SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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GILBERT MARK CLELAND,

Plaintiff,

Index No. 301293/2012
DECISION AND ORDER

-against-

BORICUA VILLAGE HOUSING DEVELOPMENT FUND CO., et al.,

Defendants.

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BORICU VILLAGE HOUSING DEVELOPMENT FUND CO., et al.,

Third-Party Plaintiff,

Index No. 83729/2014

-against-

UNITED COMMERCIAL DEVELOPMENT. LLC.,

Third-Party Defendant.

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Hon. Norma Ruiz, J.S.C.:

The plaintiff commenced this action to recover damages for injuries that plaintiff allegedly sustained on January 14, 2011, at premises located at 505 East 161st Street in Bronx County. Plaintiff, an employee of third-party defendant United Commercial Development, LLC ("United"), had been assigned the task of unloading and installing cabinets on the upper floors of the building. To transport materials and workers, defendants NYC Hoist and New York Precast, LLC (collectively, "NYC Hoist")[1] installed a metal hoist on the building's exterior, which functioned, in essence, as a service elevator. Because the hoist was located on the building's exterior, approximately 18 inches from the outside wall, a metal "plate" was placed on the floor to

[1] NYC Hoist and related companies and subcontractors installed, owned, and operated the hoist. No issues are raised on this motion as to the specific role played by each of these related entities, nor is the specific role played by any of these entities relevant to the disposition herein. The Court will not therefore further delve into these matters.

allow persons and materials to safely exit the hoist.

According to the plaintiff, at the time of the accident, the hoist operator, whom he knew only as "Anthony," was inside the hoist. Plaintiff approached the hoist to enter, but his vision was obscured by the cabinets which he was carrying, and he did not see that the plate protecting the gap had been removed. He fell into the gap, up to his chest, sustaining injuries.

Defendant NYC Hoist contends, to the contrary, that its employee or agent assigned to operate the elevator was on his lunch break, and that issues of fact exist as to whether the accident happened in the manner alleged by the plaintiff. In this regard, NYC Hoist's Operations manager, Auringer, testified that the maximum gap permitted by building department regulations was 2 ½ inches, and that the hoist in question was inspected and certified as compliant with applicable regulations.

Defendants Boricua Village Housing Development Fund Co. ("Boricua Village"), Atlantic Development Fund Group, LLC ("Atlantic"), and Knickerbocker Construction II, LLC ("Knickerbocker") (collectively, "the moving defendants") seek the following relief pursuant to CPLR 3212:

1. Dismissal of all claims against Atlantic, on the ground that Atlantic is a real-estate developer without any role in the ownership of the properties, or the management of the project;
2. Dismissal of the Labor Law § 200 and common law negligence claims against Boricua Village and Knickerbocker, on the ground that they did not control the work, or have any notice of an unsafe condition; and,
3. Contractual and common law indemnification in favor of Boricua Village and

Knickerbocker against NYC Hoist, on the ground that they were not negligent, and that their liability is purely vicarious.

Plaintiff, and defendant NY Hoist, oppose the motion. Each of the above arguments is considered *below*.

Analysis

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Liability of Atlantic

The moving defendants rely on the affidavit of Michael Stolper, the General Counsel of both Atlantic and Knickerbocker, who states that Atlantic does not own, control, or mange the work, or hire contractors or subcontractors.

In opposition, plaintiff and NY Hoist contend that the Stolper affidavit is insufficient, as the moving defendants are controlled by the same two individuals.

The affidavit of Atlantic's General Counsel is based on his personal knowledge of its business operations, and is sufficiently probative to establish a prima facie case. (*DiNapoli v Catholic Charities of the Diocese of Rockville Ctr.*, 2010 N.Y. Misc. LEXIS 6537, *2, 2010 NY

Slip Op 33708(U), 2 [Sup Ct, Nassau Co.] ["The Court finds that defendants have offered sufficient proof, unopposed by plaintiff, through the affidavit of Thomas G. Renker, General Counsel to the Diocese . . . [that] Catholic Charities and the Diocese did not own, operate, manage, maintain or control the Premises."])

Neither plaintiff nor NY Hoist have attempted to submit countervailing evidence that Atlantic owned or controlled the project or the work. "The term *owner* within the meaning of Lab. Law Art. 10 (Lab. Law § 240 *et seq.*) includes a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his or her benefit." (1-4 LexisNexis AnswerGuide New York Negligence § 4.10.) There is no evidence that Atlantic is an owner, or the agent of an owner.

Accordingly, all claims against defendant Atlantic are dismissed.

Common law and Labor Law § 200 claims

An owner may be liable under the common law or under Labor Law § 200 for a dangerous condition arising from either the condition of the premises or the means and methods of the work. (*See Cappabianca v Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143-144, 950 N.Y.S.2d 35 [1st Dept. 2012]). An owner's liability only attaches for an injury arising from the means and methods of the work if the owner exercised supervisory control over the work (*id.* at 144). Where a dangerous condition in the premises caused the accident, liability only arises if the owner created the condition or had actual or constructive notice of it (*id.*). "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 defendant's employees to discover and remedy it." (*Gordon v American Museum of*

Natural History, 67 NY2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). However, "constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection." (*Curiale v Sharrotts Woods, Inc.*, 9 A.D.3d 473, 475, 781 N.Y.S.2d 47 [2d Dept. 2004].)

There is no showing that the moving defendants controlled either the method or manner of the work, in that there is no evidence that they controlled the operation of the elevator, or the plaintiff's activities in loading/unloading materials or transporting them about the work site.

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144, 950 N.Y.S.2d 35 [1st Dept. 2012]). Proof of the defendants' supervision and control over a plaintiff's work is not required (*see Cordeiro v Midtown Holdings, LLC*, 87 AD3d 904, 906, 931 N.Y.S.2d 41 [1st Dept. 2011]).

The moving defendant have failed to establish that they did not have actual or constructive notice of an alleged dangerous condition – i.e., a 2 ½ foot gap, necessitating the use of a metal plate. They have not demonstrated when they last inspected the premises, or that the existence of the gap (and recognition of a dangerous condition) would not have been apparent on a reasonable inspection.

For these reasons dismissal of the Common law and Labor Law § 200 claims is denied.

Common Law and Contractual Indemnity

To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident. (*See Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept. 1999]). As noted above, there exist issues of fact as to whether the moving defendants were negligent in failing to provide a safe place to work, if, as plaintiff claims, a gap existed between the hoist and the building exterior.

As to contractual indemnity, NY Hoist is obligated to indemnify the moving defendants for injuries arising out of the NY Hoist's work. The indemnity agreement does not require negligence on the part of NY Hoist as a condition to its indemnity obligations, and could be triggered even in the absence of negligence. (*See Matter of New York City Asbestos Litig.*, 142 AD3d 408, 410, 39 N.Y.S.3d 125 [1st Dept. 2016], *lv dismissed* 28 NY3d 1178, 49 N.Y.S.3d 370, 71 N.E.3d 959 [2017], *lv denied* 28 NY3d 915, 52 N.Y.S.3d 292, 74 N.E.3d 677 [2017]; *Santos v BRE/Swiss, LLC*, 9 AD3d 303, 780 N.Y.S.2d 585 [1st Dept. 2004]). However, given the widely divergent factual allegations here, it is not clear that the accident occurred in a gap, whether or not a gap existed, or even if he accident occurred on or new the hoist. Given these factual disputes, it is not established that the claim arises out of the performance of NY Hoist's work.

Conclusions

Any arguments not specifically addressed herein would not affect the final disposition, or are found to be without merit.

Accordingly, based upon the foregoing, it is hereby

ORDERED that the motion is granted only to the extent of dismissing all claims against defendant Atlantic Development Group, LLC, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 16, 2018

Norma Ruiz, J.S.C