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SHORT FORM ORDER

INDEX No. 12-22883

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-14-15 (#005)
MOTION DATE 5-19-15 (#006)
ADJ. DATE 7-28-15
Mot. Seq. #005 - MotD
#006 - MG

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JOHN TARDIF and SHELLY TARDIF,

Plaintiffs,

- against -

HAUPPAUGE OFFICE PARK ASSOCIATES, LLC, COLIN DEVELOPMENT, LLC, OSI FURNITURE, GF OFFICE FURNITURE, LTD., ORLANDO MOVERS, INC., GRAEBEL COMPANIES, INC., and GRAEBEL NORTHEASTERN MOVERS,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants OSI Furniture and GF Office Furniture, Ltd., dated April 15, 2015, and supporting papers (including Memorandum of Law, dated April 15, 2015); (2) Notice of Cross Motion by the defendants Hauppauge Office Park Associates, LLC and Colin Development, LLC, dated April 16, 2015, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated July 14, 2015,, and supporting papers; (4) Reply Affirmation by the defendants OSI Furniture and GF Office Furniture, Ltd., dated July 22, 2015,

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and supporting papers; (5) Other Reply Affirmation of defendants Hauppauge Office Park Associates, LLC, and Colin Development, LLC, dated July 23, 2015 and after a hearing held on November 10, 2015 on the withdrawal of the cross claim ; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

***ORDERED*** that the branch of the motion (005) by defendant OSI Furniture for summary judgment in its favor pursuant to CPLR § 3212 is granted; and it is further

***ORDERED*** that the branch of the motion (005) by defendant GF Office Furniture, Ltd. for summary judgment in its favor pursuant to CPLR § 3212 is denied; and it is further

***ORDERED*** that the motion (006) by defendants Hauppauge Office Park Associates, LLC and Colin Development, LLC for summary judgment in their favor pursuant to CPLR § 3212 is granted.

Plaintiff, John Tardif, commenced this action to recover damages for personal injuries he allegedly sustained on January 6, 2011, when a metal filing cabinet allegedly fell on him while working as an insurance adjuster at Amica Insurance Company. His wife, Shelly Tardif, brings a derivative claim. Plaintiff alleges that the file cabinet was not fit for its intended use, and was improperly installed. Tardif maintains that defendants OSI and GF Office Furniture manufactured the file cabinet and failed to provide proper instruction for the installation of the cabinet. Plaintiff asserts claims against Colin Development, LLC, the owner of the office development, and Hauppauge Office Park Associates, the management company of the office development alleging the cabinet constituted a dangerous condition and defendants permitted the dangerous condition to exist. Plaintiff alleges that three moving companies, who were retained by Amica to move its office, are responsible for his injuries. OSI has answered and asserted cross claims against all defendants including GF Office Furniture for common law indemnity. GF has answered and asserted cross claims against all defendants except OSI. On November 11, 2015, OSI withdrew its cross claim against GF Office Furniture.

OSI and GF Office Furniture now move for summary judgment pursuant to CPLR § 3212 for dismissal of the complaint and the cross claims asserted against them. In support of the motion, they submit, among other things, the transcript of plaintiff's examination before trial, the deposition transcripts of John Haines, Robert Waldner, Alan Corini, David Susler, furniture invoices, various photographs, and the pleadings.

Hauppauge Office Park and Colin Development also move for summary judgment pursuant to CPLR § 3212 for dismissal of the complaint and the cross claims asserted against them. In support of the motion, they submit, among other things, the pleadings, plaintiff's examination before trial, the deposition transcripts of Robert Waldner, John Haines, and Kerry Corbett and the lease.

Plaintiffs oppose both motions and submit, among other things, an affidavit from Michael Panish of Los Angeles, California, purportedly an expert in construction and "cabinet systems." That affidavit is sworn to and notarized in Los Angeles, California. Pursuant to CPLR § 2309 (c) where an oath or affirmation is taken without the state it shall be treated as if taken within the state if it is accompanied by

such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation. Here, a certificate of conformity was submitted after the submission date of the motion, and therefore the plaintiff's expert's affidavit is inadmissable (***Scott v Westmore Fuel Co.***, 96 AD3d 520, 947 NYS2d 15 [1st Dept 2012]).

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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As a general rule, liability for a dangerous condition on property must be predicated upon ownership occupancy, control or special use of the property (*see* ***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Putnam v Stout***, 46 AD2d 812, 361 NYS2d 205 [2d Dept 1974], *affd* 38 NY2d 607, 381 NYS2d 848 [1976]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Likewise, a property manager, to whom the owner has delegated responsibility for the property, owes a general duty to maintain it in a reasonably safe condition (***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]; *see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Urman v S & S, LLC***, 85 AD3d 897, 925 NYS2d 186 [2d Dept 2011]). Property owners and managers, however, are not insurers of the safety of people on the premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]).

