SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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DAVID BONNETT,

Plaintiff,

- v -

ROSE ASSOCIATES, INC., WEST EDEN LLC, AGGRESSIVE SHADE GLASS & AWNING CO. INC.,

Defendants.

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INDEX NO. 156597/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41-81, 83-85 were read on this motion for summary judgment.

By notice of motion, defendant Aggressive Shade Glass & Awning Co. Inc. moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff and co-defendants Rose Associates Inc. and West Eden LLC (collectively, owner) oppose.

I. BACKGROUND

Plaintiff alleges in his complaint that on April 6, 2017, while in his apartment at 21 West Street in Manhattan, he was injured when one of the windows fell down on his hand. The building is owned by West Eden and managed by Rose; Aggressive is the building's window services contractor. (NYSCEF 46, 49, 50).

In its answer, owner asserts cross claims against Aggressive for indemnity and contribution. (NYSCEF 30).

II. UNDISPUTED PERTINENT FACTS

On or about March 11, 2017, plaintiff and his wife attempted to open the window but had difficulty doing so as it was stuck and difficult to lift. They complained to a building maintenance employee about it, and a few weeks later, received an email advising them that the owner had contacted Aggressive to examine and fix the window. (NYSCEF 51, 61).

An Aggressive work order, dated March 13, 2017, reflects that on that date, its employee checked the balances on plaintiff's window and took measurements for replacement balances. (NYSCEF 71). There is no work order reflecting that the balances were ordered and/or replaced by Aggressive.

At a deposition held on October 24, 2018, the Aggressive employee who had inspected plaintiff's window testified that although he could not remember what work, if any, he did during the inspection or the condition of the window during and after his inspection, he believed that he had followed his usual procedures. In general, when he checks a window's balances, which are spring-loaded, he would inspect them to see if they needed repair or replacement, and if they did, he would measure them and note it on his work ticket. (NYSCEF 53).

On the day of the accident, when plaintiff unlocked the window and tried to open it, he heard a very loud band and his fingers started to hurt. The top portion of the window had slid down and landed on his fingers. (NYSCEF 51, 61). Between the date of the Aggressive's employee inspection and the date of the accident, plaintiff did not touch the window. (*Id.*).

Immediately after the accident, an employee of the owner examined the window and observed that the springs on the top of it were damaged and that two of them were broken. (NYSCEF 52).

III. CONTENTIONS

A. Aggressive (NYSCEF 84)

Aggressive denies that plaintiff relied detrimentally on its performance, that it displaced the owner's duty to maintain the premises safely, or that it launched a force or instrument of harm by failing to exercise reasonable care in the performance of its duties. It argues that there is no admissible proof of its liability.

B. Plaintiff (NYSCEF 79)

Plaintiff contends that Aggressive failed to meet its *prima facie* burden in moving for summary dismissal as its witness could not recall what he did to plaintiff's window on the date of his inspection, and his description of his general procedure is insufficient absent any knowledge as to whether he had followed the procedure that day. Moreover, he maintains, Aggressive improperly relies on the alleged gaps in plaintiff's proof.

C. Owner (NYSCEF 80)

The owner reiterates plaintiff's arguments and observes that there is no evidence that anyone touched the window between the date of Aggressive's inspection and the date of the accident.

D. Aggressive's reply (NYSCEF 81)

Aggressive again denies that there is admissible proof that it launched an instrument of harm and argues that its witness testified that he followed his usual procedure when he inspected plaintiff's window. It also denies that it may be held liable to the owner in either contractual or common law indemnity, as it breached no duty owed to it.

IV. ANALYSIS

In *Espinal v Melville Snow Contractors, Inc.*, the Court determined the extent of an

independent contractor's liability to a third or non-contracting party, and held that a contractor may be held liable if, as pertinent here, it launches a force or instrument of harm. In other words, a contractor that "undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." (98 NY2d 136, 141-142 [2002]).

Here, although the notes of Aggressive's employee reflect that the window's balances needed replacements, the employee nowhere describes therein what he did to the window in inspecting it. Testimony about his general practices during an inspection does not prove what he did that day (*see Tanton v Lefrak SBN Ltd. Partnership*, 110 AD3d 441 [1st Dept 2013] [as employee testified to his general cleaning procedures, but not as to what he actually did on accident date, defendant did not establish that it did not create or exacerbate dangerous condition]). Nor does Aggressive dispute that no one had touched the window after the inspection until plaintiff's accident. Consequently, Aggressive offers no evidence that it did not negligently create or exacerbate the dangerous condition which caused plaintiff's accident and thus fails to prove, by someone with personal knowledge, that it did not launch a force or instrument of harm. (*See Ray v Apple Square LLC*, 174 AD3d 416 [1st Dept 2019] [defendant did not show it did not create dangerous condition as its witnesses had no personal knowledge as to what work was performed on premises before accident and its condition after work completed]; *Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519 [1st Dept 2013] [contractor's witnesses lacked personal knowledge of grate cleaning performed on accident date or condition of grates thereafter, and thus did not show that it did not launch force or instrument of harm during cleaning]).

Moreover, Aggressive may not rely on alleged gaps in its opponent's proof to satisfy its *prima facie* burden. (*Kolakowski v 10839 Assocs.*, AD3d , 2020 WL 357546 [1st Dept 2020]

[defendant did not meet *prima facie* burden on summary judgment by pointing to gaps in plaintiff's proof]).

As Aggressive fails to establish its *prima facie* entitlement to dismissal, there is no need to consider the sufficiency of opposing papers. For the same reasons, Aggressive does not demonstrate that it is entitled to dismissal of the owner's cross claims against it.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant Aggressive Shade Glass & Awning Co. Inc. for summary dismissal is denied in its entirety.

7/31/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE