NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MICHAEL PUCHADES,

Plaintiff,

-against-

TAUBE MANAGEMENT REALTY LLC,
H.J. DEVELOPMENT LLC,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
211-51 PROPERTY, LLC, and
TRIUMPH CONSTRUCTION CORP.,

Defendants.

Index No: 152720/12
DECISION/ORDER
Motion seq. 3, 4, 5

TAUBE MANAGEMENT REALTY LLC,

Third-Party Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,

Third-Party Defendant.

CONSOLIDATED EDISON COMPANY OF NEW YORK,

Fourth-Party Plaintiff,

-against-

TRIUMPH CONSTRUCTION CORP.,

Fourth-Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant/third-party plaintiff Taube Management Realty LLC 's (Taube) and defendant 211-51 Property, LLC's (211-51) motion for summary judgment and motion to vacate the note of issue and defendant/fourth-party defendant Triumph Construction Corp.'s (Triumph) motion for summary judgment.

Papers	**Numbered**
Defendants Taube and 211-51's Notice of Motion for Summary Judgment	1
Defendant Consolidated Edison Company's Affirmation in Opposition	2
Plaintiff's Affirmation in Opposition	3
Defendants Taube and 211-51's Reply Affirmation	4
Defendant Triumph's Notice of Motion	5

Hach & Rose, LLP, New York (Michael A. Rose of counsel), for plaintiff.
Margaret G. Klein & Associates, New York (Jeffrey D. Fippinger of counsel) for defendant and third-party plaintiff Taube Management Realty LLC and defendant 211-51 Property, LLC.
Barry McTiernan & Moore LLC, New York (Mark A. Collesano of counsel), for defendant/third-party plaintiff and fourth-party defendant Triumph Construction Corp.
David M. Santoro, Esq., New York (Michael J. McNulty of counsel), for defendant, third-party defendant and fourth-party plaintiff Consolidated Edison Company of New York.
Crisci, Weiser & McCarthy, Esqs., New York, for defendant H.J. Development.

Gerald Lebovits, J.

Taube Management Realty LLC (Taube) and 211-51 Property, LLC's (211-51) motions for summary judgment (motion sequence 3) and to vacate the note of issue (motion sequence 5), and Triumph Construction Corp.'s (Triumph) motion for summary judgment (motion sequence 4) are consolidated for disposition.

This is a personal-injury case involving a slip-and-fall. Plaintiff, Michael Puchades, is an employee of non-party 211 East 51st Street Condominium. He alleges in his complaint that on September 23, 2011, at approximately 3:00 p.m., plaintiff went into the basement of the premises owned by the condominium to change into his doorman uniform when he slipped and fell, injuring himself. After the incident, he discovered that he had slipped in a puddle of water. Plaintiff thereafter discovered that the puddle was the result of flooding in the basement — a recurring condition.

Plaintiff did not sue his employer because of a settlement under Workers' Compensation.

In this lawsuit, plaintiff sued the following: Taube, the condominium's managing agent; 211-51, the condominium's sponsor; Consolidated Edison Company of New York (Con Ed), a contractor that had done electrical work near the premises before the incident; Triumph, a contractor that assisted Con Ed in the electrical work; and HJ Development LLC. Plaintiff sues Con Ed and Triumph for negligence in creating a dangerous condition in the basement and/or, upon notice of a dangerous condition, in failing to inspect, remedy, or warn. Plaintiff sues Taube and 211-51 for having actual or constructive notice of a dangerous condition and failing to remedy the condition.

Taube then commenced a third-party action against Con Ed, and Con Ed brought a fourth-party action against Triumph.

I. TAUBE AND 211-51'S MOTION FOR SUMMARY JUDGMENT

Defendants Taube and 211-51 move to dismiss the complaint and all cross-claims brought against them. Defendants argue that neither can be held liable for negligence because neither has a duty of due care toward plaintiff. They argue that 211-51, as the condominium's sponsor, did not own the common elements of the premises — the basement — at the time of the incident and that they had no duty to repair or maintain the area. They also argue that it is not alleged that Taube, as the managing agent, created, or caused a dangerous condition and therefore that is not liable for acts of nonfeasance (*see* Defendants Taube and 211-51's Notice of Motion, exhibit 2).