To establish liability, a plaintiff must show that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see* ***Sermos v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646; *see* ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512; ***Denker v Century 21 Dept. Stores, LLC.***, 55 AD3d 527, 866 NYS2d 861 [2d Dept 2008]; ***Deveau v CF Galleria at White Plains, LP***, 18 AD3d 695, 796 NYS2d 119 [2d Dept 2005]).

OSI has established its prima facie entitlement to summary judgment to dismissing the complaint and cross claims asserted against it. David Susler's examination before trial testimony establishes that OSI did not manufacture steel or metal office furniture and only manufactures custom wood furniture. There is no admissible evidence in the record before the court that OSI manufactured, designed, produced, purchased, sold, leased, installed, replaced, moved, rearranged or transported the metal file cabinet at issue here.

In opposition to the motion, plaintiff has failed to raise a triable issue of fact with regard to OSI. David Susler's examination before trial testimony is unequivocal, OSI did not manufacture steel or metal office furniture and only manufactures custom wood furniture. Accordingly, any claim or cross claim against OSI is dismissed.

GF Office Furniture has not established its prima facie entitlement to summary judgment dismissing the complaint and cross claims asserted against it, but has established that the portion of the first cause of action which alleges negligence in the installation of the file cabinet is time barred. David Susler's examination before trial testimony establishes that GF Office Furniture was in the business of manufacturing metal office furniture. Moreover, the documentary evidence indicates that Amica purchased office furniture from GF Office Furniture in 1999, including lateral files. While plaintiff has not established that these included the suspect file cabinet, GF Office Furniture has not established that it was not their product. Moreover, GF Office Furniture has not submitted any evidence that the file cabinets were fit for their intended purpose and has not established that the file cabinet was not defective. While GF Office Furniture maintains that there is no evidence that the cabinet was not fit for its intended use and no proof that it was defective, as the moving party, it has not established its burden of proof. With regard to that portion of the complaint that alleges that OF Office Furniture improperly installed the file cabinet, it is undisputed that the file cabinet was moved multiple times, by parties other than GF Office Furniture, in the years prior to the incident. A claim for breach of a contract for the installation of a product is governed by a four year statute of limitations (***Richard A. Rosenblatt & Co., Inc. v Davidge Data Systems Corp.***, 295 AD2d 168, 743 NYS2d 471 [1st Dept 2002]). Therefore, that portion of the claim for improper installation is time barred as the statute of limitations expired in 2003.

Colin Development, as owner of the property, and Hauppauge Office Park Associates, as property manager, have demonstrated their prima facie entitlement to summary judgment dismissing the complaint and cross claims asserted against them. Plaintiff testified at his examination before trial that the file cabinet was used by him on a daily basis for ten years without incident. Neither Hauppauge nor Colin was responsible for the move from the fifth floor to the first floor. Neither moved or emptied the cabinet related to the move. Plaintiff does not know why it fell. There is no evidence that Hauppauge or Colin purchased, installed, placed, repaired or altered the cabinet.

In opposition to the motion by Colin Development and Hauppauge Office Park Associates, LLC, plaintiff failed to raise a triable issue of fact. The building owner and the maintenance staff did not move the file cabinet immediately prior to the accident. Plaintiff testified that the lower two drawers of the five draw lateral file cabinet, used for more than ten years without incident, had been emptied a day or two prior to the incident. Neither the owner of the building nor the maintenance staff created, caused or had actual or constructive knowledge of a dangerous or defective condition which may have been caused in preparation for Amica's move from the fifth floor to the first floor of the building. Moreover, plaintiff has not opposed

Hauppauge Office Park Associates, LLC position that it was an out-of-possession landlord and did not retain control over the premises. Accordingly, the motion by Colin Development and Hauppauge Office Park Associates, LLC for summary judgment in their favor dismissing the complaint and any cross claims against them is granted.

With regard to GF Office Furniture, it is defendant's burden to establish by competent evidence that plaintiff was not injured due to its product (***Ebenezer Baptist Church v Little Giant Mfg. Co.***, 28 AD3d 1173, 814 NYS2d 471 [4th 2006]). Here, defendant GF Office Furniture has not established that it was not the manufacturer or supplier of the product. Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]).

Dated: March 4, 2016

PETER H. MAYER, J.S.C.