At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of September, 2018.

PRESENT:

HON. DEBRA SILBER,

Justice.

----------X

TSERING WANGYAL,

Plaintiff,

- against -

ROBROSE PLACE, L.L.C., SKY MANAGEMENT CORP. and DAFFODIL GENERAL CONTRACTING, INC.,

Defendants.

----------X

DECISION/ORDER

Index No. 507954/13

Motion Sequence Nos. 7, 8

The following papers number 1 to 15 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5, 6, 7-9, 10, 11
Reply Affidavits (Affirmations)	12, 13, 14, 15

Upon the foregoing papers, defendant Daffodil General Contracting, Inc. (Daffodil) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the plaintiff's entire complaint as asserted against it. Plaintiff Wangyal also moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability against defendants Daffodil, Robrose Place, LLC and Sky Management Corp.[1]

[1] Robrose Place L.L.C. owns the subject premises, and Sky Management Corp. was hired to manage the property. These two firms are united in interest for the purposes of this action, and

Background

The pleadings indicate that, on June 15, 2013, (a Saturday) plaintiff was a laundry delivery person hired by non-party Brown Bag Laundry. On that date, plaintiff's assigned tasks included picking up a bag of clothes to be cleaned from a resident of unit 4 of the residential building located at 220 Sullivan Street[2] in Manhattan. Plaintiff entered the courtyard of the building by opening and walking through a cast-iron hinged swinging gate. He then walked to the applicable unit's door and picked up the bag of laundry. He then proceeded to exit through the courtyard; he opened the gate, walked through it, and after the gate swung closed behind him, the gate (including the frame around it) tipped forward and struck plaintiff in the back. He suffered injuries as a result.

Plaintiff commenced the instant action by electronically filing a summons and verified complaint on December 13, 2013. As defendants, plaintiff named the owners, and Daffodil, a contractor hired by the owners to perform exterior facade work (to re-surface the facade) on the 220 and 224 Sullivan Street properties. The complaint asserts that the subject gate was unsecured, and thus constituted a hazardous premises condition. Plaintiff further alleges that defendants were negligent in their responsibilities with respect to the gate, either by creating the hazard (i.e. causing the heavy gate to become unsecured) or knowing of the

---

this court will refer to them together as "the owners."

[2] Plaintiff's submissions to this court sometimes refer to 224 Sullivan Street; the submissions suggest that both 220 and 224 Sullivan Street share a common courtyard, which, apparently, necessitated the use of the subject gate. In any event, Robrose Place L.L.C. appears to own both buildings.

hazard and failing to correct it.[3] Plaintiff claims that such negligence proximately caused his injuries, and he seeks damages as a result.

Defendants interposed answers, and discovery ensued. On December 15, 2016, plaintiff filed a note of issue, indicating that the action is ready for trial. The instant motions for summary judgment ensued.

Arguments in Support of Plaintiff's Motion

In support of his motion, plaintiff first argues that the owners owe those lawfully present on their land a duty to keep the premises reasonably safe. Plaintiff asserts that as a delivery person for a laundry service hired by one of the owners' tenants, he was owed such a duty. Plaintiff adds that the subject gate was in the owners' exclusive control and notes that it is undisputed that he was injured when the gate suddenly fell on him. Therefore, plaintiff infers that the owners or their agents had created the subject gate's hazardous condition when the accident occurred.

Plaintiff also imputes responsibility for the accident to Daffodil. Specifically, plaintiff claims that a written agreement between the owners and a consulting architect provides that Daffodil was to remove the iron gates in order to perform the facade work, and to put them back in place after the re-surfacing was completed. Accordingly, plaintiff alleges that a proper inference is that Daffodil's workers caused the gate to become unstable and fall.

---

[3] Plaintiff had also asserted causes of action alleging violations of the Labor Law; these claims were later withdrawn by stipulation. Also, plaintiff alleges a violation of section 78 of the Multiple Dwelling Law; the court notes that the standard of care contained therein—requiring that the owner and its agents shall keep all parts of a multiple dwelling "in good repair"—does not deviate materially from the common-law premises liability duty of care.

Thus, plaintiff reasons, Daffodil is responsible for creating the premises hazard. Plaintiff concludes that, therefore, Daffodil is liable for his injuries.

