Duax v 110 Wall St. L.P.
2014 NY Slip Op 32102(U)
July 2, 2014
Sup Ct, Bronx County
Docket Number: 310111/2010
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

XINQUE DUAX,

Plaintiff,

-against-

110 WALL STREET L.P., RUDIN MANAGEMENT CO., INC., ALLSTATE CONVEYER SERVICES, INC., AMERICAN BUILDING MAINTENANCE and CONSOLIDATED HOUSEKEEPING,

Defendants.

INDEX NUMBER: **310111/2010**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendant's Motion for Summary Judgment

On Calendar of 4/7/14

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant Consolidated Housekeeping's motion for summary judgment is granted for the reasons set forth herein.

The within action involves plaintiff's claim that he was injured on August 4, 2010 when he allegedly fell down a flight of steps as a result of a defective railing. Plaintiff claims that his accident occurred while he was walking down a flight of stairs and holding on to the handrail, it disengaged from the wall causing him to fall. Plaintiff alleges that the handrail was negligently maintained and that his accident was caused by the negligently maintained handrail. The premises where the accident occurred, 110 Wall Street, New York, New York is owned by defendant 110 Wall Street, L.P. (hereinafter 110 Wall Street) and managed by defendant

Rudin Management Co., Inc. (hereinafter "Rudin"). At the time of the accident, plaintiff was working as an employee of non-party FedEx at or near the FedEx facility located on the subject premises. In August, 2010, Consolidated Housekeeping provided janitorial services to non-party FedEx pursuant to a written contract. Anthony Gubitosi, owner and president of Consolidated Housekeeping, submits an affidavit wherein he states that Consolidated Housekeeping is a corporation that provides janitorial services to commercial buildings and its employees are "office cleaners" performing vacuuming, sweeping, dusting, emptying garbage and cleaning restrooms. Pursuant to a contract, Consolidated Cleaning provided cleaning services to FedEx but its duties were limited to various cleaning services on a daily, quarterly and semi-annual basis. Mr. Gubitosi further states that pursuant to the contract, Consolidated Housekeeping was not required to perform any maintenance or repair work and was not responsible for maintaining or repairing any staircases or failings. Consolidated Housekeeping never performed any maintenance or repair work on the subject staircase or railing. Additionally, Mr. Gubitosi states that pursuant to the contract, if an employee of Consolidated Housekeeping encountered a condition that they felt was unsafe for their janitorial work, they would notify FedEx so that FedEx could rectify the problem, but its employees were not to attempt to engage in any repair or maintenance work. Finally, Mr. Gubitosi states that regarding plaintiff's accident, Consolidated Housekeeping was not aware of and did not create the loose railing condition that allegedly caused plaintiff's accident.

In opposition to the motion for summary judgment, plaintiff argues that in addition to the janitorial services, the contract also including provisions for Consolidated Housekeeping to perform "painting" as well as ensuring that "[o]ur executive staff will also make checks to be sure that all areas are properly maintained and any irregularities shall be reported to your [FedEx] office manager." Plaintiff also points to the language in the contract that provides "[o]ur aim is to do all within our power to aid in the wants and comforts of your employees and to best serve the interests of your organization." Plaintiff argues that as an employee of the non-party lessee, he was an intended beneficiary of this contract.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York,

49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

A defendant may be held liable for negligence only when it breaches a duty of care owed to the plaintiff. In re New York City Asbestos Litigation, 786 N.Y.S.2d 26 (1st Dept. 2004) citing Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002); Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402 (1985); Pulka v. Edelman, 40 N.Y.2d 781, 782 (1976). "In the absence of a duty running to the injured person, there can be no liability in damages, no matter how careless the conduct nor foreseeable the harm." Id., citing Lauer v. City of New York, 95 N.Y.2d 95, 100 (2000); Pulka, 40 N.Y.2d at 785. It is well-settled law that a service contractor owes no duty of care to a non-contracting third-party out of its contractual obligations. Jackson v. Board of Education of the City of New York, 812 N.Y..2d 91 (1st Dept. 2006).

Consolidated Housekeeping's motion for summary judgment must be granted as the evidence proffered shows that Consolidated Housekeeping has no responsibility for the condition, maintenance or repair of the subject handrail. A general provision in the contract that Consolidated Housekeeping would make checks to be sure that all areas are properly maintained is insufficient to charge Consolidated Housekeeping with an affirmative obligation to maintain or repair the subject handrail. Moreover, the proof offered here establishes that Consolidated Housekeeping did not owe plaintiff any duty of care and, thus, plaintiff has no direct cause of action against it. See, Church v. Callanan Industries, 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 138-139 (2002); Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579 (1994). without support in the record. See Pryor v. The City of New York, 879 N.Y.S2d 716 (1st Dept. 2009). A

contractual obligation, standing alone, would generally not give rise to a tort liability in favor of a third party. Espinal, *supra* citing Eaves Brooks Costume Company v. Y.B.H. Realty Corp., 76 N.Y.2d 200 (1990). However, "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'", that contracting party may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons. Espinal, 98 N.Y. 2d at 140 (Citation omitted). See also Jackson, 812 N.Y.S.2d at 98 quoting Church, 99 N.Y.2d at 111 (The contracting party may be held liable "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk"). In the instant action, there is no evidence that Consolidated Housekeeping launched a force or instrument of harm that caused plaintiff's accident.

Moreover, plaintiff's argument that discovery in the action is not complete and that depositions have not been held is unavailing as it is well-settled that "the mere hope by the party opposing summary judgment that it will uncover evidence that will prove its case is insufficient under CPLR 3212(f) to postpone a decision on a summary judgment motion". Town of Hempstead v. Incorporated Village of Atlantic Beach, 718 N.Y.S.2d 360, 362 (2d Dept. 2000). A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant information. Bailey v. New York City Transit Authority, 704 N.Y.S.2d 582 (1st Dept 2000). For the court to delay action on the motion, there must be a likelihood of discovery leading to evidence that will justify opposition to the motion. Jeffries v. New York City Housing Authority, 780 N.Y.S.2d 1 (1st Dept. 2004). Here, there is no evidence that further discovery will lead to relevant evidence. Plaintiff's counsel's statement that upon information and belief, "Gustavo Montalvan", an employee of Consolidated Housekeeping was a notice witness to the hazardous condition, without more, is insufficient to deny the motion. Plaintiff does not set forth any basis for his "information and belief" or any information whatsoever of how this person was a notice witness.

Accordingly, Consolidated Housekeeping's motion for summary judgment is granted and the complaint is dismissed as against it.

This constitutes the decision and order of this Court.

Dated: 7/2/2014

Hon. Alison Y. Tuitt