Greaves v City of New York
2020 NY Slip Op 32772(U)
August 25, 2020
Supreme Court, New York County
Docket Number: 452140/2015
Judge: W. Franc Perry
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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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INDEX NO. 452140/2015

MOTION DATE 09/12/2019

MOTION SEQ. NO. 003 004

LLOYD GREAVES,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK PUBLIC LIBRARY ASTOR LENOX AND TILDEN FOUNDATIONS, LESLEY TOWNSEND, LLC D/B/A MANHATTAN COCKTAIL CLASSIC, MICHAEL ARENELLA AND HIS DREAMLAND ORCHESTRA, LLC, ARENELLA PRODUCTIONS, LLC. D/B/A DREAMLAND ORCHESTRA, MICHAEL ARENELLA, BAMBOO LONDON, INC., FROST LIGHTING INC.,

Defendant.

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DECISION + ORDER ON MOTION

THE NEW YORK PUBLIC LIBRARY ASTOR LENOX AND TILDEN FOUNDATIONS

Plaintiff,

-against-

LESLEY TOWNSEND, LLC D/B/A MANHATTAN COCKTAIL CLASSIC

Defendant.

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Third-Party
Index No. 595524/2015

THE NEW YORK PUBLIC LIBRARY ASTOR LENOX AND TILDEN FOUNDATIONS

Plaintiff,

-against-

MICHAEL ARENELLA AND HIS DREAMLAND ORCHESTRA, LLC, MICHAEL ARENELLA

Defendant.

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Second Third-Party
Index No. 595300/2016

LESLEY TOWNSEND, LLC D/B/A MANHATTAN COCKTAIL CLASSIC, LESLEY TOWNSEND, LLC D/B/A MANHATTAN COCKTAIL CLASSIC

Third Third-Party
Index No. 595840/2017

Plaintiff,

-against-

BAMBOO LONDON, INC., ARENELLA PRODUCTIONS, LLC

Defendant.
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LESLEY TOWNSEND, LLC D/B/A MANHATTAN COCKTAIL CLASSIC, LESLEY TOWNSEND, LLC D/B/A MANHATTAN COCKTAIL CLASSIC

Fourth Third-Party
Index No. 595870/2017

Plaintiff,

-against-

FROST LIGHTING INC.

Defendant.
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 160, 176, 177, 178, 179, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 201, 202, 203, 204, 205

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221

were read on this motion to/for PRECLUDE.

In this personal injury action, defendant, The New York Public Library Astor Lenox and Tilden Foundations (NYPL), moves, pursuant to CPLR 3212, for an order: (a) granting summary judgment in its favor and dismissing the complaint and all cross claims; and (b) granting summary judgment on its third-party claim for contractual indemnity against codefendant Lesley Townsend, LLC d/b/a Manhattan Cocktail Classic (Townsend) (motion sequence no. 003).

Plaintiff, Lloyd Greaves, cross-moves, pursuant to CPLR 3212, for an order granting summary judgment to plaintiff and against defendant NYPL (003). Third-third party defendant, Bamboo London, Inc. (Bamboo London) opposes both the motion and cross motion (003).

In motion sequence number 004, plaintiff moves for an order compelling Bamboo London to appear for a deposition or be precluded from testifying at trial in this action. Bamboo London opposes the motion.

Motion sequence numbers 003 and 004 are consolidated herein for disposition.

Background

On May 17, 2013, plaintiff, a self-employed handyman contractor, was injured when using a hydraulic loading dock leveler on the premises of the New York Public Library (NYPL). Plaintiff was hired by a musical performer, defendant Michael Arenella, to transport and set up equipment for all performances by Arenella's group, defendant Dreamland Orchestra (NYSCEF Doc. No. 149, pp. 11, 14, 39, 54-55). Plaintiff claims that he injured his finger while attempting to load orchestra equipment from his cargo van for a third-party event at the NYPL.