In sum, plaintiff asserts that the record suffices for this court to grant him partial summary judgment on the issue of liability. Plaintiff notes that his account of the subject accident is uncontradicted; plaintiff adds that defendants' deposition witnesses lacked any direct knowledge of relevant events. He continues that it is undisputed that the gate was unsecured and that it fell, struck him and caused injuries. For these reasons, plaintiff concludes that he has demonstrated prima facie entitlement to judgment as a matter of law, and this court should thus grant his motion.[4]

Arguments in Support of Daffodil's Motion

In support of its motion, Daffodil first contends that the record demonstrates plaintiff's inability to establish a prima facie case of negligence against it. Daffodil points out that no negligence cause of action is sustainable against a party that did not owe the plaintiff a duty of care. Next, Daffodil asserts that since it does not own the subject premises, it thus did not owe plaintiff the duty of care associated with premises liability. Daffodil notes that it is a contractor hired by the owner to perform construction or renovation work on the premises, and that plaintiff was a third-party pedestrian or licensee with respect to that relationship.

---

[4] Plaintiff submits his affidavit, which avers facts substantially in accordance with his attorney's arguments.

As a contractor, Daffodil continues, it only owes licensees (such as plaintiff herein) a duty of care in certain well-defined circumstances. Daffodil asserts that there are only three such instances: when a contractor launches a force of harm, when the third-party relied upon the contractor's performance, and when the contractor alone maintains the safety of the premises. Daffodil claims that none of these are applicable here.

First, Daffodil contends that it did not launch a force of harm. Daffodil claims that it neither installed nor reinstalled the subject gate. Next, Daffodil claims that the record contains no indication that plaintiff relied on (or even was aware of) the quality of the work performed by Daffodil. Third, Daffodil notes that the record suggests that the agents of the property owners would frequently inspect the subject site during the project; Daffodil reasons that, therefore, the owners never relinquished the duty to maintain a safe premises. For these reasons, Daffodil concludes that, as a construction contractor, it never owed plaintiff a duty of care, and, consequently, is not liable for plaintiff's injuries.

Alternatively, Daffodil continues, plaintiff's claims against it fail even when applied to common premises liability doctrines. Daffodil notes that, according to general principles of premises liability, a defendant is subject to liability only when it either created a hazardous premises condition or had notice thereof. Daffodil points out that it only performed masonry work on the facade of the subject building; Daffodil maintains that it never removed the subject gate. Daffodil reasons that its agents thus had no knowledge of any dangerous condition concerning the gate. Moreover, continues Daffodil, the record indicates that there was no discernable hazard regarding the gate; Daffodil highlights that plaintiff's own

testimony establishes that he did not see any danger when he entered the building a few minutes before the accident. For these reasons, Daffodil concludes that the record establishes that Daffodil neither created nor had notice of any hazardous condition with respect to the subject gate. Accordingly, argues Daffodil, this court should grant its motion for summary judgment dismissing all claims against it.

Daffodil's Arguments in Opposition to Plaintiff's Motion

In opposition to plaintiff's motion for summary judgment, Daffodil first asserts that plaintiff has not established a prima facie case of negligence against it. Specifically, Daffodil points out that before a defendant may be held liable for negligence, the plaintiff must first establish that the defendant breached a duty of care owed to the plaintiff. Here, Daffodil continues, plaintiff cannot establish either the duty owed or the breach thereof.

Daffodil claims that it is undisputed that it had no ownership interest in the subject premises. Therefore, reasons Daffodil, it did not owe plaintiff the duty of care typically owed by landowners to those on the premises. Additionally, continues Daffodil, plaintiff cannot show that Daffodil either removed or re-installed the subject gate. Daffodil notes that plaintiff alleges that the gate was dangerously unsecured; however, adds Daffodil, the record lacks any indication that the gate was unsecured because of Daffodil's work. Moreover, states Daffodil, the subject work would not have necessitated removal of the gate. In short, Daffodil argues that plaintiff's evidence does not establish that Daffodil either removed or re-installed the gate (or, did so in a negligent fashion).

Daffodil reiterates that the record does not show that plaintiff relied on the quality of Daffodil's work pursuant to its contract with the owners. Finally, Daffodil points out that the record shows that the owners' agents regularly inspected the premises, thus negating any claim that Daffodil alone undertook the duty to keep the premises safe. Daffodil concludes that the record does not establish that Daffodil either owed a duty to plaintiff or breached such a duty, and, accordingly, this court should deny plaintiff's motion for summary judgment.

