# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. LYLE E. FRANK** **PART** **11M**

***Justice***

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AMANDA ALBERICO,

Plaintiff,

- v -

LDG BUILDERS LLC, ATC CONSTRUCTION GROUP, RIVERSIDE UNIT C, LLC., AE DESIGN INC. D/B/A ANDRES ESCOBAR & ASSOCIATES, NEST SEEKERS INTERNATIONAL LLC, LEV ASSET MANAGEMENT, LLC, A.T.C. CONSTRUCTION GROUP CORP., ANTHONY THOMAS CHAU CONSTRUCTION GROUP CORP, MARCHITECTS INC., and JOHN DOE,

Defendants.

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**INDEX NO.** 154621/2016

**MOTION DATE** N/A, N/A, N/A

**MOTION SEQ. NO.** 010 011 012

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 336, 337, 338, 339, 344, 347, 348, 349, 350, 354

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 345, 351, 352, 353

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 340, 341, 342, 343, 346, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383

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

Motion sequence nos. 010, 011 and 012 are consolidated for disposition[1].

This personal injury action arises out of an incident that occurred on November 29, 2015 when a decorative wall panel in plaintiff Amanda Alberico's office fell on her.

In motion sequence no. 010, defendants Riverside Unit C, LLC. (Riverside) and Nest Seekers International LLC (Nest Seekers) (together, Riverside/Nest Seekers) move, pursuant to

[1] The Court would like to thank Rebecca Chan Esq., for her assistance in this matter.

CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them on the ground that the complaint is barred by Workers' Compensation Law §§ 11 and 29, and for an order, pursuant to CPLR 3025 (b), allowing these defendants to add a collateral source offset under CPLR 4545 as an affirmative defense.

In motion sequence no. 011, defendant AE Design Inc. d/b/a Andres Escobar & Associates (AE) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claim asserted against it.

In motion sequence no. 012, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment against Riverside and defendant A.T.C. Construction Group on the issue of their liability and on the issue of her freedom from comparative negligence. Defendants A.T.C. Construction Group and A.T.C. Construction Group Corp. s/h/a ATC Construction Group and Anthony.Thomas.Chau.Construction Group Corp s/h/a Anthony Thomas Chau Construction Group Corp. (collectively, ATC) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them.

**BACKGROUND**

Plaintiff testified that, on the day of the accident, she was employed by Nest Seekers to manage its office located at 100 Riverside Boulevard, New York, New York (the Premises) (NY St Cts Elec Filing [NYSCEF] Doc No. 284, Doug Gingold [Gingold] affirmation, Ex E at 15 and 21). She was seated at the reception desk in the lobby area when a rectangular fabric-covered decorative wood panel affixed horizontally to the wall four to five feet above the desk fell and struck her head and the left side of her body (*id.* at 22-25). Plaintiff testified that prior to the accident, she never noticed any problems with the panel (*id.* at 25); did not know who installed it (*id.*); never saw anyone cleaning, working in, renovating or repairing the area (*id.* at 78-79 and

132); and never saw anyone touch the panel (*id.* at 132). Plaintiff admitted cleaning her work area and "guess[ed]" that she dusted the wall (*id.* at 78). Plaintiff testified that she had never complained about the physical conditions in her workplace before the accident (*id.* at 85). She had never heard of AE or ATC (*id.* at 79 and 102). Plaintiff also did not know who took the photographs depicting the dislodged panel and the reception area after the accident (*id.* at 29, 84-85 and 96).