On the day of the incident, third-party defendant Townsend rented a portion of NYPL's premises as a space for its annual corporate event, the Manhattan Cocktail Classic Gala (NYSCEF Doc. No. 150; NYSCEF Doc. No. 151, pp. 9). Townsend, through its principal Lesley Townsend Duval (Duval), hired Arenella and the Dreamland Orchestra to provide music for the event (NYSCEF Doc. No. 151, pp. 41-42, 70).

There is a garage with a loading dock for trucks on NYPL's premises (NYSCEF Doc. No. 149, pp. 15, 141-142; NYSCEF Doc. No. 153, pp. 10-11).[1] The loading dock surface is approximately three feet from the ground (NYSCEF Doc. No. 149, pp. 141-142). On the loading dock, there is a hydraulic leveling device (Leveler) that can be lifted to create a ramp for transporting materials from a truck bed to the loading dock (NYSCEF Doc. No. 149, pp. 19-20; NYSCEF Doc. No. 153, pp. 11-12). The Leveler is to be operated only by designated NYPL

[1] Louis Amato (Amato) is the senior operations manager for NYPL.

personnel (NYSCEF Doc. No. 153, pp. 18-20, 33-34, 77, 94-95). Vendors were required to request advance permission to use the Leveler and the NYPL would provide an employee to raise and lower the Leveler for the vendor (*id.*). However, Amato testified that he had "no idea" whether arrangements were made with the NYPL regarding permission to use the lift for the event in question (NYSCEF Doc. No. 153, pp. 19-20). Amato, after reviewing the surveillance video depicting plaintiff's accident, testified that "no [NYPL] employee [was] there" when plaintiff's accident occurred (NYSCEF Doc. No. 153, pp. 70). Arenella testified that NYPL specifically advised him of this policy during a pre-event walk-through of the premises, and that he understood his delivery persons were not permitted to use the Leveler, which he conveyed to plaintiff (NYSCEF Doc. No. 152, pp. 80, 148-150).

Before a user can activate any of the controls that move the Leveler, he or she must first push and turn an orange safety switch to unlock the controls (NYSCEF Doc. No. 153, pp. 89-91). There are prominent safety warnings on the control panel of the Leveler which state "Moving Leveler can cause serious injury or death" and "Stay Clear when leveler is in motion" (NYSCEF Doc. No. 154). A sign was also posted near the Leveler that reads "no authorized personnel (NYSCEF Doc. No. 153, pp. 20, 95-98).

According to plaintiff, he normally rents a U-Haul truck with a built-in offloading ramp to transport the Dreamland Orchestra's equipment; however, on the day in question, he rented a cargo van which had no built-in ramp (NYSCEF Doc. No. 149, pp. 18, 20). Plaintiff admits that the equipment is light enough that he and a helper, nonparty Al Gilkes (Gilkes), were able to load it into the van, which is about two feet off the ground, with no ramp (*id*. at 142). Plaintiff admits that even though the loading dock was one foot higher than the cargo van, he and his helper could have offloaded the equipment by hand without use of a leveler (*id*. at 139, 141-142).

Plaintiff had no previous experience using leveling devices attached to loading docks (*id*. at 23-24, 162-163). He also testified that the "do's and dont's" of the equipment had not been explained to him (*id*. at 163). Plaintiff testified that he had not been near the control panel of the Leveler before, and that he did not observe any warning signs, labels or anything to the like (NYSCEF Doc. No. 149, pp. 162).

Plaintiff and his helper attempted to use the Leveler to unload the van (*id*. at 86, 140-141). Gilkes operated the controls of the Leveler while plaintiff prepared to offload the equipment from inside the van (*id.* at 21, 191). As the Leveler was extending toward plaintiff, he noticed that a flap at the end of the Leveler had not yet extended (*id*. at 21-24, 29-30). As plaintiff reached and pointed with his finger to say that the flap had not extended, the flap did extend and touched down onto the vehicle, cutting the tip of plaintiff's outstretched finger (*id*.).

Christopher Lapke, lead audio assistant with Frost Lighting, testified that he was present when plaintiff's accident occurred (NYSCEF Doc. No. 187, pp. 10-12, 31). Lapke testified that he did not see anyone at the loading dock who appeared in charge of operating the Leveler (*id*. at 54). Lapke testified that the Leveler controls did not appear to be made inaccessible to unauthorized persons; and that he never heard anything regarding use or prohibition of the Leveler (*id*. at 113, 114).

