Fidler v Gordon-Herricks Corp.
2016 NY Slip Op 32775(U)
July 13, 2016
Supreme Court, Nassau County
Docket Number: 600535/14
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 13**

ROBERT FIDLER,

Plaintiff(s),

-against-

INDEX # 600535/14
Mot. Seq. 2
Mot. Date 3.25.16
Submit Date 6.20.16

GORDON-HERRICKS CORP., GORDON-BROADWAY CORP., COMPASS HOLDINGS, INC., COMPASS GROUP USA, INC., COFFEE DISTRIBUTING CORP. and F. PINHEIRO CONTRACTOR CORP.,

Defendant(s).

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Amended Motions, Affidavits (Affirmations), Exhibits,
Memorandum of Law..... 1, 2, 3, 4
Answering Affidavit and Memorandum..... 5, 6
Reply Affidavit and Memorandum..... 7

Defendants, Gordon-Herricks Corp., Gordon-Broadway Corp., Compass Holdings, Inc., Compass Group USA, Inc., Coffee Distributing Corp., move, for an order, granting them summary judgment dismissal of the plaintiff's complaint as well as any cross claims asserted by defendant, F. Pinheiro-Contractor Corp.

Plaintiff, Robert Fidler, brings this action seeking recovery for injuries allegedly sustained when he was caused to trip and fall to the ground over a concrete ramp in the warehouse loading

dock at the building in which he works, to wit, 190 Broadway, Garden City, New York (hereinafter the Premises). The Premises consisted of a warehouse, a loading dock and a parking lot.

On November 5, 2013, at approximately 5:30 p.m., plaintiff had finished work for the day and was exiting the Premises through a rear door. This door led to an elevated loading dock from which point he then walked down a steel staircase which led to the ground level. Immediately adjacent to the staircase (on the ground level), there existed a concrete ramp that was used to elevate trucks to the loading dock platform. Plaintiff testified that the ramp had no other purpose (Fidler Tr., p. 47). The subject ramp was several inches off the ground, but the front of the ramp sloped downwards to allow trucks to drive onto it. The concrete ramp was not painted with any yellow lines around its edges, nor were there any guardrails along the open sides of the ramp.

At his oral examination before trial, plaintiff testified that he took the same route to his car as he had done in the month prior to his accident. He testified that on the date of the accident, as he descended down the steel staircase, a large truck was diagonally parked at the bottom of the stairs blocking his path and his visibility of the surrounding parking area. Plaintiff claims that the blocked truck forced him to turn immediately right at the bottom of the stairway. As he walked towards his vehicle, he tripped over the cement ramp. Plaintiff maintains that he was not attempting in any manner to step onto the ramp and believed that he had cleared the ramp on his way to his car. Notably, plaintiff testified that he saw the ramp before he tripped over it. He testified as follows:

Q: Between the time you left the warehouse and the time you tripped on the night of the accident, did you see the ramp?

A: Did I see the ramp, yes.

Q: And when did you see the ramp, where were you when you saw the ramp?

A: You could see it when you are walking down the steps.

Q: So did you know the ramp was there when you tripped on it?

A: Did I know the ramp was there?

Q: Yes.

A: Yes.

Q: And why did you trip on the ramp?

A: It was an accident.

[Plaintiff's attorney]: I think what he's asking you, what caused you to fall over the ramp.

A: I had thought I cleared the ramp when I started making my right to my car. . . .

Q: Where were you looking in the five seconds before you fell?

A: Um, I think straight. Head up.

Q: After you stepped off the stairs, did you see the ramp at all?

A: I don't believe.

Q: Did you look down at any point in time after you got off the stairs?

A: Not that I remember. I was looking straight ahead.
(Fidler Tr., pp. 112, 123-124).

Plaintiff testified that at the time of his accident, when he exited the building, it was dark outside. He also testified that the loading dock area was not illuminated by any artificial lights. Specifically, he explained the lighting fixture in the loading dock area was not functioning. Plaintiff testified that prior to his accident, the artificial lights on the loading dock had stopped working for approximately one week. Additionally, plaintiff stated that earlier in the day of his accident, he reminded a warehouse manager at the Premises to repair the lights on the loading dock; however, the lights were still not repaired by the time the plaintiff exited the Premises.

Plaintiff is the Vice President of Equipment and Service for defendant Coffee Distributing Corp. (CDC) which had operated out of the Premises for approximately 10 years (Fidler Tr., p. 44). Plaintiff testified that despite his managerial position with CDC, he was not charged with repairing safety issues around the Premises; such role was delegated by CDC to the Vice President of Operations, namely, non-party, Brian Bohn.

