SHORT FORM ORDER

INDEX No. 12-5373
CAL. No. 16-00361OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 7-12-16 (002)
MOTION DATE 7-19-16 (003)
MOTION DATE 11-29-16 (004)
ADJ. DATE 4-11-17
Mot. Seq. # 002 - MG
003 - MD
004 - MG

LISA DENNISON as Administrator of the Estate of RICHARD DENNISON, Deceased, and LISA DENNISON, Individually,

Plaintiffs,

- against -

AVALONBAY COMMUNITIES, INC., d/b/a AVALON COMMUNITIES AT SMITHTOWN, FOUR H MAINTENANCE, INC., NELSON & POPE, LLP, and HENDERSON & BODWELL, LLP,

Defendants.

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AVALONBAY COMMUNITIES, INC.,

Third-Party Plaintiff,

- against -

FOUR H MAINTENANCE, INC., and UNITED CESSPOOL SERVICE, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 117 read on these motions for summary judgment ; Notices of Motion and supporting papers 1 - 22, 23 - 41, 42 - 77 ; Answering Affidavits and supporting papers 78 - 82, 83 - 89, 90 - 92, 93 - 95, 96 - 100, 101 - 109 ; Replying Affidavits and supporting papers 110 - 111, 112 - 113, 114 - 117 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 002) by third-party defendant United Cesspool Service, Inc., the motion (seq. 003) by defendant AvalonBay Communities, Inc., and the motion (seq. 004) by defendant Nelson & Pope, LLP, are consolidated for purposes of this determination; and it is

ORDERED that the motion by third-party defendant United Cesspool Service, Inc., for summary judgment dismissing the third-party complaint and all cross complaints against it is granted; and it is

ORDERED that the motion by defendant AvalonBay Communities, Inc., for summary judgment dismissing the complaint and all cross complaints against it is denied; and it is further

ORDERED that the motion by defendant Nelson & Pope, LLP, for summary judgment dismissing the complaint and all cross complaints against it is granted.

This action was commenced by plaintiff Lisa Dennison, as administratrix of the estate of decedent Richard Dennison, to recover damages for injuries he allegedly sustained on November 1, 2011, when he drowned in a sewage tank while in the employ of United Cesspool Service, Inc. The sewage tank is located within a sewage treatment plant upon a premises owned by defendant AvalonBay Communities, Inc. (AvalonBay) in Smithtown, New York. Mrs. Dennison asserts an additional claim for the wrongful death of her husband, Richard Dennison, as well as a derivative claim for loss of consortium. By a third-party action, defendant AvalonBay seeks contribution or indemnification from defendant/third-party defendant Four H Maintenance, Inc., and third-party defendant United Cesspool Service, Inc. The defendants/third-party defendants also assert numerous cross claims against one another for indemnification and contribution.

It is generally undisputed that plaintiff's decedent, Richard Dennison, arrived at the subject premises at approximately 1:25 p.m. on the date in question. He was tasked, as a duty of his employment by United Cesspool Service, with the monthly pumping of collected sludge from an 18-foot-deep sewage tank, into a storage vehicle for off-site disposal. United Cesspool Service was an independent contractor hired by Four H Maintenance (Four H) to pump sludge from the sewage tanks approximately once a month. Four H, in turn, was an independent contractor hired by AvalonBay to maintain its sewage treatment plant. Four H was also the general contractor during the sewage treatment plant's construction.

At some point prior to his incident, Mr. Dennison entered the sewage treatment plant on AvalonBay's property, inserted a large suction hose into the vat, and activated his tanker truck's pump, which sucked the unwanted sludge from the vat. The removal of large amounts of sludge from the vats in question was a time-consuming process– a task he had begun the previous day. A long metal "catwalk" was present above the sewage vats, comprised of metal grates, with handrails on each side. The horizontal metal grates, of which the catwalk's floor was constructed, were supported on one edge

by a concrete ledge on their right, and on their opposite edge by a steel beam. Each approximately three-foot-by-three-foot metal grate section was secured to its supporting steel beam by two "G-clips." Those clips clamped each metal grate section to its supporting steel beam on the left. In order to access the sewage vat, Mr. Dennison regularly traversed the catwalk.