Lesley Townsend Duval (Duval) testified that over 100 vendors participated in the event, which hosted 2,500 people (NYSCEF Doc. No. 151, pp. 34). All supplies for the event, including, but not limited to, bars, tables, glassware serving ware, sound staging, lighting, and decorations were brought into NYPL via the loading dock where plaintiff's accident occurred (*id*. at 57-58). Duval also testified that NYPL knew the event required the use of the lift (*id*. at 84-86).

Plaintiff testified that the Leveler appeared to be moving at a normal speed but that he thinks the Leveler was defective and malfunctioning because it came down on his finger more suddenly than he expected (NYSCEF Doc. No. 149, pp. 21, 29, 118, 155-156). Due to the alleged defective condition of the Leveler, plaintiff commenced this action against the NYPL for negligence sounding in premises liability.

Indemnity Agreement

The indemnity provision pursuant to the contract between NYPL and Townswend, states:

> To the fullest extent permitted by applicable law, you [Townsend] will indemnify and hold harmless the Library, its trustees, officers, employees and agents as well as The City of New York against all third-party claims, liabilities, losses, damages or actions, including costs and reasonable attorneys' fees, arising out of, resulting from or connected with the event or the use of our facility by you, your employees, contractors, suppliers, agents, guests or invitees, excluding any claims, liabilities, losses, damages or actions arising out of the sole and exclusive negligence or willful misconduct of the New York Public Library

(NYSCEF Doc. No. 150, pp., ¶ 7 (a)).

Discussion

Motion Sequence No. 003

It is well established that the 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'" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp.*, 26 NY3d at 49 [internal quotation marks and citation omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Vega v Restani Constr. Corp*., 18 NY3d 499 [2012]; *Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*McCummings v New York City Tr. Auth*., 81 NY2d 923 [1993]; *Rotuba Extruda v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, Bamboo London argues that the motion and cross motion for summary judgment are premature as this court, by the so-ordered stipulation signed by the Honorable Judge Alexander Tisch dated December 12, 2018 specifically provided that "[a]ny summary judgment motion [is] to be filed within 60 days after all discovery is complete as determined by the [c]ourt" ((NYSCEF Doc. No. 221). Since discovery is not yet complete, and no determination as such has been made by the court, Bamboo London argues that the motions are premature and should be denied with leave to renew where appropriate. The court agrees.

Even if the court were to hold otherwise, the court finds that at this stage of the proceedings, questions of fact remain which warrants denial of both the motion and cross motion. NYPL argues that it is entitled to indemnity from Townsend pursuant to NYPL and Townsend's agreement. "A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). Summary judgment may not be granted on a claim of contractual indemnification when the

extent of each potentially liable party's negligence has yet to be determined (*Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]; *Hughey v RHM-88, LLC*, 77 AD3d 520 [1st Dept 2010]).

Here, defendant argues that the language of the parties' agreement provides for Townsend to indemnify NYPL for all claims "arising out of, resulting from or connected with the [Manhattan Cocktail Classic Gala] event or use of [NYPL's facility by [Townsend], [Townsend's] . . . contractors, suppliers . . . guests or invitees" unless the "claims, liabilities, losses, damages or actions aris[es] out of the sole and exclusive negligence or willful misconduct of the New York Public Library" (NYSCEF Doc. No. 150, ¶ 7). The phrase "arising out of" "requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]). The determination regarding whether an incident arose out of something focuses on the general nature of the operation in the course of which the injury was sustained and not on the precise cause of the accident (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]).

Further, a party seeking contractual indemnity may satisfy its burden by showing that it is free from active negligence; the indemnitee does not need to show that the indemnitor was negligent (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]). Plaintiff's claims arise from Townsend's use of the NYPL's facility and is related to the use of the facility by Townsend's contractors, suppliers and invitees, i.e., Arenella and plaintiff. Those claims, therefore, trigger Townsend's indemnity obligations regardless of whether Townsend was itself negligent (*see Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82 [1st Dept 2002]). The question turns to whether NYPL was negligent in connection with plaintiff's accident (*Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 374 [1st Dept 2007] ["defendant[] cannot be indemnified for [its] own negligence"]).