Owners' Arguments in Opposition to Daffodil's Motion

In opposition to Daffodil's motion, the owners assert that issues of material fact as to Daffodil's liability preclude summary judgment. Specifically, the owners state that the record does not establish that Daffodil did not remove or re-install the subject gate. The owners acknowledge that Daffodil's deposition witness testified as such; however, the owners continue, that witness was not frequently present at the subject premises and had little first-hand knowledge of what work was performed by Daffodil employees. In contrast, the owners add, their deposition witness (their property manager) testified that, the subject gate was removed by Daffodil's employees. Further, the owners continue, their property manager - unlike Daffodil's deposition witness - was in fact on the premises overseeing the work on most days and thus would have actual knowledge of which workers performed which work. The owners also submit two affidavits of persons (who were either also present on the site or knew the job requirements) whose statements are consistent with the testimony of the owners' property manager. For these reasons, the owners conclude that Daffodil has failed

to demonstrate the absence of any issue of fact as to their potential liability. Accordingly, the owners argue that this court should deny Daffodil's motion for summary judgment.

Owners' Arguments in Opposition to Plaintiff's Motion

In opposition to plaintiff's motion, the owners first cite the general principles of premises liability. Specifically, the owners claim, in order for plaintiff to succeed, plaintiff must show both that the subject gate was a hazardous condition and that the owners either created the dangerous condition or had notice (actual or constructive) of it. Here, the owners argue, plaintiff has not shown that they caused the gate to become dangerous nor that they knew that it was.

First, the owners assert that the record contains no proof that they created the subject condition. The owners point out that their witnesses and affiants all aver that only Daffodil performed work on the subject gate. Specifically, the owners continue, Daffodil employees removed the gate during the facade work. Although Daffodil disputes this, the owners state that, nevertheless, the record does not link them to any work performed on the gate.

The owners then turn to the issue of notice. Specifically, the owners argue that if plaintiff cannot show that the owners' employees performed work on the subject gate, premises liability is possible only if plaintiff demonstrates that the owners had notice of a defect in the gate. The record, the owners continue, has no indication of notice. First, the owners state that the record contains no suggestion that their employees received actual complaints. Next, the owners point out that for constructive notice to exist, a defect must be apparent for an amount of time sufficient for their agents to correct it. Here, contend the

owners, the record belies any suggestion of constructive notice. Indeed, the owners continue, the record suggests that any damage or change to the gate's condition was done the day before the accident, implying that the building residents used the gate during the morning of plaintiff's accident and the previous evening without incident. The owners further point out plaintiff's deposition testimony, in which he states that he used the gate to enter the premises but noticed nothing wrong with it. Lastly, the owners note that plaintiff also testified that he noticed nothing wrong with the gate as he opened it to exit the premises; it was only after he exited that the subject gate fell and struck him.

Based on this record, the owners conclude that there is no evidence that their employees created the hazardous condition and maintain that there is no evidence that their employees received actual notice of it. Lastly, the owners point out that the record contains no suggestion that any defect in the subject gate was apparent for any appreciable amount of time. For these reasons, the owners argue that this court should deny plaintiff's motion for summary judgment.

Plaintiff's Arguments Against Daffodil's Motion

Plaintiff also opposes Daffodil's motion. Plaintiff reiterates his argument that he is entitled to partial summary judgment on the issue of liability against all defendants; plaintiff claims that only the issue of apportionment of liability by the trier of fact remains. Nevertheless, plaintiff addresses Daffodil's contentions.

Specifically, plaintiff asserts that, contrary to Daffodil's arguments, Daffodil is properly held liable either as an agent of the landowner or as an entity that created the subject

premises hazard. Plaintiff additionally claims that Daffodil at least had notice of the dangerously unsecured gate. Moreover, plaintiff adds that the subject gate violated several health and safety codes relating to entrances of buildings under construction or renovation.[5]

Also, plaintiff notes defendants' apparent failure to identify any worker who actually either removed or reinstalled the subject gate. Plaintiff suggests defendants have cynically manipulated the discovery process, given that there is no dispute that the subject gate was unsecured. Instead, plaintiff continues, each defendant accuses the other of being responsible for the maintenance and safety of the gate. Plaintiff maintains that defendants' passing of blame is irrelevant, since he argues that each defendant is jointly and severally liable for the condition of the gate. Furthermore, plaintiff suggests that because of the subject renovation project, no entity other than the defendants would reasonably have removed and/or reinstalled the subject gate; the logical conclusion, according to plaintiff, is that the employees of at least one of the defendants created the subject hazard.[6] Thus, reasons plaintiff, Daffodil, despite its protestations, is nevertheless subject to liability in this action.

---

[5] Plaintiff submits the affidavit of an engineer who concludes substantially the same.