Mr. Dennison's supervisor, Robert McInerney, was doing similar work at a separate vat on the premises earlier in the day, but left prior to Mr. Dennison's arrival. Hours later, Mr. McInerney attempted to contact Mr. Dennison by telephone without success. Returning to the subject premises at approximately 6:30 p.m., Mr. McInerney found Mr. Dennison's truck running outside the treatment plant. The truck's storage tank was full, and its pump continued to run. Upon entering the treatment plant, Mr. McInerney discovered that a portion of the catwalk's metal grating near the plant's entrance door was missing. Looking down into the sewage vat, directly underneath where the grate was missing, Mr. McInerney found Mr. Dennison's body. Following the recovery of Mr. Dennison's body, it was determined that he had drowned. Subsequently, the vat was drained. Inside, police discovered the missing grate portion, along with two bent "G-clips." The parties to the instant action offer varying theories as to the mechanism of Mr. Dennison's fall.

The sewage treatment plant in question was constructed in two parts, deemed "Phase I" and "Phase II." Phase I of the plant was designed by defendant Nelson & Pope, LLP (N&P), and constructed under its supervision in approximately 1996. Phase II was an addition to Phase I, and its construction was completed in 2001. N&P drafted the initial plans/specifications for Phase II, but was replaced by defendant Henderson & Bodwell, LLP, prior to the commencement of Phase II's construction. Mr. Dennison's incident occurred in the portion of the treatment plant designated as Phase II.

Third-party defendant United Cesspool Service, Inc. (United) now moves for summary judgment in its favor, arguing that it had no duty to maintain AvalonBay's premises or the catwalk from which plaintiff's decedent fell. United also argues that no actionable defective condition at the subject premises has been established and that, even if one was present, it was latent. In support of its motion, United submits copies of the pleadings and copies of the parties' deposition transcripts.

AvalonBay also moves for summary judgment in its favor, arguing that it had no notice of any defect on its premises, that it conducted regular safety inspections, and that if any dangerous condition existed, it was latent. AvalonBay also moves for an order of the Court granting it conditional indemnification from Four H and N&P.

Further, N&P moves for summary judgment in its favor on the grounds that the subject catwalk deviated from the initial design it supplied, that non-moving defendant Henderson & Bodwell, LLP actually designed the catwalk, and that N&P had no role in the construction of that catwalk. Initially, the Court finds that N&P has established good cause for filing its motion later than the 120 days permitted in CPLR 3212 (a) and, accordingly, it will be considered on the merits (*see generally* ***Braun v Star Community Publ. Group, LLC***, 125 AD3d 913, 5 NYS3d 151 [2d Dept 2015]).

A party moving for summary judgment 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 (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). 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]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). A defendant moving for summary judgment in a case arising from an alleged hazardous or defective condition has the initial burden of "establishing that it did not create the alleged dangerous or defective condition or have either actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (***Gairy v 3900 Harper Ave., LLC***, 146 AD3d 938, 938, 45 NYS3d 564 [2d Dept 2017]). To constitute constructive notice, a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants employees to discover and remedy it" (***Gordon v Am. Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). A mere general awareness that a dangerous condition may exist is insufficient to constitute notice of a particular condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]; ***Chaney v Abyssinian Baptist Church***, 246 AD2d 372, 667 NYS2d 737 [1998]). To meet its initial burden on the issue of lack of constructive notice, a "defendant is required to offer some evidence as to when the accident site was last cleaned or inspected" prior to the plaintiff's fall (***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 679, 39 NYS3d 190 [2d Dept 2016]). When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed (***Schnell v Fitzgerald***, 95 AD3d 1295, 1295, 945 NYS2d 390 [2d Dept 2012]).

As the determination would affect the outcome of all motions, the Court must first consider the threshold issue of whether there is sufficient, non-speculative, evidence that negligence was a proximate cause of decedent's death. Where there are "several equally plausible explanations for the decedent's death, which are not attributable to any alleged negligence of . . . [a] defendant, any determination by the trier of facts as to causation would be based on sheer speculation" (***Manzo v 372 Doughty Blvd. Corp.***, 147 AD3d 930, 930-931, 47 NYS3d 137 [2d Dept 2017]). In a case involving a death, "a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can [himself or herself] describe the occurrence" (***Noseworthy v New York***, 298 NY 76, 80, 80 NE2d 744 [1948]). Further, "where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his [or her] power to produce evidence of the actual cause that

produced the accident, which the plaintiff is unable to present" (*Id.*). However, the *Noseworthy* doctrine does not apply when the defendant's knowledge as to the cause of the decedent's accident is no greater than that of the plaintiff (***Hod v Orchard Fields, LLC***, 111 AD3d 794, 795, 975 NYS2d 162 [2d Dept 2013]). Although "the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of the defendant, as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (***Hartman v Mt. Val. Brew Pub, Inc.***, 301 AD2d 570, 570, 754 NYS2d 31 [2d Dept 2003]).

Here, it is true the circumstances of decedent's death are open to some speculation. However, decedent's body was not simply discovered drowned in the subject vat; there were physical aberrations at the scene, such as the missing grate and bent G-clips, tending to provide some circumstantial evidence of a proximate cause of his fall (*see* ***Schneider v Kings Hwy. Hosp. Ctr., Inc.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Patrikis v Arniotis***, 129 AD3d 928, 12 NYS3d 174 [2d Dept 2015]). Thus, not all possible causes of decedent's death are equally plausible (*cf.* ***Manzo v 372 Doughty Blvd. Corp.***, *supra*). Whether plaintiff will succeed in establishing the cause of decedent's fall at trial is presently of no import. There can be "more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause" (***Davidoff v First Dev. Corp.***, 148 AD3d 773, 775, 48 NYS3d 755 [2d Dept 2017] [internal quotations and citations omitted]). In light of the parties' deposition testimony, sufficient circumstantial evidence is present for triable issues to exist as to the cause of decedent's fall (*see* ***Acton v 1906 Rest. Corp.***, 147 AD3d 1277, 47 NYS3d 788 [3d Dept 2017]).

Turning to the motions at hand, United has established a prima facie case of entitlement to summary judgment (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Specifically, through the deposition testimony of John Hunt of Four H, United has proffered evidence showing that it was an independent sludge pumping contractor, which had no duty to inspect the subject premises for any defects or dangerous conditions. United did not own the premises and owed no duty to plaintiffs regarding the integrity of the catwalk (*see* ***Tafolla v Aldrich Mgt. Co., LLC***, 136 AD3d 1019, 26 NYS3d 194 [2d Dept 2016]; *see also* ***Nealy v Pavarini-McGovern, LLC***, 135 AD3d 917, 24 NYS3d 372 [2d Dept 2016]). United having established a prima facie case, the burden shifted to the opposing parties to raise a triable issue of fact (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

Four H opposes United's motion, arguing that triable questions of fact exist as to whether plaintiff's decedent violated United's procedures by pumping the sludge from the interior of the treatment plant rather than from its exterior standpipe, and whether United had a duty to report any malfunction of that exterior standpipe. Four H submits an affidavit of Patrick Andare, a copy of United's "Sludge Removal Procedure," and a transcript of John Hunt's deposition testimony. N&P also opposes United's motion, adopting Four H's arguments in large part, and alleging one additional triable issue exists: whether the exterior standpipe was actually functional on the date in question. Those arguments are unavailing. The adduced evidence shows that sludge was commonly removed from both the interiors and exteriors of sewage treatment facilities, and that either method was acceptable. Assuming, *arguendo*, all facts as asserted by the opposing parties are true, they merely serve as a reasons why plaintiff's decedent may have been inside the sewage facility, rather than outside. While possibly

supplying the conditions permitting decedent's accident to occur, there is no indication that any deviation from alleged best practices, or a malfunctioning external drain pipe, were proximate causes of his death. Thus, it is irrelevant whether the exterior standpipe was functional (*see* ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]).

AvalonBay does not oppose United's motion. Further, as an independent contractor hired solely to pump sludge, United had no duty to inspect for defects at the plant (*see* ***Merchants Mut. Ins. Co. v Quality Signs of Middletown***, 110 AD3d 1042, 973 NYS2d 787 [2d Dept 2013]; ***McMurray v P.S. El.***, 224 AD2d 668, 638 NYS2d 720 [2d Dept 1996]). Therefore, neither Four H nor N&P have established that United breached any duty. Accordingly, the motion by United for summary judgment dismissing the complaint and any cross claims against it is granted.

AvalonBay failed to establish a prima facie case of entitlement to summary judgment. While it adduced evidence that the metal grates in question were walked upon hundreds of times a year, that there are no records of any complaints or incidents involving the metal grates, and that the G-clips used to secure the grates were "standard," questions of fact remain (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Specifically, AvalonBay has not proven that a loose G-clip was a latent defect. Unlike the defects in ***Jackson v Conrad***, 127 AD3d 816, 7 NYS3d 355 (2d Dept 2015) and ***Nicoletti v Iracane***, 122 AD3d 811, 996 NYS2d 697 (2d Dept 2014), the G-clips here were visible from above and not entirely obscured by the flooring (*see also* ***Arevalo v Abitabile***, 148 AD3d 658, 48 NYS3d 506 [2d Dept 2017] [dangerous condition hidden below thick vegetation]; ***Doxey v Freeport Union Free Sch. Dist.***, 115 AD3d 907, 982 NYS2d 539 [2d Dept 2014] [dangerous condition encased within a metal tube]). As such, there is a question of fact as to whether a "reasonable inspection" would include testing the tightness of the G-clips' bolts (*see* ***Taub v JMDH Real Estate of Garden City Warehouse, LLC***, 150 AD3d 1301, 56 NYS3d 220 [2d Dept 2017]). In addition, AvalonBay has not shown when the grating in question was last inspected by its own employees before decedent's incident and, therefore, cannot prove a prima facie lack of constructive notice (*see* ***Jeremias v Lake Forest Estates***, 147 AD3d 742, 46 NYS3d 188 [2d Dept 2017]; ***Mavis v Rexcorp Realty, LLC***, *supra*; ***Jackson v Manhattan Mall Eat LLC***, 111 AD3d 519, 975 NYS2d 34 [1st Dept 2013]).

AvalonBay's application for a conditional order finding that Four H and N&P must provide contractual indemnification to AvalonBay is denied. A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (***Jardin v A Very Special Place, Inc.***, 138 AD3d 927, 930, 30 NYS3d 270 [2d Dept 2016]). A party seeking contractual indemnification must establish that it was "free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (***Arriola v City of New York***, 128 AD3d 747, 749, 9 NYS3d 344 [2d Dept 2015]). The right to contractual indemnification depends upon the specific language of the contract (***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). When a party is under no legal duty to indemnify another party, "a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assoc., Ltd. v AGS Computers, Inc.***, 74 NY2d 487, 491, 549 NYS2d 365 [1989]). In other words, a contract that provides for indemnification will be enforced "as long as the intent to assume such a role is sufficiently clear and unambiguous" (***Stanton v Oceanside***

Union Free Sch. Dist., 140 AD3d 731, 734, 32 NYS3d 620 [2d Dept 2016]). Ambiguity is present when a provision of a contract is "susceptible of two reasonable interpretations" (***Concordia Gen. Contr. Co., Inc. v Preferred Mut. Ins. Co.***, 146 AD3d 932, 46 NYS3d 146[2d Dept 2017]). Absent a factfinder's determination of the cause of decedent's accident, the Court is unable to determine whether Four H's contractual obligations to AvalonBay are implicated. Should a fact finder conclude that a defective condition was present, and that the catwalk was that defective condition, the factfinder must then determine whose duty it was to inspect it. As to N&P, AvalonBay's application for indemnification and contribution is denied in its entirety in light of the Court's determination below.

N&P has established a prima facie case of entitlement to summary judgment (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). It adduced evidence that it satisfied its obligation to AvalonBay by drafting specifications for Phase II of the sewage treatment plant, that Henderson & Bodwell's engineering services were retained for the construction of that portion of the plant, that Four H was the general contractor for Phase II's construction, and that Phase II's catwalk, as constructed, differed in certain respects from the plans drafted by N&P.