In a premises liability action "liability for a dangerous condition is generally predicated on ownership, control or special use of the property" (*Colon v Corporate Bldg. Groups, Inc*., 116 AD3d 414, 414 [1st Dept 2014]). Here, there is no dispute that NYPL controls and maintains the property. "A plaintiff alleging injury caused by a dangerous condition must show that defendant either created the condition, or failed to remedy it, despite actual or constructive notice thereof" (*Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011] [internal citations omitted]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Smith v Costco Wholesale Corp*., 50 AD3d 499, 500 [1st Dept 2008]). Mere speculation is insufficient to sustain the cause of action (*Acevedo v York Intl. Corp*., 31 AD3d 255, 256 [2006]).

Here, plaintiff argues that the NYPL created a dangerous condition by not providing NYPL personnel at the loading dock when, as NYPL claims, they were the only entity permitted to operate the Leveler. The court finds a question of fact remains as to this issue. Arnella testified that he was told by NYPL that the loading dock leveler was to operate solely by NYPL and that he, in turn, explained that to plaintiff. Plaintiff denies this. Lapke also testified that he never heard anything regarding use or prohibition of the Leveler. Duval testified that NYPL knew that the lift would be needed that night. After reviewing the video surveillance, Amato testified that there was no NYPL employee at the loading dock. It belies logic that NYPL personnel would leave the Leveler unmanned on a night when over 100 vendors many of whom were using the sole loading dock available to unload the vast supplies needed for the event. Therefore, a question of fact remains as to whether NYPL created a dangerous condition by leaving the Leveler unmanned at the time of the injury.

However, to the extent that the Leveler is defective, it is undisputed that NYPL did not create any alleged defect in the Leveler, as it did not design the Leveler, and NYPL maintained the services of an outside contractor for repairs and maintenance of the Leveler (NYSCEF Doc. No. 153, pp. 13; NYSCEF Doc. No. 155, ¶ 5). Specifically, Gennaro, who at all relevant times was employed as senior director, facilities management with NYPL, avers that

> NYPL maintains the services of a contractor called Loading X Dock, Inc. for repairs and maintenance of the [Leveler]. NYPL's records do not reflect any reports from Loading X Dock, Inc. indicating any issue with the leveler or components thereof extending with unusual speed before May 17, 2013. Nor do they reflect that Loading X Dock, Inc. was called to address or repair any issue before May 17, 2013

(*id.*, ¶ 1, 5).

The question turns to whether NYPL had either actual or constructive notice of any alleged defect that would have caused the flap on the Leveler to extend with unusual speed. Here, NYPL asserts that plaintiff's claim that the alleged defect in the Leveler pertains to its functioning and not its outward appearance, is sufficient by itself to show that NYPL did not have actual notice or reason to know about the alleged defect in the Leveler. However, a question of fact remains as to whether there was a warning placed on the control panel identifying the dangers of operating the control panel or advising that it was to be operated by NYPL personnel only.

In order "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [defendant's] employees to discover and remedy it'" (*O'Connor–Miele v Barhite & Holzinger*, 234 AD2d 106, 106 [1st Dept 1996], quoting *Gordon*, 67 NY2d at 837). As the moving party, defendants bear the burden of establishing lack of notice *(Muhammad v New York City Hous. Auth*., 111 AD3d 513 [1st Dept 2013]). While defendant claims that there was a warning placed on the control panel, it is not

clear when the warning was placed on the panel and if it was present at the time plaintiff was injured.

At this stage of the proceedings, looking at the facts in the light most favorable to plaintiff, the court finds questions of fact remain, and therefore the motion for summary judgment is denied. For these same reasons, the plaintiff's cross motion is, likewise, denied.

