SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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PAUL HEARD,

Plaintiff,

- v -

MCGOVERN & COMPANY LLC, SL GREEN REALTY CORP., EQUINOX EAST 53RD STREET, INC., EQUINOX HOLDINGS LLC,10E53 OWNER LLC, TRISTATE PLUMBING SERVICES CORP., CT CONSTRUCTION CONSULTANTS LLC, ECLIPSE DEVELOPMENT, INC.,

Defendant.

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INDEX NO. 160113/2016

MOTION DATE March 5, 2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 84, 85

were read on this motion to/for SUMMARY JUDGMENT.

In this action alleging negligence and violations of the Labor Law, plaintiff claims he was injured on June 10, 2015 in the course of his employment as an electrician when he fell from an elevated work surface. This action was consolidated with a related action commenced by plaintiff under index number 155429/2018 by order of this court dated August 9, 2018. Prior to the consolidation, defendant CT Construction Consultants LLC, ("CTC") had moved for summary judgment under motion sequence number 001, seeking dismissal of the complaint and all cross claims and counterclaims asserted against CTC on the basis that it did not assume any duties for the premises, and did not perform any services on the site of plaintiff's alleged incident. Defendants SL Green Realty Corp. and 10E53 Owner LLC, (collectively referred to as "SL Green defendants") oppose the motion.

BACKGROUND/CONTENTIONS

The following facts are taken from the complaint (NYSCEF Doc. No. 70), the parties' affidavits and documentary evidence submitted with this motion. On June 10, 2015, plaintiff was employed as an electrician by Forest Electric and alleges that he was injured when he fell from an elevated work surface due to a dangerous and defective lift, ladder and/or scaffold as well as debris at a construction project at 10 East 53rd Street, New York, New York. (NYSCEF Doc. No. 70, ¶¶ 19-22). Plaintiff alleges that CTC was the general contractor, construction manager, and the agent and/or managing agent for the owner of the premises where the construction work was being performed. (NYSCEF Doc. No. 70, ¶¶ 10-12).

CTC has appeared in this action and answered the complaint, denying the essential allegations and asserting several affirmative defenses. (NYSCEF Doc. No. 71). Prior to the commencement of discovery, CTC sought an order pursuant to CPLR § 3212, seeking summary judgment on the basis that it did not enter into a contract to perform construction services at the site where plaintiff alleges he was injured. In support of summary dismissal, CTC submits the affidavit of its managing partner, Beau Keen, annexing documents that it contends demonstrates CTC did not execute a contract to perform construction management services, nor did it assume any duties with respect to the construction project which forms the basis of plaintiff's complaint. (NYSCEF Doc. No. 76, Exs. A, B, C).

SL Green defendants oppose CTC's motion for summary judgment on procedural grounds and argue that the motion is premature and should be denied pursuant to CPLR § 3212 (f), as discovery remains outstanding and contending that CTC's submissions raise issues of fact which preclude summary judgment. For the following reasons, CTC's motion is granted.

STANDARD OF REVIEW/ANALYSIS

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], *quoting Zuckerman v City of New York*, 49 NYS2d 557, 562 [1980]).

Here, the SL Green defendants oppose CTC's motion seeking summary judgment on purely procedural grounds. Specifically, SL Green defendants contend that the court should not consider the affidavit of CTC's managing partner, Beau Keen, or any of the documents submitted with the Keen affidavit in support of summary judgment, because the affidavit does not contain a certificate of conformity, as required by CPLR § 2309(c). Additionally, SL Green defendants contend that because CTC's notice of motion fails to provide notice as required by CPLR § 2214(b), and fails to annex all pleadings, as required by CPLR § 3212(b), CTC's summary judgment motion should be denied. Finally, SL Green defendants claim that CTC's motion for summary judgment is premature pursuant to CPLR § 3212(f), because CTC has not provided any discovery and its motion raises issues of fact.

Initially, the court notes that the procedural defects identified by SL Green defendants do not provide a basis to deny CTC summary judgment in this matter as CPLR 2001 provides that a

court, at any stage of an action, "may permit a mistake, omission, defect or irregularity, . . . or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded". Here, the procedural irregularities identified by SL Green defendants, concerning the lack of notice pursuant to CPLR § 2214(b), and the failure to annex all pleadings, as required by CPLR § 3212(b), are disregarded by the court as such procedural omissions do not impact or prejudice the rights of SL Green defendants who have had ample opportunity to oppose the motion in all respects and have suffered no prejudice resulting from CTC's filing defects.

Similarly, the absence of a certificate of conformity accompanying the Keen affidavit, is not, in and of itself, a fatal defect and is disregarded, *nunc pro tunc*, pursuant to CPLR 2001. (see *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; *Matos v. Salem Truck Leasing*, 105 AD3d 916, 963 NYS2d 366 [2d Dept 2013]; *Rivers v. Birnbum*, 102 Ad3d 26, 953 NYS2d 232 [2d Dept 2012]). Turning to the substantive arguments raised by CTC, the court finds that it has met its burden of proof and is entitled to summary judgment in this matter as it has demonstrated that it was not involved in the work performed at the site of plaintiff's accident, nor did it have the authority to supervise or control the performance of the work.

"[T]he elements of a negligence claim [] are the existence of a duty, a breach of that duty, and that such breach was a proximate cause of the events which produced the injury" (*The Bd. of Directors of the Lefferts Gardens II Condominium v Lefferts Blvd. Corp.*, 2013 N.Y. Slip Op. 30649[U] [Sup Ct, Queens County 2013], *quoting Lapidus v State*, 57 AD3d 83, 92 [2d Dept 2008]).

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for

an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work.

For claims that arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014); *Foley v. Consolidated Edison Co. of NY*, 84 AD3d 476, 923 NYS2d 57 (1st Dept 2011); *Willis* v. *Plaza Constr. Corp.*, 151 AD3d 568, 54 NYS3d 281 (1st Dept 2017) (Defendants not liable under Labor Law § 200 and common law negligence to plaintiff injured by a bursting hose pouring cement where they did not supervise or control the manner of plaintiff's work).

Moreover, it is well settled that "an accident alone does not establish a Labor Law § 240 (1) violation or causation." (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289, 803 NE2d 757, 771 NYS2d 484 [2003]). Rather, evidence must be presented to show that a safety mechanism failed in order to impose liability pursuant to Section 240(1). *Id.*

In support of its contention that it neither supervised nor controlled plaintiff's work or the activity which gave rise to the injuries alleged, CTC submits the Keen affidavit and the contracts and documents reviewed by Mr. Keen, which plainly provide that CTC did not sign a contract or commence any work as of June 10, 2015, the date of plaintiff's accident. (NYSCEF Doc. No. 76). Indeed, CTC has proven that it did not obtain New York City Building permits for the site until June 17, 2015, one week after plaintiff's alleged injury and has established that it never signed a contract to perform any work in connection with the project, demonstrating that the

initial letter of intent was terminated prior to the execution of a construction management agreement. (NYSCEF Doc. No. 76, Exs. A, B, C). The Keen affidavit and the documents submitted by CTC in support of summary judgment demonstrate convincingly that CTC did not have a duty to supervise or control plaintiff's workplace nor did it have any involvement in the construction project wherein plaintiff claims he was injured. (See, *Foley v. Consolidated Edison Co. of NY,* 84 AD3d 476, 923 NYS2d 57 [1st Dept 2011]; *Willis* v. *Plaza Constr. Corp.,* 151 AD3d 568, 54 NYS3d 281 [1st Dept 2017] [Defendants not liable under Labor Law § 200 and common law negligence to plaintiff injured by a bursting hose pouring cement where they did not supervise or control the manner of plaintiff's work]).

Finally, the court rejects SL Green's contention that CTC's motion should be denied as premature, pursuant to CPLR § 3212 (f), because it has not produced a witness for deposition or any other discovery in this action. It is well settled that a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment (see e.g. *Cioe v Petrocelli Elec. Co., Inc.*, 33 AD3d 377, 823 NYS2d 359 [2006]; *Bank of Am. v Tatham*, 305 AD2d 183, 757 NYS2d 855 [2003]; see also *Bachrach v Farbenfabriken Bayer AG*, 36 NY2d 696, 697, 325 NE2d 872, 366 NYS2d 412 [1975] ["Hope alone will not raise a triable issue"]).

CTC has amply demonstrated that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law. SL Green defendants have simply failed to demonstrate an evidentiary basis to deny CTC's motion for summary judgment.

Accordingly, it is hereby

ORDERED that defendant CT Construction Consultants LLC's motion for summary judgment is granted; and it is further

ORDERED that the Complaint and any cross claims and counterclaims asserted are dismissed in the entirety as against defendant CT Construction Consultants LLC, with costs and disbursements as taxed by the clerk; and it is further

ORDERED that the action is severed and shall continue against the remaining defendants; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

8/17/2020	
DATE	**W. FRANC PERRY, J.S.C.**

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