In 2011, CDC was purchased by defendant, Compass Group USA, Inc. (Compass Group). This purchase included Compass Group's assumption of the lease agreement between CDC and defendant Gordon Herricks Corp., the owner of the Premises, to operate CDC's business from the Premises. The lease agreement between Herricks and CDC dated September 29, 2006, which

term extended for ten years, conveyed 50% of the Premises to CDC together with the parking lot (Motion, Ex. O). The lease agreement, provided, in pertinent part, as follows:

> Alterations:
>
> > 3. Subject to the prior written consent of Owner, and to the provisions of this article, Tenant at Tenant's expense, may make alterations, installations, additional or improvements which are nonstructural. . . . All fixtures . . . installed in the premises at any time . . . shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises. . . .
>
> Tenant's Liability Insurance Property Loss, Damage, Indemnity:
>
> > 8. Owner or its agents shall not be liable for . . . any injury or damage to persons . . . resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner. . . .
>
> Access to Premises:
>
> > 13. Owner or owners agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities. . . .

In addition, the Rider to the Lease sets forth, in pertinent part, as follows:

> 42. Conflicts. In the event there shall be any conflicts between the provisions of this "Rider" and the provisions of the printed portions of this lease, the provisions of this "Rider" shall be controlling.

43. Net Lease. This lease shall be deemed a net lease and the Landlord shall only have those obligations under the lease as specifically set forth herein in this "Rider." Landlord shall have no obligation to furnish any services to the demised premises other than repairs as set forth in Article "44" hereof.

44. Repairs. Notwithstanding any of the provisions of Paragraphs "4" and "6" of this lease, Landlord's sole responsibility for making repairs shall be limited to structural repairs to the footings, foundation, structural steel and roof supports and repairs to the exterior portion of the built up roof. . . . Tenant shall make all other repairs and/or replacements to the demised premises throughout the term of this lease, including repairs and/or replacements to any and all equipment contained therein.
(Emphasis Added).

Plaintiff testified that although he was a manager at the warehouse for 10 years, he never met a representative of the landlord, Herricks. Indeed, he testified that he did not know who owned the Premises, i.e., 190 Broadway, and did not know what responsibility the landlord had with respect to the Premises, if any.

Plaintiff testified that he has worked for CDC for approximately 28 years and has been its Vice President of Equipment and Service since 2010. He stated thus that since the acquisition of CDC by Compass Group, he had been working for Compass Group for three years. At his deposition, plaintiff testified that he believed that following the acquisition, CDC was a "division" of Compass Group (Fidler Tr., pp. 28-29). Indeed, he specifically agreed that it would be "correct to say that [he] work[ed] for both [CDC] and Compass Group. . . ." (*Id.* at 30). Plaintiff testified as follows:

Q: ...who do you currently work for?

A: Compass Group.

Q: Do you know the correct legal name of the entity that you work for?

A: Compass Group.

Q: How long have you worked for Compass Group?

A: I believe it is three years now. . . .

Q: And how did you come to work for Compass Group?

A: Compass Group acquired the company I worked for previously. . . .

Q: Have you ever heard of a company called Coffee Distributing Corp.?

A: Yes.

Q: What is Coffee Distributing Corp.?

A: A company that was purchased by Compass Group.

Q: Do you still work for Coffee Distributing Corp?

A: Coffee Distributing Corp. is now Compass Group, a division of.

Q: Coffee Distributing Corp., does it still exist or is it a d/b/a?

A: Yes.

Q: So would it be correct to say that you work for both Coffee Distributing Corp. and Compass Group?

A: Yes.

Q: Have you ever heard of Compass Group U.S.A., Inc.?

A: Yes.

Q: Is that one of your employers?

A: It is part of, yes.

(Fidler Tr., pp. 28-30).

According to the affidavit of Kathy Keller, Associate Assistant General Counsel on behalf of the defendants, Compass Holdings, Inc. (CHI), is an umbrella corporation that owns several entities including having connections to CDC. Keller attests that since May 31, 2007, i.e., about three years prior to Compass Group's purchase of CDC and about six years prior to the plaintiff's accident, CHI has merged into Compass Group and has not been in existence since that time.

Notably, the ramp upon which plaintiff fell was installed by CDC prior to CDC being purchased by Compass Group. CDC Vice President of Operations, Bryan Bohn, testified that he hired defendant, F. Pinheiro Contractor Corp. (Pinheiro) to install the subject ramp (Motion, Ex. H, p. 27). Bohn explained that the ramp was not "structural" since it was not permanent and not attached to the building, but rather, placed on top of the pavement.

Following the accident, plaintiff admittedly received Workers' Compensation benefits. Notably, Compass Group maintains Workers' Compensation policies for all of its entities, including CDC.

Robert Friedman is the President of Coffee Distributing Corp. (Friedman Tr., p. 9). He confirmed that CDC was "acquired by Compass Group" in 2011.