Motion Sequence No. 004

Plaintiff seeks an order compelling defendant Bamboo London, Inc. to appear for a deposition or be precluded from testifying at trial in this action. CPLR 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . ., the party seeking disclosure may move to compel compliance or a response." On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), *5 [Sup Ct, NY County 2015]). CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed."

On September 5, 2018, the court issued a discovery order, directing attorneys for Bamboo London to advise all parties within 45 days as to whether they will produce a witness for a deposition (NYSCEF Doc. No. 211). By letter dated June 21, 2019, plaintiff's counsel wrote to Bamboo London's attorney requesting that he advise all parties as to his client's availability for deposition (*id.*). In response, Bamboo London's counsel emailed all parties stating that he could not produce a witness for deposition and that "[a]ny of the old contact numbers for personnel are no longer viable" (NYSCEF Doc. No. 212).

Counsel for Bamboo London asserts that as of December 29, 2016, the company was dissolved, and that there are no current employees who are present to testify to Bamboo London's specific functions at the NYPL event in question (NYSCEF Doc. No. 213, ¶ 13). Further, counsel for Bamboo London claims that, the NYS Department of State, Division of Corporations, Entity Information document (NYSCEF Doc. No. 218), lists Simon Weston (Weston) as the chief executive officer. Weston lives in England, and his last known address is: P.O. Box 369, The Avenue, Tadworth, Surrey, KT20 9ES. Walsh affirms that his office has no control over Weston since Bamboo London was dissolved nearly a year prior to the impleader action by Lesley Townsend, LLC bringing Bamboo London into this lawsuit. According to Walsh, Carolyn Specht, listed as managing agent of Bamboo London but an independent bookkeeper and tax preparer, avers that there are no employees available to testify.[2]

Business Corporation Law § 1006 provides, in relevant part, that a dissolved corporation "may continue to function for the purpose of winding up the affairs of the corporation," and that "[t]he dissolution of a corporation shall not affect any remedy available ... against such corporation ... for any right or claim existing or any liability incurred before such dissolution" (Business Corporation Law § 1006[a], [b]; *see Greater Bright Light Home Care Servs., Inc. v. Jeffries–El*, 151 AD3d 818, 820–821 [2d Dept 2017]).

Bamboo London claims that plaintiff's motion to compel should be denied as its inability to produce a witness is not "willful, contumacious, or due to bad faith...a showing that it is impossible to make the particular disclosure will bar the imposition of a sanction under CPLR 3126" (*Dauria v New York*, 127 AD2d 459, 460 [1st Dept 1987]). Here, however, counsel for

[2] The affidavit of Carolyn Specht is currently under seal.

Bamboo London has not stated what specific efforts it made to attempt to comply with the court's directive.

The court directs Bamboo London to produce for deposition, a witness with information concerning the efforts it has taken to locate and identify any former employee(s) from Bamboo London with knowledge relating to the incident. Bamboo London was in existence at the time the accident commenced, and as such, plaintiff is entitled to inquire as to what specific efforts were undertaken by Bamboo London to identify someone employed by Bamboo London, prior to its dissolution, with knowledge relating to the incident in question.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant, The New York Public Library Astor Lenox and Tilden Foundations (NYPL) for summary judgment is denied in its entirety (motion sequence no. 003); and it is further

ORDERED that the cross motion for summary judgment by plaintiff, Lloyd Greaves, is, likewise denied (003); and it is further

ORDERED that the motion by plaintiff to compel the deposition of defendant Bamboo London, Inc. is granted to the extent that Bamboo London is directed to produce for deposition, at the office of counsel for defendants or at a location or in a manner that the parties agree upon, on a date and at a time convenient for the parties, a witness with information concerning the steps it has taken to identify a former employee from Bamboo London with knowledge relating to the incident (motion sequence no. 004); and it is further

ORDERED that counsel for the parties are directed to confer with one another by telephonic or electronic means, within 30 days of completion of the deposition, and promptly

thereafter send a joint e-mail to the clerk of Part 23 advising whether a status conference is necessary to schedule additional discovery.

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

8/25/2020
DATE

W. FRANC PERRY, J.S.C.

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