Harvey Bienstock submitted an affidavit on behalf of N&P in which he states that he has 50 years of experience as a professional engineer, as well as substantial experience designing sewage treatment plants. He indicates that he reviewed, among other things, N&P's plans for the treatment plant, the deposition transcripts, the pleadings, and photographs. He states that he conducted a site visit on August 31, 2016, and compared N&P's designs to the plant, as built. He notes that Phase I of the plant's construction, which was under N&P's control from start to finish, employs "saddle clip anchors" on both sides of its catwalk "with no apparent movement" present. Mr. Bienstock states that with respect to Phase II, the location of decedent's incident, N&P did not oversee its construction, as Henderson & Bodwell, LLP had taken over for N&P at that time. Mr. Bienstock avers that the area of decedent's fall possessed conditions that "differed from what was expected from the design intent of [N&P's] documents." Mr. Bienstock further opines that design plans generated by N&P for AvalonBay met the standard of care.

The testimony of witnesses John Hunt, Thomas Lembo, and James Deland on behalf of Four H, N&P, and Henderson & Bodwell, LLP, respectively, shows that the contractor– in this case Four H– was responsible for determining the materials to be used in Phase II's construction. Upon Four H's communication with materials suppliers, those suppliers created "shop drawings." The shop drawings, these witnesses explained, gave detailed specifications of each individual part the contractor intended to use in construction. Upon receipt of the shop drawings from materials manufacturers, Four H would transmit them to Henderson & Bodwell, which would evaluate them. If the particular part shown in a shop drawing met with Henderson & Bodwell's approval, it would send the drawing to the Suffolk County Department of Public Works for further approval. Only after the approval of Henderson & Bodwell and Suffolk County was Four H permitted to move forward with the construction of that portion of the treatment plant. Mr. Hunt testified that Four H took N&P's broad performance specifications and chose materials that met those specifications. However, Mr. Hunt indicated that N&P did not specify the size of the grating sections, nor the types of clips used to secure them. Such evidence demonstrates that AvalonBay terminated N&P's involvement with Phase II prior to the facility's construction, which obviated any role N&P would otherwise maintain in materials selection or

approval. N&P having established a prima facie case, the burden shifts to AvalonBay to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

AvalonBay opposes N&P's motion, essentially arguing N&P's design plans for the sewage treatment plant omitted any means of egress from the containment vats, and failed to specify that the catwalk grates should be welded to their support structure. In opposition, AvalonBay submits, among other things, the affidavit of Douglas W. Peden. Mr. Peden's affidavit, identical to his affidavit submitted by plaintiff in opposition to AvalonBay's motion for summary judgment, states that he is a registered architect in the State of New York. He states that N&P prepared design drawings and technical specifications for Phase II of the sewage plant in 1999. He avers that Henderson & Bodwell, LLP "assumed engineering duties from Nelson & Pope prior to the start of construction for Phase II." He further states that construction of Phase II was performed by Four H in 2001. In conclusion, Mr. Peden opines that decedent's fall was occasioned by AvalonBay's failure to maintain the catwalk in a safe condition by periodically tightening the G-clips securing the catwalk's grates.

Mr. Peden's affidavit assigns no blame to N&P for decedent's fall. While Mr. Peden states that the "Metal Bar Grating Manual published by National Association of Architectural Metal Manufacturers" recommends that permanently installed grating sections should be welded to a supporting flange, he does not assign such duty to N&P, and does not state that welding is the sole appropriate method to secure catwalk grates. Finally, while AvalonBay suggests that the vats should have been designed by N&P to have means of egress for someone who accidently falls into one, N&P did not have that duty, barring any industry standards to the contrary (*see* ***Canales v Hustler Mfg. Co.***, 12 AD3d 392, 786 NYS2d 539 [2d Dept 2004]). Plaintiff does not oppose N&P's motion. Accordingly, the motion by defendant Nelson & Pope, LLP, for summary judgment dismissing the complaint and any cross claims against it is granted.

Dated: September 6, 2017

Martha L. Cf
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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