According to Friedman, on March 1, 2011, 100% of CDC was sold to Compass Group which operated it through its division, non-party Canteen Vending Services (Canteen). Friedman, however, did not know if CDC still existed as a separate corporation after 2011. According to Friedman, CDC was sold to "either Compass Group USA or ... Canteen Vending Services which is a division of Compass Group" (13). He explained that CHI is "the umbrella corporation. And they have a numerous . . .divisions that operate under different names" (Friedman Tr., pp. 13-14). Friedman explained that Canteen handles CDC's front office functions including business, marketing and sale strategies and Compass Group handles CDC's back office functions such as payroll, processing, insurance, budgeting, some banking, human resources, and benefits. Canteen also controlled CDC's business operations and to some extent client relationships. Compass Group, however, made decisions about business and marketing strategies.

Friedman explained that Compass Group controls all of the real estate for each of its entities, does the payroll services for all of the divisions of Compass Group, and also handles all of the insurance claims including those that involve workplace injuries or accidents. Friedman stated that, by looking at the plaintiff's paystub, Mr. Fidler's direct employer is Compass Group. He added that while he considers his direct employer to also be Compass Group USA, Inc., he reports directly to Canteen.

Friedman testified that up until CDC was acquired by Compass Group, CDC leased the (two separate) premises located at 200 and 190 Broadway, which commenced in approximately 1998 and 2006, respectively. Lawrence Gordon, the President of defendant Herricks and a shareholder of defendant Gordon-Broadway Corp. (Broadway), explained that defendant

Herricks owns 190 Broadway and defendant Broadway owns 200 Broadway, two separate buildings. Gordon explained that on the date of the accident, Compass Group/CDC occupied half of 190 Broadway and all of 200 Broadway (*Id.* at 68). The other half of 190 was occupied by non-party Synergy Gym (*Id.* at 67). He stated that he and CDC Vice President Brian Bohn ordered the installation of the subject ramp to enable CDC's trucks to be level with the loading dock. This installation occurred prior to Compass Group's purchase of CDC.

Friedman could not recall if CDC consulted with Herricks before installing this ramp, nor did he have any knowledge of whether the lease required him to inform or get the permission of the landowner.

Notably, Gordon also stated that Herricks had the right to re-enter the property in an emergency but that it did not possess a key to the Premises. Gordon testified that in November 2013, he would drive by the Premises once a month. He confirmed that no one else from defendant Herricks visited the property and that he did not have any point of contact at the Premises. He would not speak with Friedman and had only spoken with Bohn about roof leaks or plumbing issues. He spoke to no one else at Compass Group or CDC. As to the ramp, Gordon testified that he neither approved the installation of the ramp nor observed it when he drove by.

In bringing this action for negligence, plaintiff claims that he tripped and fell on the subject ramp which was defective and because the area surrounding it was improperly lit.

Upon the instant motion, defendants Gordon-Herricks Corp., Gordon-Broadway Corp., Compass Holdings, Inc., Compass Group USA, Inc., Coffee Distributing Corp., seek an order granting them summary judgment dismissal of the plaintiff's complaint as well as any cross claims asserted by defendant, F. Pinheiro-Contractor Corp. The movants assert eight principal bases for their entitlement to summary judgment. First, pursuant to CPLR 3212 and the Workers' Compensation Law §11, Compass Group USA, Inc. and Coffee Distributing Corp. are entitled to summary dismissal of the plaintiff's complaint. Second, CHI is entitled to summary judgment because on May 31, 2007, prior to the accident, it merged into Compass Group, with Compass Group being the surviving company and thus had no legal existence on the date of Fidler's accident. Third, defendant Herricks is entitled to summary dismissal because it was an out of possession landlord of the Premises and its only obligation with respect to the demised Premises was to make structural repairs. Fourth, the accident was not proximately caused by any structural defect or building code violation; thus, any claim that Herricks is entitled to summary judgment is meritless. Fifth, even if plaintiff had alleged a structural building code violation, the building code does not apply to ramps which are not designed as a required exit to a building. Sixth, defendant Broadway is entitled to summary judgment since it owned 200 Broadway, i.e., the office building adjacent to the warehouse Premises, and had no ownership interest or presence at the warehouse Premises on the date of the accident. Seventh, the plaintiff's complaint should be dismissed since neither the lighting nor the absence of any guardrail was the proximate cause of the accident. Lastly, by being aware that the light at the loading dock was not functioning, and instead of using an alternative exit, plaintiff chose to exit through the darkened loading dock,

walking down an outdoor flight of stairs, and tripped when he attempted to walk around the subject ramp, the plaintiff he assumed the risk of injury.

In support of their motion, the defendants offer, *inter alia*, the affidavit of Kathy Keller, Esq. (Keller), Compass Group's Associate Assistant General Counsel as well as the expert affidavit of Architect, David D. Cannon, AIA.

Notably, in her affidavit, Keller attests therein that she is familiar with the corporate structure of Compass Group, including CHI, Canteen, and CDC and their relationship, if any, to the subject property (Motion, Ex. F). She states that in 2011, Compass Group purchased CDC, making it a wholly owned subsidiary, albeit remaining an active corporation (*Id.* at ¶¶3-4, 6). In addition, she explains that CHI merged with and into Compass Group on May 31, 2007 with Compass Group being the surviving company (*Id.* at ¶7) and that even before this merger, CHI had no relationship to the subject Premises and no operation role with respect to business there (*Id.* at ¶¶7). Notably, Keller also attests that on April 26, 2012, Compass Group entered into a lease amendment with owner Herricks and became the tenant of record at the Premises (*Id.* at ¶6).

In his expert affidavit, David D. Cannon, AIA, an architect with over 30 years of experience in architectural design and document review, attests that based upon his review of the applicable local and regional building codes, an invoice for the construction of the subject ramp dated October 30, 2010, multiple photographs, a lease agreement, excerpts of the plaintiff's deposition transcript and an inspection of the subject ramp on August 25, 2015, it is his expert opinion that the ramp as it existed on the date of the accident did not violate any building or statutory code regulations and provisions and was not a structural component of the building because it was not a part of the foundation, walls or roof.

The law is settled. Summary judgment is the "procedural equivalent of a trial" (*Falk v. Goodman*, 7 NY2d 87, 91 [1959]), and, as such, it is a "drastic remedy" which should not be granted where there is any doubt as to the existence of a triable and "bona fide" issue of fact (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 [1978]). It is only when the movant has made a *prima facie* showing which demonstrates that summary judgment is warranted, does the burden then shift to the opposing party to show by evidentiary facts that a claim is real and can be established at trial (*Zuckerman v. City of New York*, 49 NY2d 557, 562–563 [1980]; *Indig v. Finkelstein*, 23 NY2d 728 [1968]). Ultimately, the purpose of the motion is to sift out evidentiary facts and determine from them whether an issue of fact exists (*Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 NY2d 178 [1994]). As such, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (*Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept. 2011]; *Pearson v. Dix McBride, LLC*, 63 AD3d 895 [2d Dept. 2009]).

Here, this court finds that the movants have established their *prima facie* entitlement to judgment as a matter of law.

Specifically, this court finds that the employee Fidler's negligence action against both CDC and Compass Group is barred by the exclusivity provisions of Workers' Compensation Law. The law is clear. "[T]he receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" (*Charles v. Broad St. Dev., LLC*, 95 AD3d 814, 816 [2d Dept. 2012] [internal quotation marks omitted]; see Workers' Compensation Law §§ 11, 29[6]). Moreover, where facts " 'demonstrate the plaintiff's dual employment status, whether the relationship between two corporate entities is that of joint ventures, parent and subsidiary, corporate affiliates, or general and special employers, immunity will be extended to all the plaintiff's employers' " (*Degale–Selier v. Preferred Mgt. & Leasing Corp.*, 57 AD3d 825, 825 [2d Dept. 2008] *quoting Levine v. Lee's Pontiac*, 203 AD2d 259, 261 [2d Dept. 1994]).

Here, having received Workers' Compensation benefits, Fidler is precluded from suing his employer for the workplace injury. Since CDC was clearly the plaintiff's employer, any claim by the plaintiff against said entity is barred by Workers' Compensation Law § 11 (*Rainey v. Jefferson Vil. Condo No. 11 Assoc.*, 203 AD2d 544, 546 [2d Dept. 1994]; *Hyman v. Agtuca Realty Corp.*, 79 AD3d 1100, 1100–1101 [2d Dept. 2010]; *Samuel v. Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594–595 [2d Dept. 2010]).

Similarly, Compass Group is also entitled to the benefit of the Workers' Compensation Law. The record is clear that as the parent company of CDC, Compass Group dominated and controlled the operations of its subsidiary such that it is entitled to the benefit of the exclusivity defense of the Workers' Compensation Law (*Sanna v. Rim, Inc.*, 8 AD3d 649, 650 [2d Dept. 2004]; *Romano v. Curry Auto Group*, 301 AD2d 509 [2d Dept. 2003]). Specifically, it is undisputed that CDC was a wholly owned subsidiary of Compass Group whose front and back office operations were controlled by Compass Group including maintaining Workers' Compensation Insurance for CDC. Indeed, it is clear that prior to the accident Compass Group also assumed CDC's lease for the subject Premises. Thus, having dominated and controlled the operations of CDC, Compass Group clearly dominated and controlled the operations of CDC including controlling its client relationships and the day-to-day operations and deciding its business, marketing, and sales strategies, and thus is entitled to the benefit of the Workers' Compensation Law defense (*Haines v. Verazzano of Dutchess LLC*, 130 AD3d 871 [2d Dept. 2015]; *Cappella v. Suresky at Hartfield Lane, LLC*, 55 AD3d 522 [2d Dept. 2008]). Moreover, the record is clear that the plaintiff testified that he worked for both CDC and Compass Group. Indeed, Compass Group's Assistant General Counsel also avers that the plaintiff was employed by CDC.

As such, this court finds that the defendants herein have demonstrated that both, Compass Group and CDC, are entitled to summary dismissal of the plaintiff's claims herein.

In addition, the defendants have demonstrated that CHI was not a legal entity on the date of the accident; as such it, too, is entitled to summary dismissal of the plaintiff's complaint (*Zarzycki v. Lan Metal Products Corp.*, 62 AD3d 788 [2d Dept. 2009]). Specifically, the affidavit

of Compass Group's Assistant General Counsel Kathy Keller establishes that CHI merged into Compass Group on May 31, 2007 with Compass Group being the surviving company. Indeed, Keller attaches the certificate of merger to her affidavit to further substantiate her sworn statement. Thus, insofar as CHI was no longer in existence on the date of Fidler's accident, it is clear that it cannot be held liable for the plaintiff's injuries (*Id*; *see also*, *Phillips v. Bovis Lend Lease*, 103 AD3d 698 [2d Dept. 2013]).

Next, the defendants have also demonstrated that Herricks, an out-of-possession landowner, is entitled to summary judgment dismissal of the plaintiff's complaint. "Generally, an out-of-possession owner or lessor is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions" (*Lindquist v. C&C Landscape Contrs., Inc.*, 38 AD3d 616, 617 [2d Dept. 2007] *quoting Scott v Bergstol*, 11 AD3d 525, 525 [2d Dept. 2004]; *Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686, 686 [2d Dept. 2006]).

Pursuant to the terms of the lease agreement, including the rider to the lease, *supra*, Herricks had no obligation to make any non-structural repairs; instead, the tenant was responsible for making all such repairs. Pursuant to the lease agreement, Herrick's responsibility was "limited to structural repairs to the footings, foundation, structural steel and roof supports and repairs to the exterior portion of the built up roof" (Motion, Ex. O, §44). The evidence herein confirms that the subject ramp was built by CDC after it took possession of the Premises without permission or notice to Herricks. In addition, the defendants' have submitted the expert affidavit of Architect Cannon, who attests that, upon his inspection, the ramp was not a structural improvement. Thus, it is apparent that CDC was not required to seek Herrick's permission to install the ramp; and further, that since the ramp was not a structural condition, it was not Herrick's responsibility to maintain or repair the ramp under the lease. To that extent, inasmuch as the plaintiff claims herein that his accident was caused as a result of a non-functioning light, clearly the light is not a structural issue such that Herricks was charged with the responsibility of maintaining or repairing the same. In any event, it is clear that in addition to the absence of any legal obligation to repair or maintain the light or the ramp, Herricks did not have notice of either alleged condition (*see generally*, *Hernandez v. Neubert Realty Corp.*, 169 AD2d 645 [1st Dept. 1991]).

This court recognizes that "[r]eservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner for injuries caused by a dangerous condition" (*Lowe-Barrett v City of New York*, 28 AD3d 721, 722 [2d Dept. 2009] *quoting Stark v Port Auth. of N.Y. & N.J.*, 224 AD2d 681, 682 [2d Dept. 1996]). However this is only true "when 'a specific statutory violation exists and there is a significant structural or design defect' " (*Id*). Here, the defendants have demonstrated that the plaintiff cannot base liability against Herricks on the grounds that his accident was caused by a structural building code violation. Again, the defendants have demonstrated that neither the ramp nor the light was

structural. In addition, Architect Cannon maintains in his expert opinion that he reviewed the applicable local and regional building codes, inspected the ramp and determined that it did not violate any building or statutory code.

In any event, this court finds that the plaintiff's failure to assert that the ramp violated the Building Code or any other statute is fatal to his claim against the out-of-possession landlord (*see generally*, *Cornacchia v. Mount Vernon Hosp.*, 93 AD2d 851 [2d Dept. 1983]).

Finally, this court finds that the defendants have also established their *prima facie* entitlement to summary dismissal of the plaintiff's complaint as asserted against defendant Broadway.

It is well settled that a party cannot be held liable for injuries caused by a dangerous or defective condition on property unless the party has both a duty to maintain or clean the area, and has sufficient notice of the dangerous or defective condition that would allow the party to remedy the condition (*see*, *Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Pena v. New York City Tr. Auth.*, 237 AD2d 150 [1st Dept. 1997]). Here, the defendants have demonstrated that defendant Broadway had no role with respect to the subject Premises, 190 Broadway, the location where the subject accident occurred. It did not own or lease the Premises and as such had no obligation to maintain it (*see generally*, *Santos v. 304 W. 56th St. Realty LLC*, 21 Misc.3d 174 [Sup. Ct. Kings 2008]). Broadway owned the abutting property. "It is well settled that an owner or occupier of abutting property owes no duty of care to others to warn them of or protect them from a defective or dangerous condition on neighboring premises" (*Gehler v. City of New York*, 261 AD2d 506, 507 [2d Dept. 1999]; *see also*, *Pensabene v Incorporated Vil. of Val. Stream*, 202 AD2d 486 [2d Dept. 1994]).

