

McGovern v CBRE, Inc.
2019 NY Slip Op 31820(U)
June 24, 2019
Supreme Court, New York County
Docket Number: 155834/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 155834/2017

MICHAEL MCGOVERN,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

CBRE, INC, SUMMIT GLORY, LLC, IRONSHORE HOLDINGS (US) INC., STRUCTURE TONE, LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 31-44, 47, 50-69 were read on this motion for summary judgment.

By notice of motion, third-party defendant Liberty Contracting Corp. moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint and cross claims against it. Certain parties oppose.

This action arises out of a construction-related accident that occurred on September 12, 2016 on the fifth floor at 28 Liberty Street in Manhattan. Defendants CBRE, Inc. and Summit Glory, LLC, owned the building at issue. The construction was on the third through fifth floors leased by Ironshore Holdings (US) Inc. The general contractor was Structure Tone, LLC, which hired Liberty as the demolition contractor. (NYSCEF 69). In his complaint, plaintiff alleges that while working for third-party defendant Sweeney and Harkin, he tripped and fell on the fifth floor of the building on metal pins or nails protruding from the floor. (*Id.*).

Liberty submits an affidavit from one of its foremen, who states that Liberty performed demolition work on the fifth floor of the building on several days in July 2016 and on August 6, 2016, and then again on September 15, 2016, three days after plaintiff's accident. The foreman

adds that at the end of each work shift and at every job site, Liberty personnel broom-sweep the floors and remove any protruding objects including nails or pins by using metal scrapers and/or crowbars. They also cart out any material or items from the demolition, including debris. Any condition deemed potentially unsafe is cordoned off by yellow warning tape and/or empty debris containers. The foreman observes that workers for other sub-contractors had access to the fifth floor between August 6 and September 12, 2016. (NYCEF 43).

Liberty relies on the foreman's affidavit to argue that having performed work on the fifth floor of the building more than one month before plaintiff's accident, it neither created the dangerous condition, nor had actual or constructive notice of it. Thus, absent evidence of any negligence on its part, it cannot be held liable for indemnity or contribution. It also submits evidence that it procured the required insurance for the project. (NYSCEF 32).

The opposing parties observe that the motion is premature, having been interposed before the completion of discovery, with no depositions having yet been held. They also contend that the foreman's affidavit is conclusory and self-serving and thus insufficient to meet Liberty's *prima facie* burden. (NYSCEF 50, 55).

As Liberty's proof addresses only its general worksite responsibilities, and as the foreman has no apparent personal knowledge as to whether those responsibilities were fulfilled before plaintiff's accident, Liberty does not demonstrate, *prima facie*, that it had neither actual nor constructive notice of the unsafe condition at issue. (*See e.g., Taub v JMDH Real Estate of Garden City Warehouse, LLC*, 150 AD3d 1301 [2d Dept 2017] [while defendants' employee testified generally as to inspection of pallets, employee lacked personal knowledge as to when pallet last inspected and whether there were prior complaints about pallets, and thus failed to eliminate triable issues as to whether defendants had constructive notice of defect]; *Romero v*

Morrisania Towers Housing Co. Ltd. Partnership, 91 AD3d 507 [1st Dept 2012] [defendants failed to make *prima facie* showing of lack of notice absent evidence based on personal knowledge of their fulfillment of their cleaning and inspection duties before accident]).

Moreover, absent evidence as to how long the nails or pins had been protruding from the floor, that Liberty may not have performed work on the fifth floor for over a month before the accident does not prove that it did not create the condition. Liberty may not rely on the opposing parties' failure to submit evidence to meet its *prima facie* burden. (*See Nill v Schneider*, AD3d , 2019 NY Slip Op 2363517 [2d Dept 2019] [on summary judgment, defendant bears burden of affirmatively proving merits of defense, which cannot be based on asserted gaps in plaintiff's proof]; *Belgium v Mateo Prods., Inc.*, 138 AD3d 312 [1st Dept 2016] [party does not establish *prima facie* showing of entitlement to summary judgment by pointing to gaps in opponent's proof]).

As Liberty thereby fails to establish that it was not negligent and/or that its acts or omissions did not cause or contribute to plaintiff's accident, there is no basis on which to dismiss the indemnity or contribution claims against it. (*See e.g., Sparks v Focus 1 LLC*, 162 AD3d 1565 [4th Dept 2018] [summary judgment motion premature as information necessary to oppose motion, including whether defendant created and contributed to dangerous condition, was within defendant's exclusive knowledge]).

However, Liberty sufficiently establishes that it procured the required insurance, and the opposing parties do not address it.

Accordingly, it is hereby

ORDERED, that third-party defendant Liberty Contracting Corp.'s motion for summary judgment is granted solely to the extent of dismissing any claims against it for failure to procure

insurance, and otherwise denied.

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6/24/2019

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: