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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 4
Justice

Index Number : 116404/2007
AYERS,III, ALFRED JOSEPH
vs
DORMITORY AUTHORITY
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

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

Dated: January 27, 2014

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, IAS PART 11

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ALFRED JOSEPH AYERS III,

Index No.: 116404/07

Plaintiff,

-against-

THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, THE CITY OF NEW YORK and HUNTER COLLEGE,

Defendants.

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JOAN A. MADDEN, J.:

In this personal injury action, defendant the Dormitory Authority of the State of New York ("DASNY") moved for summary judgment dismissing the complaint against it.[1] Plaintiff opposed the motion.

This action arises out of an incident that occurred on September 13, 2006, at the Master of Fine Arts Building at Hunter College located at 450 West 41st Street in Manhattan ("the Building") when a fire started on the top of a sidewalk shed on the south side of the Building. Plaintiff was injured when he landed on the top of the shed, in an attempt to extinguish the fire by jumping to the shed below a second story window of the Building. Plaintiff, a student at Hunter College who was trained in fire suppression during his time in the Air Force, maintains that he undertook to put out the fire as the numerous studios that overlooked the shed were filled with flammable and toxic materials.

DASNY owns the Building which was used by the City University of New York ("CUNY") for Hunter College. At the time of the incident, plaintiff was in the restroom on the

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[1]The claims against Hunter College have been discontinued, and the claim against the City of New York has been dismissed.

second floor of the Building. Plaintiff testified that he saw Richard McGauley,[2] a mechanical engineer at Hunter College, who indicated to him that there was a fire and that the fire hose did not work. According to plaintiff, he could not see where the fire was coming from. Plaintiff testified that he ran a bucket of water to McGauley to put out the fire and also offered to climb down to the scaffolding when the water did not appear to work so that he could use a fire extinguisher to put out the fire from that location. Plaintiff jumped from the window ledge onto the scaffolding and landed on his feet and then fell into a squatting position placing some weight onto his right hand. He was unable to stand up and noticed bone protruding from his ankle. While on the sidewalk shed plaintiff remembers seeing some debris near the fire area, which he describes as "construction equipment, possibly metal. I remember metal rebar, some wood. I don't know." (See Plaintiff's Dep. at 81).

McGauley testified that he was employed as "an oiler" by Hunter and that he was responsible for maintaining all the mechanical equipment the Building. He testified that he was present on the scene and was the first to notice the fire from the second floor of the Building. McGauley testified at his deposition that he saw a "little fire" on top of the sidewalk shed but did not see any garbage on the shed under the wooden planks. (McGauley Dep., at 118). McGauley further testified that student cigarette butts started the fire, and that he frequently saw students smoke and saw cigarette butts near the fire. McGauley proceeded to throw buckets of water from the second floor window onto the sidewalk shed putting out the fire.

DASNY moved for summary judgment, arguing that as an out-of-possession landlord, it does not retain sufficient control or authority over the Building to give rise to a duty owing to

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[2]McGauley's name is incorrectly spelled McCauley in the papers submitted in connection with the motion.

plaintiff. DASNY alternatively argued that even if it owed plaintiff a duty, it had no notice of any dangerous condition leading to the fire. DASNY contends that there could not have been notice of "unspecified garbage" on the top of the sidewalk shed.

Plaintiff opposed the motion on various grounds, including that DASNY owes a duty to him, as the shed at issue was part of an ongoing project, and points to evidence showing that CUNY requested that DASNY arrange for the installation of the sidewalk shed.

In reply, DASNY conceded responsibility for the repairs underway at the Building as DASNY employees contracted for the erection of the sidewalk shed. DASNY admits that its contractor is responsible for the shed. However, DASNY argued that it entitled to summary judgment based on evidence that the fire was started by students smoking and CUNY's lack of supervision of its students, and not by any defect in the shed which was constructed from wood in compliance with the New York City Building Code. DASNY also argued that it had no notice of any garbage on the shed.

In its interim decision and order dated July 9, 2013, the court noted that as DASNY has conceded that it hired the contractor who performed work on the shed, it is not entitled to summary judgment based on its status as an out-of-possession landlord. The court also found issues of fact as to whether the DASNY caused or created the condition of debris on the shed such that it could be held liable to plaintiff.

However, while finding factual issues as to whether DASNY breached a duty to plaintiff in connection with the debris on the top of the shed, the court found that there remained an issue as to whether such a breach was a proximate cause of plaintiff's injuries. As neither side directly addressed the proximate cause issue in their papers, the court permitted each side to submit papers on the issue.

In its supplemental papers, DASNY argues that the debris on the shed merely furnished the condition or occasion for the accident and was not the cause, citing Sheehan v. City of New York, 40 NY2d 496, 503 (1976); Batista v. City of New York, 101 AD3d 773 (2d Dept 2011). Specifically, it asserts that the facts surrounding the incident was caused to be injured by his unilateral decision to jump out of a window onto the shed to attempt to put out the fire, which was caused by CUNY's negligence in permitting students to throw lit cigarette butts out the window of its facility in violation of CUNY's rules.

Plaintiff counters that the cases relied on by DASNY are factually distinguishable from the instant action, and the circumstances here do not fall within the narrow exception for instances in which the defendant's alleged negligence can be said to merely provide the occasion or place for an accident.

In general, proximate cause is an issue to be decided by the finder of fact. (See Benitez v. New York City Bd. Of Educ., 73 N.Y.2d 650, 659 (1989); See also, Kriz v. Schum, 75 NY2d 25, 34 (1989), quoting Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 315-316 (1980) ("because the determination of legal causation turns upon questions of foreseeability and 'what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve'"). Likewise, whether an intervening event relieves defendant of liability is generally for the jury. Morris v. Lenox Hill Hospital, 232 AD2d 184 (1st Dept 1996), aff'd 90 NY2d 953 (1997). However, "extraordinary intervening acts which are not foreseeable in the normal course of events may serve as a basis for a ruling, as a matter of law, that the chain of causation has been broken." Monell v. New York, 84 A.D.2d 717 (1st Dept. 1981).

DASNY argues that CUNY's negligence in permitting the students to smoke and drop

their cigarette butts out of the window was an intervening act, and that any negligence by DASNY in leaving debris on the shed merely furnished the occasion for plaintiff's injuries as opposed to being a substantial factor in causing such injuries. DASNY's theory regarding independent intervening act must be viewed in the context of allegations of DASNY's negligence with respect to the leaving the debris on the shed.

In analyzing the issue of legal cause, the Court of Appeals has written:

> There are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law. Those cases generally involve independent intervening acts which operate upon but do not flow from the original negligence. Thus, for instance, we have held that where an automobile lessor negligently supplies a car with a defective trunk lid, it is not liable to the lessee who, while stopped to repair the trunk, was injured by the negligent driving of a third party (Ventricelli v Kinney System Rent A Car, 45 NY2d 950) . Although the renter's negligence undoubtedly served to place ... the injured party at the site of the accident, the intervening act was divorced from and not the foreseeable risk associated with the original negligence. And the injuries were different in kind than those which would have normally been expected from a defective trunk. In short, the negligence of the renter merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated ....

Derdiarian v. Felix Contr. Corp., 51 NY2d at 351.

Under this analysis, contrary to DASNY's position, there are factual issues as to whether CUNY's alleged negligence in permitting the students to smoke out the window was an independent intervening act. Specifically, under DASNY's theory, it cannot be said, as a matter of law, that CUNY's alleged acts merely operated upon and did not flow from DASNY's original negligence so as to constitute an independent intervening act. Rather, a triable issue of fact exists as to whether the debris on the shed and/or CUNY's alleged negligence were substantial factors

in causing plaintiff's injuries.[3] See e.g., Derdiarian v. Felix Contr. Corp., 51 NY2d at 315 (upholding jury finding that contractor's failure to provide adequate safety precautions at work site was a proximate cause of plaintiff subcontractor's injuries which occurred when the operator of motor vehicle failed to timely ingest medication and suffered a seizure and crashed into barricade erected by defendant contractor and caused plaintiff to be splattered with boiling liquid enamel from a kettle struck by the motor vehicle).

Moreover, the case law relied on by DASNY is not controlling here, as it involves situations in which the court found that the defendant's alleged negligence was unrelated to, and wholly independent from, a subsequent act of negligence causing plaintiff's injuries. See Sheehan v. the City of New York, 40 NY2d at 503 (holding that the driver and owner of a bus could not be held liable for injuries sustained by plaintiff/ bus passenger, when a sanitation truck struck the bus from the rear since "no act of the bus caused the sanitation truck to be any place other than where it was"); Batista v. City of New York, 101 AD3d 773 (manner in which defendants closed off lane of traffic was not a proximate cause of injuries suffered by plaintiff when motorcycle on which he was passenger struck a van in the rear when the operator of the van observed the lane closure and had come to a complete stop for three seconds before the accident).

Accordingly, as issues of fact remain as to whether any negligence by DASNY in

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[3]As pointed out by plaintiff, DASNY does not argue that it can be determined as a matter of law that plaintiff's decision to assist in putting out the fire was an extraordinary intervening act, breaking the chain of causation. In any event, such an argument would fail under the circumstances here, given the location of the shed in relation to the second story window from which plaintiff jumped, and plaintiff's testimony that numerous studios whichlooked the shed were filled with flammable and toxic materials.

connection with the debris on the shed was a proximate cause of plaintiff's injuries, DASNY's motion for summary judgment is denied.

In view of the above, it is

ORDERED that DASNY's motion for summary judgment is denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: January 17, 2014

J.S.C.