Ravi Gulivindala (Gulivindala), a senior vice president at Nest Seekers, described the Premises as a storefront for Nest Seekers, a real estate brokerage firm (NYSCEF Doc No. 287, Gingold affirmation, Ex H at 7-8). He described the Premises as a "raw space" when Riverside purchased it in 2011 (*id.* at 8 and 24). Gulivindala stated that Nest Seekers' principal, Eddie Shapiro (Shapiro), hired Andres Escobar (Escobar) to design the build out of the Premises and ATC to construct it (*id.* at 10-11 and 25-26). He testified that Shapiro was responsible for overseeing the work as it was being performed (*id.* at 12). Gulivindala learned of the accident when plaintiff contacted him to tell him that a panel above her desk fell on her (*id.* at 34). Gulivindala stated that he visited the Premises two days after the accident and saw the panel that allegedly struck plaintiff standing upright against a wall (*id.* at 36). He added that prior to the accident, no one, including plaintiff, had complained about the panel or the reception area and there were no prior incidents involving the panel or the reception area (*id.* at 33 and 45).

Shapiro, Nest Seekers' president and chief executive officer, testified that Nest Seekers formed Riverside as a single purpose entity tasked with purchasing the Premises (NYSCEF Doc No. 288, Gingold affirmation, Ex I at 9 and 13). Riverside then leased the Premises to Nest Seekers (*id.* at 17-18). Shapiro explained that Riverside, a wholly-owned subsidiary of Nest Seekers, has no employees, maintains its own bank account and files its own tax returns (*id.* at

13-15). He described the Premises as a "concrete shell" when he first saw it (*id.* at 23). Riverside hired "Andres Escobar Design" as the design firm for the build out (*id.* at 45) and ATC to perform the construction work (*id.* at 23 and 34). A separate contractor may have been hired to perform the "AC" work (*id.* at 34 and 83). "Yoram Barel" (Barel), an administrator, served as Riverside's on-site representative to coordinate with ATC and was responsible for ensuring that ATC's work conformed with the design, although Barel "most likely" was not at the Premises every day (*id.* at 25 and 44). Shapiro did not believe there was a contract between Riverside and ATC, with the invoice dated December 9, 2011 describing the scope of ATC's work (*id.* at 31-34). Shapiro stated that ATC installed upholstered panels comprised of fabric and foam padding over a compressed board on the walls surrounding the reception desk (*id.* at 37-38). Shapiro guessed the panels may have been affixed to the wall with "screws, or nails, and maybe some PL glue, construction glue" (*id.* at 50). He did not know what "blocking" meant in the artistic renderings of the finished Premises (*id.* at 54). Shapiro testified that he did not see anything in the design documents about the use of glue as the method for attaching the panel to the wall (*id.* at 65), and he was not aware of any conversation between ATC, Escobar or the architect about the use of glue as the means and methods of performing this work (*id.* at 66). He could not recall when it was decided to change the panel's design from faux wood to fabric upholstery, although that was a conversation he likely had with the designer and contractor (*id.* at 68-69). Shapiro stated there was no entity other than ATC hired to install the decorative panels (*id.* at 35).

Jonathan Chau (Chau) testified that he is the manager and president for ATC Construction Group Corp. (NYSCEF Doc No. 304, John E. Horan [Horan] affirmation, Ex C at 11-12 and 14). Chau testified that ATC performed work at the Premises for Nest Seekers in 2011, although he could not recall if Riverside paid for the work (*id.* at 16 and 26). Nest Seekers

furnished his company with blueprints (*id.* at 25). Chau stated that he created the invoice dated December 9, 2011, which described the scope of ATC's work (*id.* at 25). He stated that ATC purchased the materials and built the reception desk, installed glass partitions, carpeting and kitchen cabinets and tiled the bathroom (*id.* at 28-29). Chau testified that ATC installed sheetrock above the desk (*id.* at 63), but it did not install the decorative wall panels above and on either side of the reception desk (*id.* at 61). The panels had not been installed when ATC finished its work at the Premises (*id.* at 52-53). Chau stated that he did not know who purchased and installed those panels (*id.* at 71 and 75). He claimed there were other contractors present at the site, but he did not see any of them install the panels (*id.* at 53).