Plaintiff and Con Ed oppose the motion. Plaintiff argues that an issue of fact exists about whether defendants had notice of an ongoing water-leak condition alleged to have caused the puddle's existence. According to plaintiff, Taube, as managing agent, allegedly has a contractual duty to inspect and remedy a defective condition, like a leak in the premises. Plaintiff argues that if Taube actually knew about the leak and failed to take appropriate action, it is negligent. Plaintiff contends that if 211-51 had an ownership relationship with the condominium, it would have a duty similar to Taube's with respect to notice of the leak (*see* Plaintiff's affirmation in opposition, exhibit 6).

In opposition, Con Ed argues that Taube, as managing agent, may have delegated responsibility from the contractors to assume a duty of due care. Con Ed also asserts that 211-51 may have known about the ongoing leak and assumed a role in remedying the situation (*see* Defendant Consolidated Edison Company's affirmation in opposition, exhibit 5).

Summary judgment is a drastic remedy that should not be granted if factual issues exist (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). Factual disputes preclude summary judgment (*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). The movant on a summary-judgment motion "must provide evidentiary proof in admissible form . . . to warrant . . . (a court granting] summary judgment [citation omitted]" (*Kershaw v Hosp. for Special Surgery,* 114 AD3d 75, 81 [1st Dept 2013]). Once the movant meets this burden, the burden shifts to the opposing party to submit proof in admissible form of issues of fact requiring a trial (*id.* at 82).

The main issue here is duty: "The threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party, and the existence and scope of that duty is a legal question for the courts to determine [citations omitted]" (*Sheila C. v Povich,* 11 AD3d 120, 125 [1st Dept 2004]). Defendants admit that 211-51 was the premises' sponsor: copies of the condominium's declaration, by-laws, and offering plan are submitted as evidence (*see* Copy of 211-51 Condominium Declaration, By-Laws and Offering Plan, exhibit 3). The documents provide that the final unit of the condominium was sold on June 25, 2009. The alleged accident occurred on September 23, 2011, over a year after the sponsor relinquished its control over the premises. Defendants argue that, at the time of the alleged accident, 211-51 had no control, use, or ownership of the premises, and no duty of due care toward plaintiff — an employee of the condominium. Defendants note that plaintiff did not sue his employer because of a settlement under Workers' Compensation. They show that Article 2 of the by-laws provides

that the board of managers has the specific duty to repair and maintain the common areas of the premises, including the basement.

Although plaintiff assumes that 211-51 may have an ownership interest in the premises, no evidence exists to substantiate this (*see* Plaintiff's affirmation in opposition, exhibit 6). Con Ed submits a deed between the sponsor and a former owner, UNED Associates, LLC, dated May 1, 2007 (*see* Consolidated Edison Company's affirmation in opposition, exhibit 5). But this document was superseded by the condominium declaration, dated June 30, 2008, and which was filed on July 11, 2008. Therefore, the deed Con Ed submits as evidence is outdated. Con Ed also argues that the sponsor's agent, Ian Fishkin, has a physical involvement in the premises and holds several positions there. These arguments are conclusory and fail to raise any issues about ownership or control. At the time of the incident, 211-51 had no control. And even if it had notice of a defective condition, 211-51 had no duty to plaintiff. At most, it had privity with the condominium or a fiduciary duty to the unit owners. Because plaintiff was not a unit owner, 211-51 had no obligation toward him.