As such, this court finds that the defendants' have demonstrated their *prima facie* entitlement to summary dismissal of the plaintiff's complaint.

In light of the movants' showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, the plaintiff, relying upon, *inter alia*, his own affidavit as well as the affidavit of his expert, Robert Grunes, and his supplemental bill of particulars, principally offers the following three arguments to rebut the defendants' *prima facie* showing of judgment as a matter of law. One, defendant CDC (the plaintiff's employer) is not an alter-ego of defendants CHI or Compass Group such that the latter entities would be protected from suit pursuant to the Workers' Compensation Law. Two, defendant Herricks is not immune from suit as an out-of-possession landlord because it had a right of re-entry, and the ramp clearly constitutes a structural condition on the Premises that violated several safety provisions for which the defendant never obtained the proper installation permits. Lastly, the ramp constituted a dangerous condition

because the defendants failed to properly maintain, secure and provide sufficient warnings; and the defendants created the condition that caused plaintiff to fall, by failing to have proper illumination in the area of the ramp, and by blocking an egress from the building that compelled the plaintiff to walk towards the ramp.

In pertinent part, the plaintiff's expert, Robert Grunes, a Professional Engineer duly licensed to practice by the State of New York, opines in his affidavit in opposition to the defendants' motion for summary judgment as follows:

> 18. The presence of the subject, poured in place, ramped concrete platform was in violation of the provisions of the rental lease by and between the tenant employer and the property owner. Moreover, the concrete platform was structural in that it must have properly supported the dynamic and static loads associated with the mounting/dismounting of the trucks using it, the weights of the trucks, loads and material handling equipment employed in the loading/unloading operations. Consequently a permit should have been secured from the authorizing entity and the constructed structure should have been inspected and been approved prior use. . . .
> (Aff. In Opp., Ex. G, ¶18)

In addition, in his affidavit in opposition to defendants' motion for summary judgment, plaintiff Fidler writes in pertinent part:

> 20. At the time of my accident to present, I worked for and continue to work for Defendant [CDC] .
>
> 21. It is my understanding that in or about 2011, CDC was purchased by an entity known as "Compass Group" which is related to several other companies with similar names. At the time of the purchase, CDC did not dissolve or cease any operations and continue to operate just as it had done prior to the purchase. . . .
>
> 24. The individual involved in the management and upper management of CDC, including Robert Friedman, Aaron Lipshutz and myself, continue to this day to sign our names on correspondence as employees of [CDC].
>
> 25. Letters and other such correspondence contain CDC's letterhead without any mention or reference [to] Compass.

Our business cards reflect that we work for CDC only, with no mention of Compass.

26. CDC maintains a website that has no mention of any Compass entity.

27. I do not report to or take any directives from any individuals at Compass on a daily basis. I do not perform any tasks directly for Compass or its entities. I have the authority to hire individuals and fire workers without approval from any Compass entity just as I have done prior to the purchase of CDC in 2011.

28. Upon information and belief, CDC maintains its own corporate bank account that is unconnected to any Compass entity.

29. The day to day operations and management of CDC remains exactly as they were prior to the purchase of CDC by Compass Group and its related entities. Robert Friedman continues to be CDC's President to whom all other Vice Presidents report.

30. I previously testified that I am employed by Compass Group simply because my paystub reflects that I am paid by an entity known as "Compass Group, North America." However, during the time of my accident to the present, I am and continue to be employed by CDC and report to CDC's long-time president, Robert Friedman. I continue to work with other long-time employees of CDC.

31. CDC and Compass, along with its various entities, are completely distinct entities, and it cannot be said that the two entities are alter-egos of each other. Customers and others who deal with CDC are not led to believe they are dealing with Compass or any of its entities.

32. I have always been, and continue to be employed by [CDC] and am not involved in the operations of Compass or any of its entities. . . .

This court finds that, despite the plaintiff's submissions and arguments, the plaintiff's opposition nevertheless fails to present a triable issue of fact as to the liability of any of the moving defendants.

