SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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WALTER BILECKI,

Plaintiff,

-against-

TURNER CONSTRUCTION COMPANY, FOREST ELECTRIC CORP. and ARI PRODUCTS, INC.

Defendants.

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TURNER CONSTRUCTION COMPANY,

Third-party plaintiff,

-against-

FOREST ELECTRIC CORP.,

Third-party defendant.

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Index No. 153507/16
Motion Seq. No. 005

DECISION AND ORDER

In an action involving a worker's fall at the workplace, defendant Ari Products, Inc. (Ari) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it (motion seq. No. 004). Defendant/third-party defendant Forest Electric moves for summary judgment dismissing plaintiff's negligence claim against (motion seq. No. 005). Plaintiff opposes both motions, which are consolidated for disposition.

BACKGROUND

On the day of his accident, October 21, 2105, Plaintiff Walter Bilecki was working as an operating engineer for nonparty Cushman & Wakefield at 388 Greenwich Street. Nonparty Citigroup Technology, Inc., the owner of the building, hired defendant/third-party plaintiff Turner Construction Company (Turner) as construction manager on a construction and renovation project that was ongoing at the time of Plaintiff's accident. Turner subcontracted with

Forest to do electrical work, and with Ari to install raised access flooring.[1] Plaintiff alleges that while on the 12th Floor, he stepped through a hole on a raised data floor. Plaintiff only alleges negligence claims against Ari and Forest.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). Generally, a contractor does not a duty to third parties (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 [2002]). The Court in *Espinal* articulated three exceptions to the rule:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

[1] Turner discontinued its claims against Forest by stipulation (NYSCEF doc No. 73).

Here, Ari and Forest argue, among other things, that, as subcontractors with no contractual relationship to Plaintiff, they had no duty to Plaintiff. Plaintiff argues that issues of fact remain as to both parties' negligence, as Ari removed the floor covering and Forest did work between the raised floor and the concrete floor below. Neither activity raises a question of fact as to whether Ari or Forest launched an instrument of harm such that a duty to Plaintiff was created.

Turner's project superintendent, Francis McGowan, stated that Turner would coordinate the removal of any sections of floor and that Turner was in charge of safety on the job (NYSCEF doc 108 at 85-86). As the authority for removing the flooring and providing any necessary safeguards rested with Turner, then there is no question of fact as to whether Ari or Forest launched an instrument of harm such a duty to Plaintiff from either Ari or Forest was created. As neither Ari nor Forest had a duty to Plaintiff, neither party can liable to Plaintiff for negligence.

Accordingly, Ari and Forest's applications for dismissal of Plaintiff's negligence claims as against them must be dismissed. As no party opposes Ari's application for dismissal of all cross claims as against it, that branch of Ari's motion is also granted.

CONCLUSION

Accordingly, it is

ORDERED that Ari Products, Inc.'s (Ari) motion for summary judgment dismissing the complaint and all cross claims as against it (motion seq. No. 004); and it is further

ORDERED that Defendant/third-party defendant Forest Electric motion for summary judgment dismissing Plaintiff's complaint as against it (motion seq. No. 005) is granted; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly and the remaining claims are severed and continue; and it is further

ORDERED that counsel for Ari is to serve a copy of this decision, along with Notice of entry, on all parties within 10 days of entry.

Dated: August 22, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.