AE's principal, Escobar, testified that AE was hired to create an office concept and to provide drawings for the build out at the Premises (NYSCEF Doc No. 303, Horan affirmation, Ex H at 10-11). AE submitted the renderings to "Yoram Burrell" and communicated with Shapiro (*id.* at 21). He testified he had no idea which entity Yoram Burrell was affiliated with (*id.* at 33), but believed he was the owner's representative (*id.* at 28). Although AE's work did not include providing a construction manager, AE appointed Nexida Mejia (Mejia) as a project manager (*id.* at 11-13). Escobar testified that AE had recommended installing tiled panels, not fabric-wrapped panels, on the walls flanking the reception desk (*id.* at 17-18). The design called for "blocking" to attach the panels to the substrate (*id.* at 18-19). Escobar described blocking as a "ridged material that will be able to adhere or that the panels would be able to be attached – fastened in a proper matter [sic]" (*id.* at 19-20). The "right method" in this instance would have been to provide blocking inside the framing behind the sheetrock to which the panels could be mechanically fastened (*id.* at 23-24). From the photographs he was shown of the reception area after the accident, Escobar opined that the dislodged panel "looks like it was probably glued" and

not mechanically fastened to the sheetrock (*id.* at 24-25). Escobar added that glue "would be the wrong method of installation" (*id.* at 25). Escobar stated the change in design from tiled to upholstered panels was a decision made by the client and its contractor (*id.* at 18). Escobar testified that AE was not invited to visit the Premises during installation (*id.* at 21) and confirmed that Mejia was never asked about the panels in the reception area (*id.* at 22). Neither he nor Mejia inspected the work after it was completed (*id.* at 36). He never learned the identity of the general contractor (*id.* at 37).

**PROCEDURAL HISTORY**

Plaintiff commenced this action by filing a summons and complaint asserting a cause of action sounding in negligence on June 1, 2016 (NYSCEF Doc No. 1). She alleges in the verified bill of particulars dated May 30, 2017, that defendants were negligent in the design, construction, ownership and maintenance of the Premises, created a dangerous condition by failing to construct, secure and maintain the panel, and created or failed to remove the allegedly defective panel from the Premises (NYSCEF Doc No. 283, Gingold affirmation, Ex D, ¶ 3).

This action has been consolidated with a second action captioned *Alberico v Chau*, Sup Ct, NY County, index No. 159987/2018 (the 2018 Action) (NYSCEF Doc Nos. 160 and 220). The complaint and cross claims against Extell Riverside LLC, Extell Developer/Riverside L.L.C., Extell Development Company, CRP/Extell Parcel K., L.P. and ATC Plumbing & Mechanic have been discontinued (NYSCEF Doc No. 10-13 and 22). Riverside and Nest Seekers have discontinued the cross claims against each other (NYSCEF Doc No. 94). The complaint and cross claims against Halstead Management Company, LLC have been dismissed (NYSCEF Doc No. 137). The claims against March Chadwick, M. Arch Architects, March Associates, Architects and Planners, P.C. and A.T.C. Contracting Corp. have been discontinued

(NYSCEF Doc Nos. 32, 35 and 74, stipulations of discontinuance, in the 2018 Action). The claims against Muraflex have been dismissed (NYSCEF Doc No. 46, July 3, 2019 decision and order, in the 2018 Action). It does not appear that LDG Buildings, LLC, Lev Asset Management, LLC and Marchitects Inc. have answered.

AE's prior summary judgment motion for was denied with leave to renew at the close of discovery (NYSCEF Doc No. 273).

Riverside/Nest Seekers, AE and plaintiff now move separately and ATC cross-moves for summary judgment. Plaintiff also moves to amend the complaint.

**DISCUSSION**

**I. Riverside/Nest Seekers' Motion to Amend**

Riverside/Nest Seekers move to amend their amended answer, dated December 11, 2018, to plead a collateral source offset as an affirmative defense.

Under CPLR 3025 (b), leave to amend the pleadings shall be freely given upon such terms as may be just." The "plaintiff does not need to establish the merit of the new claim but must simply show that it is not 'palpably insufficient' or 'clearly devoid of merit'" (*Agbo v Constantin Assoc., LLP*, — AD3d —, 2022 NY Slip Op 02861, *1 [1st Dept 2022] [citation omitted]). The motion must be supported by evidence similar to that submitted on a motion for summary judgment (*see Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017]), together with a proposed pleading (*see HT Capital Advisors v Optical Resources Group*, 276 AD2d 420, 420 [1st Dept 2000]). The party opposing the amendment bears a heavy burden of demonstrating that the "facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]). If the proposed amendment lacks merit, leave to amend

should be denied (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]).

Riverside/Nest Seekers have demonstrated that the proposed amendment to plead a collateral source offset as an affirmative defense is not palpably insufficient (*see Wooten v State of New York*, 302 AD2d 70, 73 [4th Dept 2002], *lv denied* 1 NY3d 501 [2003] [stating that a collateral source defense under CPLR 4545 must be pled as an affirmative defense]). Plaintiff does not oppose this branch of the motion, and ATC has not addressed it. Accordingly, that part of Riverside/Nest Seekers' motion seeking leave to amend their answer is granted. Annexing, adopting and incorporating the new affirmative defense into a previously served answer, as Riverside/Nest Seekers have done (NYSCEF Doc No. 290, Gingold affirmation, Ex K), however, is insufficient. Riverside/Nest Seekers shall serve and file a second amended answer containing the new affirmative defense as pled on the first page in Exhibit K within 30 days of the date of service of this order with written notice of entry.

**II. The Motions for Summary Judgment**

A party moving for summary judgment "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

**A. Nest Seekers (Motion Sequence No. 010)**

Nest Seekers argues the complaint is barred by the exclusive remedy provision found in the Workers' Compensation Law.

It is well settled that "Workers' Compensation Law §§ 11 and 29 (6) restrict an employee from suing his or her employer … for an accidental injury sustained in the course of employment" (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 357 [2007]). Workers' Compensation Law § 11 also precludes recovery for common-law indemnification and contribution against an employer unless the employee suffered a "grave injury." Workers' Compensation Law § 11 contains a narrow list of what constitutes a grave injury (*see Meis v ELO Org.*, 97 NY2d 714, 716 [2002]), defined as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Nest Seekers has demonstrated that plaintiff is its employee and that she has been paid benefits under the Workers' Compensation Law (NYSCEF Doc No. 283, ¶ 11; NYSCEF Doc No. 286, Gingold affirmation, Ex G). Moreover, plaintiff has not alleged she suffered a grave injury in her verified bill of particulars (*see Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012] [reasoning that "[defendant] may not be held liable for common-law indemnification … since plaintiff does not allege, nor does his bill of particulars evince, a 'grave injury' within the meaning of Workers' Compensation Law § 11"]). As such, Nest Seekers has established that plaintiff's claims are barred by the Workers' Compensation Law (*see Sanchez v Delta Airlines, Inc.*, 188 AD3d 616, 617 [1st Dept 2020]).

Plaintiff, in response, agrees that Nest Seekers is entitled to dismissal of the complaint against it (NYSCEF Doc No. 337, Michael Peters [Peters] affirmation, ¶ 11).

ATC argues the motion should be denied because Nest Seekers failed to submit the pleadings as required under CPLR 3212 (b). However, the court may overlook this deficiency where, as is the case here, the pleadings were filed electronically (*see Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept 2012]).

Next, ATC contends that dismissal of its cross claims for contribution and common-law indemnification should be denied because Nest Seekers failed to establish that plaintiff did not sustain a grave injury or its freedom from negligence. ATC argues that the definition of a grave injury includes "an acquired injury to the brain caused by an external physical force resulting in permanent total disability," and plaintiff alleges she suffered a traumatic brain injury (NYSCEF Doc No. 283, ¶ 13). In *Rubeis v Aqua Club Inc*. (3 NY3d 408, 413 [2004]), the Court of Appeals explained that "a brain injury results in 'permanent total disability' under section 11 when the evidence establishes that the injured worker is no longer employable in any capacity."