With respect to Taube, defendants argue that in its capacity as managing agent, it has no liability toward plaintiff even if it had notice of a dangerous condition. A managing agent is subject to liability to an injured person for negligence only if the agent was in complete and exclusive control of the management and operation of the building (*see James v Greenpoint Fin. Corp.*, 34 AD3d 644, 645 [2d Dept 2006]). Plaintiff is not a party or third-party beneficiary to the management agreement between Taube and his employer (*see* Copy of 211-51 Condominium Management Agreement, exhibit 4). Citing *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]), defendants contend that to sue Taube for negligence, plaintiff must prove that Taube launched a force or instrument of harm; that plaintiff detrimentally relied on Taube's continued performance of contractual duties; or that Taube entirely displaced the condominium's duty to maintain the premises.

In this case, plaintiff has not shown an issue of fact that Taube's conduct complies with the *Espinal* requirements. Although plaintiff states that Taube could have launched a force of harm, no proof exists that Taube went beyond notice of a condition that would constitute nonfeasence. No evidence exists that Taube took exclusive control of the condominium's duty to maintain the premises at the time of the incident. The management agreement did not displace the condominium's duty to maintain the premises (*see Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 773 [2d Dept 2011]). Thus, Taube has no duty of care toward plaintiff and is not liable.

The court grants Taube and 211-51's motion for summary judgment, dismissing all claims and cross-claims against them.

II. TAUBE AND 211-51'S MOTION TO VACATE THE NOTE OF ISSUE

While their motion for summary judgment was pending, defendants moved to vacate the note of issue and certificate of readiness that plaintiff filed (*see* Defendants Taube and 211-51's Notice of Motion to Vacate, exhibit 15). If their summary-judgment motion were to be denied, they sought vacatur on the ground that plaintiff failed to complete necessary disclosure,

including providing medical authorizations, an additional examination before trial (EBT), and a medical examination, pursuant to a supplemental bill of particulars that plaintiff filed that indicated that plaintiff suffered additional injuries (*see* Plaintiff's Supplemental Bill of Particulars, exhibit 16). Taube and 211-51 argue that this disclosure is necessary and would significantly affect their defense in the upcoming trial. In opposition, plaintiff insists that all necessary disclosure has been completed and that he responded to defendants' demands (*see* Plaintiff's affirmation in opposition, exhibit 17).

Given that this court has granted defendants' motion for summary judgment dismissing them from this action, their motion to vacate the note of issue is denied as academic.

III. TRIUMPH'S MOTION FOR SUMMARY JUDGMENT

Triumph seeks summary judgment dismissing the complaint and all cross-claims brought against it, based on undisputed evidence that it did not create a dangerous condition on the premises and had no notice, actual or constructive, of any dangerous condition (*see* Defendant Triumph's Notice of Motion, exhibit 8). Triumph states that it had been performing work in the vicinity of the premises several months before plaintiff's alleged accident. It had entered into an agreement with Con Ed, which was installing electrical utilities on the premises. The project involved electrical installations as well as conduits and vault installations. Based on the EBT of John McCann, a superintendent employed by Triumph, Triumph performed work that involved installing a transformer vault and reinforcing electricity in the roadway. Triumph also installed conduit service to the premises and the sewer. The vault excavation was 12 feet wide, 8 feet long and about 12 to 15 feet from the premises; it excavated from the vault for the conduit. The conduit excavation was six feet long, three feet wide, and three feet deep. Triumph installed the pipe from the sidewalk vault to exposed sleeves, which were for the interior of the premises, to the premises. After installing the pipe, the evacuation was closed. Con Ed inspected Triumph's work and installed the electricity (*see* EBT tr of John McCann, exhibit 11).

Triumph refers to plaintiff's expert witness, William Marletta, who asserts that an open excavation hole that existed for an extended period of time before the alleged accident contributed to the water leak. He concludes that Triumph's work caused leaking into the basement during rainfall. Marletta states that after the excavation was closed, the leak stopped (*see* Plaintiff's affidavit of William Marletta in opposition, exhibit 13).

Triumph claims that it had not received any complaint about its work or water problems and that its work was completed months before the incident. Triumph argues that based on the evidence, it did not cause the dangerous condition or had notice of the condition and this that it is not liable to plaintiff. In his opposition to the motion, plaintiff, referring to Marletta's conclusions, contends that the leak existed for an extended period of time and that Triumph knew or should have known of the long-term water seepage because of the damage exhibited by repeated flooding. Photos of the basement — when Marletta inspected the premises — reveal water stains on the walls and closet doors. Marletta opines that the excavation area was not adequately or properly sealed to prevent water intrusion into the premises (*see* Plaintiff's affidavit of William Marletta in opposition, exhibit 13).

Christopher Montes, the condominium superintendent, testified that the premises had experienced water seepage in the basement area before the incident and that it would occur whenever heavy rain fell. He testified that the excavation wall was open for over a year and that water leaked into the premises during this time. He also testified that he spoke to Con Ed employees, informing them that water would seep into the premises from the excavation site during heavy rainstorms. Montes stated that the leak stopped once the construction of the front exterior portion of the premises was completed, which was sometime after the alleged accident occurred (*see* EBT tr of Christopher Monte, exhibit 12).

In its reply, Triumph makes a general denial of any liability and claims that any assertion of liability is conclusory. Triumph contends that plaintiff's expert's affidavit does not conclude that it is liable for negligence regarding its excavation work (*see* Defendant Triumph's reply affirmation, exhibit 14).

To prove negligence, a plaintiff must demonstrate that a defendant either created or had actual or constructive notice of an allegedly dangerous condition (*see Gordon v Am. Museum of Natural History,* 67 NY2d 836, 837-838 [1986]).

Plaintiff raises an issue of fact. Montes's testimony and Marletta's affidavit raise a question about whether Triumph's work is connected to the subsequent water leak. Montes's testimony contradicts Triumph's claim that the leak ceased after the excavation was completed, which occurred before plaintiff's fall. Montes testified that the leak was not resolved until the excavation area was sealed, which was after the incident occurred. In his affidavit, Marletta states that the leak in the basement was due to the contractors Triumph and Con Ed's excavation work. Marletta also states that Triumph's pipes leading into the premises were located where there was leakage.

At his EBT, McCann testified that after Triumph had installed its conduit through the sleeves leading into the premises, it filled the area around the conduit with an expanding foam that Con Ed provided. McCann states that Con Ed was responsible for inspecting the conduit installation when Triumph completed it. He testified that he did not know whether Con Ed inspected this installation. Joseph Mangano, field supervisor for Con Ed, testified at his EBT that although he visited Triumph's work site daily during Triumph's work, he did not supervise or inspect Triumph's installations to see whether they were waterproof. He also testified that he did not know any Con Ed employees who inspected them (*see* EBT tr of Joseph Mangano, exhibit 10).

Sufficient evidence exists to preclude granting Triumph's motion. A possible causation exists between Triumph's excavation work and the water seepage or leakage that allegedly occurred during rainy days for an extended duration. This water problem had apparently occurred long after the contractors' work was completed. Plaintiff, however, has provided enough evidence to allow a trier of fact to determine whether Triumph caused a dangerous condition in the basement.

Accordingly, it is

ORDERED that defendants Taube Management Realty LLC and 211-51 Property, LLC's motion for summary judgment (Mot. Seq. 3) is granted and the complaint and all cross-claims are dismissed with costs and disbursements to defendants as taxed by the Clerk upon a submission of an appropriate bill of costs, and the County Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants Taube Management Realty LLC and 211-51 Property, LLC's motion to vacate the note of issue (Mot. Seq. 5) is denied as academic; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that defendant Triumph Construction Corp.'s motion for summary judgment (Mot. Seq. 4) is denied; and it is further

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that the moving defendants serve a copy of this decision with notice of entry on all parties and the County Clerk's Office.

Dated: January 9, 2017

HON. GERALD LEBOVITS
J.S.C. J.S.C.