Initially, this court notes that plaintiff's affidavit in opposition not only contradicts his prior sworn deposition testimony which is insufficient to defeat a properly supported motion for summary judgment (*Telfeyan v. City of New York*, 40 AD3d 372, 373 [1st Dept. 2007]), but inasmuch as the plaintiff attempts to explain away the differences by simply stating that at his deposition he responded to the question of his employer based on what his paystub reflects, such explanation is not persuasive. Indeed, this court cannot overlook the fact that the plaintiff is the Vice President of Equipment and Service at CDC and has worked for the company for nearly three decades. This court is not persuaded that the plaintiff, no doubt a senior employee, a manager, at his company with 28 years of employment experience within the company, was confused at his sworn deposition as to who his employer was based on a paystub. This is particularly difficult to accept given that at his deposition, his answers were not generic, rather they were nuanced and carefully articulated. Specifically, he testified as follows:

Q: ...who do you currently work for?

A: Compass Group.

Q: Do you know the correct legal name of the entity that you work for?

A: Compass Group.

Q: How long have you worked for Compass Group?

A: I believe it is three years now. . . .

Q: And how did you come to work for Compass Group?

A: Compass Group acquired the company I worked for previously. . . .

Q: Have you ever heard of a company called Coffee Distributing Corp.?

A: Yes.

Q: What is Coffee Distributing Corp.?

A: A company that was purchased by Compass Group.

Q: Do you still work for Coffee Distributing Corp?

A: Coffee Distributing Corp. is now Compass Group, a division of.

Q: Coffee Distributing Crop., does it still exist or is it a d/b/a?

A: Yes.

Q: So would it be correct to say that you work for both Coffee Distributing Corp. and Compass Group?

A: Yes.

Q: Have you ever heard of Compass Group U.S.A., Inc.?

A: Yes.

Q: Is that one of your employers?

A: It is part of, yes.
(Fidler Tr., pp. 28-30)

Thus, given that "[a]ffidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, 'creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment' (*Telfeyan,* 40 AD3d at 373 *quoting Harty v Lenci*, 294 AD2d 296, 298 [1st Dept. 2002]; *Schiavone v Brinewood Rod & Gun Club*, 283 AD2d 234, 235-236 [1st Dept. 2001]). In addition, given that the plaintiff has failed to rebut the sworn affidavit of Associate General Counsel of Compass Group which explains that CDC is a wholly owned subsidiary of Compass Group and that the plaintiff, as an employee took advantage of the Workers' Compensation policy of his employer (held by Compass Group for the benefit of all of its subsidiaries including CDC), this court herewith discounts the plaintiff's affidavit to the extent that it contradicts his previous deposition testimony that he worked for CDC *and* Compass Group and filed a Workers' Compensation claim with both CDC and Compass Group.

Plaintiff's argument in opposition that the defendants have failed to provide any evidence demonstrating that CDC and the various Compass Group entities were alter-egos of each other is meritless. The law provides that a parent company that dominates and controls the operations of its subsidiary, here CDC, is entitled to the benefit of the exclusivity defense of Workers' Compensation (*see generally*, *Sanna v. Rim, Inc.*, 8 AD3d 649, 650 [2d Dept. 2004]d). This court finds that the law does not require that Compass Group demonstrate it controlled *every*

aspect of CDC's operations. Furthermore, even assuming that the law required this showing, this court finds that the evidence demonstrates that Compass Group indeed controlled CDC's front office and back office operations and functions as well as its client relationships and day-to-day operations and decisions regarding CDC's business, marketing and sales strategies (*see e.g.*, *Haines v. Verazzano of Dutchess, LLC*, 130 AD3d 871 [2d Dept. 2015]; *Paulino v. Lifecare Transport*, 57 AD3d 319 [1st Dept. 2008]).

As to CHI, the plaintiff's failure to offer any evidence to refute the defendants' *prima facie* showing that any claims against CHI must be dismissed because it did not have any legal existence at the time of plaintiff's accident is fatal to preclude summary judgment as against CHI.

Plaintiff's argument in opposition that defendant Herricks is not immune from suit as an out of possession landlord because it had a right of re-entry and the ramp constitutes a structural condition on the Premises that violated several safety provisions for which the defendant never obtained the proper installation permits is also meritless.

Notably, plaintiff acknowledges that an out of possession owner such as Herricks is generally not liable for negligence with respect to the condition of its Premises. However, plaintiff fails to demonstrate that any of the several narrow exceptions to this rule apply to the facts at hand. The record herein is clear that Herricks did not have any obligation to make *all* repairs or to maintain the Premises. Indeed, its obligation to make repairs was "limited to structural repairs to the footings, foundation, structural steel and roof supports and repairs to the exterior portions of the built up roof" (Lease, §44). Clearly, the ramp in question has no relation to the footings, foundation, structural steel or roof at the subject Premises.

To this extent, the plaintiff has neither offered any admissible evidence to rebut the finding that Herricks was contractually obligated to make repairs and thus can be liable for negligence on this basis, nor does the plaintiff offer any evidence to show that Herricks can be held liable under the common law. To that end, the plaintiff is required to establish that there existed a significant structural or design defect that was contrary to a specific statutory safety provision. The plaintiff has failed to do this. Indeed, the plaintiff's argument that Herricks is liable under this theory fails for two reasons: one, the ramp in question was not structural in nature, and two, it did not violate any statutory safety provisions.

Specifically, while the plaintiff's expert opines that the ramp was structural merely because it was designed to carry heavy loads, *supra*, the plaintiff's own reliance upon a First Department case contradicts this very definition of "structural." In *Vasquez v. The Rector*, 40 AD3d 265 [1st Dept. 2007], the Court granted summary judgment to defendant owner after the plaintiff employee was injured while wheeling a container down a ramp. The Court therein held that the ramp was not structural because it did not affect the structural integrity of the building (*Id.* at 266). Guided by, *inter alia*, this decision, this court finds that the ramp herein was not, as submitted by the defendants' expert Architect Cannon, a structural component of the building. Indeed, it is plain that it was not even a part of the foundation, walls or roof, such that Herricks, an out of possession landowner, can be held contractually liable under the lease.

Nor does the plaintiff offer any substantive evidence that the ramp in question violated any structural building code. Inasmuch as the plaintiff claims that the ramp was a "platform" as defined in 29 Code of Federal Regulations 1910.21(a)(4), such argument is wholly meritless as there is no evidence herein that the subject ramp was "[a] working space for persons, elevated above the surrounding floor or ground . . . such as a balcony or platform for the operation of machinery and equipment" (29 CFR 1910.21[a][4]).

Plaintiff's claim that the subject ramp was required to have guardrails also fails as a matter of law. Specifically, contrary to the plaintiff's arguments, the appropriate statute to govern the facts at hand is 29 CFR 1910.23(c)(1) which states in pertinent part:

> § 1910.23 Guarding floor and wall openings and holes.
>
> (c) Protection of open-sided floors, platforms, and runways.
>
> (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing . . . on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. . . .

Here, the plaintiff's own expert notes that the subject ramp was only 8.75 inches tall, far short of four feet. As such it is clear that the ramp did not require a guardrail by statute.

Equally meritless is plaintiff's claim that the ramp violates 29 CFR 1910.144 which requires yellow paint to mark physical hazards. By its very terms, this statute is an OSHA statute that does not apply to defendant Herricks, an out-of-possession landlord (see 29 CFR 1910.5[a]).

In any event, the plaintiff's claims of lack of lighting, railing and paint, even if true, do not establish that said failures were the proximate cause of plaintiff's injuries. Indeed, his own testimony establishes that the plaintiff knew the ramp was there, knew that the light was not functioning, knew that the ramp lacked a railing and was not painted yellow, and in fact admitted to not looking down when navigating around it. This testimony precludes a denial of defendants' motion for summary judgment dismissal of the plaintiff's negligence claims.

Notably, the moving defendants, Herricks, Broadway, CHI, Compass Group, and CDC, also seek an order, granting them summary judgment dismissal of defendant, F. Pinheiro-Contractor Corp.'s cross claim which maintains:

> That if the plaintiff was caused to sustain personal injuries . . . the said injuries and damages arose out of [the negligence of] . . .the codefendants of this impleading defendant, with indemnification and save harmless agreement and/or responsibility by them in fact and/or implied by law, and without any breaches or any negligence of this impleading defendant contributing thereto. . . .
>
> (Motion, Ex. A, ¶12).

Notably, just as the plaintiff's claims against the moving defendants fail for the foregoing reasons, *supra*, Pinheiro's common law cross claims against said defendants also fail.

Indeed, if at all, Pinheiro can only assert a contractual claim against CDC, the only defendant it is in privity with. However, pursuant to the purchase order for the ramp, it is plain that Pinheiro is not entitled to indemnification (Motion, Ex. P). Thus, Pinheiro's cross claim for "indemnification and save harmless" is premised entirely on common law principles which, as stated above, are barred by the Workers' Compensation Law §11 (*Fernandes v. Equitable Life Assur. Socy of United States*, 4 AD3d 214, 215 [1st Dept. 2004]). Specifically, Pinheiro's cross claim against Compass Group and CDC fail because Workers' Compensation Law §11 precludes plaintiff's common law claims against plaintiff's employer, CDC, and its parent corporation, Compass Group, which controlled CDC's front and back office operations (*Maxwell v. Rockland County Community Coll.*, 78 AD3d 793 [2nd Dept. 2010]).

Accordingly, the moving defendants' instant application for an order, granting them summary judgment dismissal of the plaintiff's complaint as well as any cross claims asserted by defendant, F. Pinheiro-Contractor Corp, is **granted** in its entirety.

The parties' remaining contentions have be considered by this court and do not warrant discussion.

This shall constitute the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 13, 2016

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
JUL 14 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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