenance of a building, structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his

> agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable . ...

Under this section of the General Obligations Law, an agreement to indemnify in connection with a construction contract is void and unenforceable to the extent such agreement contemplates full indemnification of a party for its own negligence. Itri Brick & Concrete v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 (1997) (invalidating indemnification provisions which provided for full indemnification of the general contractors for their own negligence and contained no language limiting the subcontractors' obligations to that permitted by law or to the subcontractor's negligence).

When, as here, the indemnification clause permits a party to be indemnified for its own wrongdoing, the right to indemnification turns on whether the party seeking to be indemnified is free from active wrongdoing or negligence. See e.g., Itri Brick & Concrete v Aetna Cas. & Sur. Co., 89 NY2d at 795, n.5 (noting that without a finding of negligence on the part of a general contractor an indemnification agreement "would not run afoul of the proscriptions of the General Obligations Law § 5-322.1"); Brown v. Two Exchange Partners, 76 NY2d at 180-181 (where there is no finding of fault on the part of an indemnitee "neither the wording nor the intent of [General Obligations Law § 5-322.1] is violated by allocating responsibility ...through an indemnification provision").[3] At issue in this case is whether there is a factual issue as to the potentially liability of the CPS and/or Tishman for common law negligence or a violation of

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[3]Brooks v. Judlau Contracting, Inc. v. Brooks, 11 NY3d 204 (2008) cited by defendants/third-party plaintiffs for the proposition that they are entitled to summary judgment even if there are factual issues regarding their negligence is not controlling here. Unlike this case, the indemnification provision in Brooks did not require the subcontractor to indemnify the indemnitee for its own negligence.

Labor Law § 200, such that it would be premature to grant conditional summary judgment on their claims for contractual indemnification against Venetian.

The common-law duty to maintain a safe workplace is codified in Labor Law § 200. See, Gasper v Ford Motor Co., 13 NY2d 104 (1963). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner or general contractor exercises no supervisory control over the operation, no liability attaches to owner under the common law or under Labor Law § 200." Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993). To be charged with liability under Labor Law § 200, an owner or general contractor must perform more than their "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept), lv denied, 100 NY2d 508 (2003).

"[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003). Instead, it must be shown that the owner or general contractor "'*had authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition*'." Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007)(emphasis in the original), quoting, Ruzzuto v. Wenger Construct. Co., 91 NY2d at 352.

However, even when the owner or general contractor do not exercise supervision over the work site sufficient to give rise to potential liability under Labor Law § 200, such supervision is not necessary when, as here, it is alleged that the owner or general contractor has actual or constructive notice of the condition causing the injuries, which does not arise out of the means and methods of the subcontractor. See e.g., Bonura v. KWK Associates, Inc., 2 AD3d 207 (1st Dept 2003);Higgins v. 1790 Broadway Associates, 261 AD2d 223 (1st Dept 1999).

"Constructive notice requires that the hazard be "visible and apparent and . . . exist for a

length of time prior to the accident sufficient to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986); Plantamura v Penske Truck Leasing, 246 AD2d 347 (1st Dept 1998). On a motion for summary judgment, the evidence must be viewed in the light most favorably to the plaintiff. Golden v Coinmach Industries, Inc., 273 AD2d 4, 5 (1st Dept 2000). Thus, while "a plaintiff carries the burden at trial of convincing the trier of facts, even by circumstantial evidence, of at least constructive notice of an ongoing dangerous condition ... to obtain summary judgment the defendant must demonstrate that plaintiff will be unable to satisfy that burden at trial (citations omitted). Armstrong v Ogden Allied Facility Management Corp., 281 AD2d 317, 318 (1st Dept 2001).

Here, plaintiff alleges the ramp was defective based on her deposition testimony that the boards creating the ramp were loose and not secured, and that her foot went into a hole, i.e. a gap between the boards. Under these circumstances, Tishman's reliance on deposition testimony of witnesses who could not recall noticing if the ramp was defective and/or receiving complaints about the ramp is insufficient meet its burden of showing lack of constructive notice of the condition of the ramp. Moreover, there is evidence from which it can be inferred that Tishman knew or should have known about the condition of the ramp, including testimony that it had at least two representatives on the site walking through the site on a daily basis to check for safety issues and evidence that the defective ramp was installed five days before the accident.

As there are issues of fact as to whether Tishman knew or should have known about the condition causing plaintiff's injuries, it would be premature to grant it summary judgment on its claim for contractual indemnification. See e.g., Cuevas v. City of New York, 32 AD3d 372, 374 (1st Dept 2006)(holding that conditional grant of summary judgment on claims for contractual indemnification was premature where there were triable issues of fact regarding whether parties to be indemnified either improperly maintained or installed the vault on which plaintiff fell); Gomez v National Center for Disability Services, Inc., 306 AD2d 103 (1st Dept 2003)(holding

that the resolution of the contractual indemnification claim was premature where there were issues of fact as to negligence of the party to be indemnified under the relevant indemnification provision).

In contrast, CPS is entitled to a conditional grant of summary judgment on its third-party claim against Venetian for contractual indemnification as there is no evidence that any representative of CPS was present on the worksite or had notice of any defect relating to the relevant ramp, and thus any liability on its part would be purely statutory based on a violation of Labor Law § 240(1) and/or § 241(6). See Brown v. Two Exchange Partners, 76 NY2d at 180-181; see also, Colozzo v. National Center Foundation, Inc., 30 AD3d 251 (1st Dept 2006)(granting conditional summary judgment to indemnitee where there is no evidence of negligence on the part of the indemnitee).

Conclusion

In view of the above, it is

ORDERED that the cross motion by defendant/third-party plaintiff Tishman Construction Co. for an order granting it conditional summary judgment on its third party claim for contractual indemnification against third-party defendant, Venetian Enterprises, Inc is denied; and it is further

ORDERED that the cross motion by defendant/third-party plaintiff CPS 1 Realty Group for an order granting it summary judgment on its third party claim for contractual indemnification against third-party defendant, Venetian Enterprises, Inc conditioned on the outcome of the primary action is granted; and

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street on January 27, 2011 at 11:00 am.

DATED: January 4 ,2011

J.S.C.