Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

GALINA KARAMAN,
Plaintiff,

- against -

45TH AVENUE HOUSING COMPANY, et al.,
Defendants.

Index
No. 6543 2011

Motion
Dates Nov 27 & Dec 6 2013

Motion
Cal. Nos. 38-40, 69

Motion
Seq. Nos. 7-10

The following papers numbered 1 to 40 read on this motion by defendant Vikrant Contracting & Building, Inc., i/s/h/a Vikrant Contracting & Builders, Inc. (Vikrant), for an order granting it summary judgment dismissing the complaint; and on this motion by plaintiff for an order granting her summary judgment against defendant 45th Avenue Housing Company (45th Avenue), DSA Services, Inc. (DSA), J.K. Construction N.Y. Inc. (JK), and Vikrant; and on this motion by JK for an order granting it summary judgment dismissing the complaint and all cross-claims; and on this motion by 45th Avenue and DSA for an order granting them summary judgment dismissing the complaint and all cross-claims.

	Papers Numbered
Notices of Motion - Affirmation - Exhibits.....	1-17
Answering Affirmation - Exhibits.....	18-32
Reply.....	33-40

Upon the foregoing papers it is ordered that the motions are consolidated for purposes of a single disposition and are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on September 16, 2010, when, while on the sidewalk adjacent her residence, known as 45-25 Kissena Boulevard, in Queens County, a sheet of plywood fell on her. According to plaintiff's testimony, at approximately 4:00 P.M., she exited her apartment through the side entrance and stood on the sidewalk to wait for an ambulette to take her to physical therapy. At the time, the weather was normal with neither rain nor wind. Suddenly, it began to rain heavily with strong wind gusts, sending her – along with some construction workers who were working on the building – to seek protection under a sidewalk shed. Not long thereafter, plaintiff saw something coming toward her from her left side, striking her and causing her to fall to the ground, rendering her unconscious. Plaintiff did not know what the object was or where it came from. Her husband, who also testified herein, spoke with a construction worker who apparently witnessed the accident and told him that plaintiff was struck by a piece of plywood which came from the sidewalk shed. At the time of the accident, the building was undergoing interior and exterior renovation work which, among other things, required the use of scaffolding; the sidewalk shed was constructed for pedestrian safety. It should also be noted that, at that time, a rare weather event occurred when an F1 tornado touched down in Queens County.

It is well established that 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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination *(see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied *(see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

"For a defendant to be held liable in tort, it must have owed the injured party a duty of care (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.2d 579, 584 [1994]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 13 [2d Dept 2011]; *Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011])" (*Suero-Sosa v Cardona*, 112 AD3d 706 [2d Dept 2013]). "The existence and extent of a duty is a question of law" (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d at 13). In support of its motion, JK initially argues that it owed no duty to plaintiff since it contracted with DSA, the general contractor for the job, for the sole purpose of performing facade work on the subject building, to wit: re-pointing and crack and balcony repair, and, as such, JK and plaintiff are not in privity of contract. Generally, a contractual

obligation will not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Bienaime v Reyer*, 41 AD3d 400 [2007]; *Huttie v Central Parking Corp.*, 40 AD3d 704 [2007]). However, there are three circumstances under which a party who enters into a contract may be said to have assumed a duty of care, rendering that party potentially liable in tort to third persons: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140 [internal quotations and citations omitted]; *see George v Marshalls of MA, Inc.*, 61 AD3d 925 [2009]; *Huttie*, 40 AD3d at 705-706), the only potentially applicable exception being the first of the three.[1]

In that respect, JK has demonstrated, prima facie, that it neither "launched" an instrument of harm, nor created or had actual or constructive notice of the alleged condition (*see Sainval-Brice v All Seasons Indus. Servs., Inc.*, 85 AD3d 1004 [2011]; *Bono v Halben's Tire City, Inc.*, 84 AD3d 1137 [2011]; *Farrell v City of New York*, 83 AD3d 655 [2011]). Namely, Mohinder Singh, JK's owner, testified that JK never utilized plywood (the mechanism of the injury) in the performance of the work it was hired to do; that it was not responsible for sidewalk shed maintenance but rather only for debris created by its workers during the course of their work; and that he supervised the work every day and never observed any loose wood, particularly on the date of the accident.