[6] The court notes that the public internet website of the New York City Department of Buildings indicates that the owner's architect filed plans in December 2012 with regard to exterior work, and that on June 18, 2013, three days after plaintiff's accident, a caller complained that there were workers on the scaffold on the rear of the building who were working without safety harnesses. This creates an inference that Daffodil's work was still in progress on the Saturday morning that plaintiff had his accident.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a motion for summary judgment are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Furthermore, "[i]n all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotations omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept 1989]; *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are

issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

The court finds that Daffodil's motion must be denied. The elements of a negligence cause of action are "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Abbott v Johnson*, 152 AD3d 730, 732 [2d Dept 2017], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). A duty of reasonable care owed to a plaintiff is a requisite part of the cause of action (*see e.g. Fox v Marshall*, 88 AD3d 131 [2d Dept 2011]). Absent a duty of care, there is no breach, and therefore, no liability (*id.* at 135; *see also Gordon v Muchnick*, 180 AD2d 715 [2d Dept 1992]).

Daffodil correctly points out that since it has no interest in the subject premises, it is thus not subject to premises liability under the same standard as that for owners (*cf. Davis v Rochdale Vil., Inc.*, 63 AD3d 870, 870-871 [2009] [liability exists when the owner "either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time"], citing *Gordon v American Mus. of Nat. Hist.*, 67 NY2d 836 [1986] and *Moody v Woolworth Co.*, 288 AD2d 446 [2d Dept 2001]). Moreover, and "[a]s a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract" (*Dugan v. Crown Broadway*, LLC, 33 AD3d 656 [2d Dept 2006]). However, as a contractor performing masonry work on the premises, it is subject to

liability if it "fail[ed] to exercise reasonable care in the performance of [its] duties [and] launche[d] a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002]).

Here, an issue of fact exists as to whether Daffodil failed to adequately remove and/or reinstall the subject gate. To be clear, Daffodil's submissions indicate that it neither removed nor reinstalled the gate. However, the record contains sworn statements stating that Daffodil could not have performed the facade work without removing the gate, and that only Daffodil's employees would have removed and reinstalled the gate. Naturally, if the latter statements are believed, Daffodil would be liable for "launch[ing] a force or instrument of harm," namely, the heavy gate that fell on plaintiff (*id.*). Since this court cannot determine issues of credibility in the course of determining summary judgment motions (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004] ["(c)redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]), Daffodil's motion must be denied.[7]

Turning to plaintiff's motion, this court cannot award plaintiff summary judgment on the issue of liability against defendants. Plaintiff contends that defendants are jointly and severally liable; this argument lacks merit, however, because joint and several liability occurs when "two or more tort-feasors act concurrently or in concert to produce a single injury"

[7] Daffodil did not raise substantial arguments concerning any cross claims or the issue of indemnification in its submissions.

(*Ravo v Rogatnick*, 70 NY2d 305, 309-310 [1987], citing *Suria v Shiffman*, 67 NY2d 87 [1986]; *Bichler v Lilly & Co.*, 55 NY2d 571 [1982]; *Derby v Prewitt*, 12 NY2d 100, 105 [1962]; *Sweet v Perkins*, 196 NY 482, 485 [1909]). Contrary to plaintiff's arguments, and based upon the instant record, this court cannot find, as a matter of law, that the owners and Daffodil acted "concurrently or in concert" with respect to the hazardous unsecured gate (*Ravo*, 70 NY2d at 309). To the contrary, the record contains sworn statements asserting that Daffodil did not cause the gate to become hazardous, which contradict other sworn statements which assert that *only* Daffodil could have caused the gate to pose a danger to passersby. The trier of fact may find that all defendants acted in concert; then again, it may not. For this reason, plaintiff is not entitled to partial summary judgment on the issue of liability against all defendants.

However, plaintiff's motion is granted to the extent that this court finds that there is no issue of plaintiff's comparative negligence to be submitted to the trier of fact. The record unequivocally establishes that plaintiff played no part in causing his own injuries. In other words, plaintiff has demonstrated that the breach of a duty of care owed to him proximately caused his injuries; the issue to be determined is which defendant[s], if any, committed the breach and are thus liable to plaintiff for their negligence. Accordingly, it is

ORDERED that the motion of defendant Daffodil General Contracting, Inc. for summary judgment dismissing the complaint of plaintiff Tsering Wangyal is denied; and it is further

ORDERED that the motion of plaintiff Tsering Wangyal for partial summary judgment against defendants Robrose Place, LLC, Sky Management Corp. and Daffodil General Contracting, Inc. on the issue of liability is granted solely to the extent of resolving the issue of comparative negligence as a matter of law in favor of plaintiff, and is otherwise denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court