To raise a triable issue of fact, plaintiff must come forward with evidence in opposition demonstrating that JK somehow created or exacerbated the condition which is alleged to have caused her harm (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351 [2007]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210 [2010]). Plaintiff has failed to do so here. Plaintiff appears to have mischaracterized the respective testimony of various witnesses in order to impose a duty upon JK. First, to the extent that plaintiff points to the deposition of Carlo Frassetti, project manager and site safety officer for DSA (the general contractor), to show that JK was responsible for securing loose wood pieces on top of the sidewalk shed, Mr. Frassetti made a distinction between debris created by JK, for which the latter was responsible for cleaning, and the scaffolding and sidewalk shed structure itself (partially comprised of plywood), which was not JK's responsibility. Further, the testimony of the only witness to the accident – a Mr. Hugo Gomez – indicating that plaintiff was struck by plywood from the sidewalk shed, coupled with the testimony of Mr. Singh indicating that JK did not work with plywood, renders Mr. Frassetti's testimony irrelevant for purposes of

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1. Plaintiff fails to rebut evidence demonstrating either: (1) that she relied on, much less was aware of, the contract between JK and DSA; or (2) that JK was exclusively responsible for site safety.

implicating JK. Second, the use of the testimony of Mr. Frassetti and Mr. Gomez to imply that JK used plywood for the job does not demonstrate that JK indeed used plywood. Mr. Frassetti testified for what purpose JK would likely use plywood in the event they were to use it, and Mr. Gomez's testimony that "every contractor uses plywood for everything" is wholly speculative and non-specific. Third, the affidavit of Scott Siberman, P.E., in which he states that, based on his experience, facade workers use plywood in connection with their work, is speculative and insufficient to demonstrate both that JK used plywood and that said plywood was that which struck plaintiff (*see e.g. Arredondo v Valente*, 94 AD3d 920 [2012]; *Kopeloff v Arctic Cat, Inc.*, 84 AD3d 890 [2011]). Finally, to the extent that plaintiff argues – on her own motion for summary judgment – that the doctrine of res ipsa loquitur applies, it would appear that the doctrine fails to apply in this instance since plaintiff cannot demonstrate that the event was "caused by an agency or instrumentality within the exclusive control of the defendant," (*Bodnarchuk v State*, 49 AD3d 581 [2008]), simply because plaintiff asserts that the instrumentality was in the control any one of the defendants named herein (and, as such, it cannot be within the exclusive control of just one of them) (*see Martinez v City of New York*, 292 AD2d 349 [2002]; *Greenidge v HRH Constr. Corp.*, 279 AD2d 400 [2001]). It is for this reason, too, that plaintiff has not met her prima facie burden of establishing her entitlement to judgment as a matter of law against defendants 45th Avenue, JK, DSA, and Vikrant.

JK has also has demonstrated its prima facie entitlement to summary judgment dismissing: (1) the cross-claims for common-law contribution and indemnification asserted against it by45th Avenue and DSA by establishing that it breached no duty to plaintiff (*see Martin v Huang*, 85 AD3d 1132 [2011]); (2) the cross-claim for contractual indemnification by demonstrating that the accident did not arise out of the work it performed; and (3) the cross-claim for breach of contract for failure to procure insurance by production of the general liability policy covering these defendants as additional insureds. 45th Avenue and DSA have not opposed this branch of JK's motion.

Vikrant, the contractor responsible for installation and removal of the sidewalk shed, also moves for summary judgment dismissing plaintiff's complaint. In support, Vikrant – like JK – submits that none of the *Espinal* exceptions, noted above, apply, which would otherwise create a duty owed to plaintiff. However, Vikrant has failed to meet its prima facie burden of demonstrating that it did not launch a force or instrument of harm. The record reveals that Vikrant's responsibilities also included maintenance of the sidewalk shed; indeed, Mr. Frassetti testified that Vikrant would be called if the sidewalk shed required maintenance, repair, or modifications. Moreover, Palwinder Singh, Vikrant's owner, testified that, in addition to receiving calls in the event there was an issue with the sidewalk shed as described, Mr. Singh would perform sidewalk shed inspections every two weeks to ensure that the structure was well-maintained. While certain testimony shows that there was

no loose plywood in the vicinity of the accident, Vikrant's contention that plaintiff cannot identify that the plywood that struck her belonged to Vikrant or was part of the sidewalk shed is belied by the incident report generated by Mr. Gomez (which Mr. Gomez authenticated at his deposition), in which he reported that the "plywood portion of the scaffold flew down hitting [plaintiff] on her feet and she fell."[2] Moreover, there is evidence that Vikrant was in the process of dismantling the sidewalk shed, or portions thereof, before the accident occurred.[3] Thus, it cannot be said as a matter of law whether Vikrant owed plaintiff a duty of care.

To that end, Vikrant is not entitled to summary judgment based upon the occurrence being an "act of God," as human activities must not have contributed to the loss in any degree (*see Sawicki v GameStop Corp.*, 106 AD3d 979 [2013]; *Moore v Gottlieb*, 46 AD3d 775 [2007]).[4] As noted above, there are issues of fact as to whether Vikrant's actions, in any way, may have contributed to the happening of this accident.

Turning to the motion by 45th Avenue and DSA, the former has met its prima facie burden of establishing that it is entitled to dismissal of the complaint and cross-claims by virtue of the affidavit of Stuart C. Kaplan, president of the Board of 45th Avenue, wherein he states that 45th Avenue did not, inter alia, own, operate, manage, or control the building adjacent to plaintiff's accident, and that the contract with DSA was for work to be done at a different property (located at 137-47 45th Avenue, Queens). Neither plaintiff nor Vikrant and JK have raised a triable issue of fact in this regard.

Turning to the branch of the motion by DSA, the general contractor hired for the project, this defendant has, too, demonstrated that none of the *Espinal* exceptions, noted above, apply. Though plaintiff references deposition testimony of Mr. Frassetti to the extent that DSA was responsible for performing site safety inspections daily, same is irrelevant absent plaintiff demonstrating that DSA created or exacerbated the alleged condition (*see Fung*, 9 NY3d 351; *Foster*, 76 AD3d 210). As such, DSA is entitled to dismissal of the

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2. While it is true that Mr. Gomez testified that he did not know the origin of the plywood, same simply creates an issue of fact, which is within a jury's province.

3. While, immediately prior to the accident, Vikrant may have been removing metal pipes from the sidewalk bridge, there is evidence that Vikrant had removed wood therefrom earlier that day.

4. To the extent the defendants herein reference the order of Justice Kevin Kerrigan in *Perciavalle v Tapalga* (2013 NY Slip Op 31778 [U]), that case is inapposite since it involved the falling of a tree limb whereas there are issues as to whether the object which is alleged to have fallen on plaintiff was part and parcel of the work being done in the area at the time.

complaint, in addition to JK's cross-claims for common-law contribution and indemnification. [5]

Accordingly, the motion by JK for an order granting it summary judgment dismissing the complaint and all cross-claims asserted against it is granted. Plaintiff's motion for an order granting her summary judgment against defendants 45th Avenue, JK, DSA, and Vikrant is denied. Vikrant's motion for an order granting it summary judgment dismissing the complaint is denied. The branch of the motion by 45th Avenue and DSA for an order dismissing plaintiff's complaint and JK's cross-claims is granted.

Dated: February 20, 2014

J.S.C.

5. It is noted that Vikrant partially opposes the motion, referencing its cross-claims against 45th Avenue and DSA. However, Vikrant's verified answer to the amended complaint, submitted to the court on this record, does not appear to allege any cross-claims.