Here, as discussed above, plaintiff has not alleged in her pleadings that her brain injury constitutes a grave injury (*see Galeno v Everest Scaffolding, Inc*., 202 AD3d 433, 435 [1st Dept 2022] [dismissing claims for contribution and common-law indemnification where the pleadings did not evince a grave injury]). Furthermore, plaintiff's testimony that she suffers from frequent headaches (NYSCEF Doc No. 284 at 53) does not render her no longer employable in any capacity (*see Anton v West Manor Constr. Corp*., 100 AD3d 523, 524 [1st Dept 2012] [stating that daily headaches do not satisfy the grave injury standard]). In addition, plaintiff testified that she has applied for many jobs since the date of the accident and was enrolled in a class to learn how to teach yoga (NYSCEF Doc No. 284 at 15-16 and 109). Thus, not only has plaintiff failed

to plead that she sustained a grave injury, but the evidence does not support a finding that she is no longer employable in any capacity. In the absence of a grave injury, Nest Seekers' motion for summary judgment dismissing the complaint and ATC's cross claims for common-law indemnification and contribution against it is granted.

**B. Riverside (Motion Sequence No. 010)**

Riverside moves for summary judgment dismissing the complaint and cross claims against it on the ground that it is Nest Seekers' alter ego.

"The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities which are alter egos of the entity which employs the plaintiff" (*Moses v B & E Lorge Family Trust*, 147 AD3d 1045, 1046 [2d Dept 2017] [internal quotation marks and citation omitted]). Factors to consider in determining whether an entity is an employer's alter ego include the "absence of corporate formalities, inadequate capitalization, and the commingling of corporate and personal funds" (*Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v Desarrolladora Farallon S. de R.L. de C.V.*, 146 AD3d 439, 441 [1st Dept 2017]), and whether the alleged alter ego and the plaintiff's employer shared administrative, financial and insurance resources (*see Rodriguez v Dairyland HP, LLC*, 180 AD3d 607, 607 [1st Dept 2020]). Allegations consisting solely of domination and control are insufficient (*see Cornwall Mgt. Ltd. v Kambolin*, 140 AD3d 507, 507 [1st Dept 2016]). Likewise, the fact that two entities are related or that they share common principals, without more, is insufficient to establish that one is an alter ego of the other (*see Kolenovic v 56th Realty, LLC,* 139 AD3d 588, 589 [1st Dept 2016]; *Batts v IBEX Constr., LLC*, 112 AD3d 765, 767 [2d Dept 2013]). Indeed, it must be shown that one "controls the day-

to-day operations of the other" (*Buffington v Catholic Sch. Region of Northwest & Southwest Bronx*, 198 AD3d 410, 411 [1st Dept 2021] [internal quotation marks and citation omitted]).

Applying these precepts, Riverside has failed to meet its prima facie burden on summary judgment. In its statement of material facts (SMF), Riverside states that it is an alter ego of Nest Seekers (NYSCEF Doc No. 278, Riverside SMF, ¶ 2), but this statement constitutes a legal conclusion as opposed to an uncontested material fact (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.8-g [a] [stating that the statement of material facts shall contain "material facts as to which the moving party contends there is no genuine issue to be tried"]). More importantly, Riverside fails to advance any legal arguments in support of the claim that it is Nest Seekers' alter ego, nor does it direct the court to specific evidence in the record showing that it is Nest Seekers' alter ego.

In any event, the evidence proffered on the motion fails to establish that Nest Seekers exercised day-to-day control over Riverside (*Buffington*, 198 AD3d at 411; *Arias v Anjo Mfg. Co., Inc.*, 173 AD3d 506, 507 [1st Dept 2019]), or that the two operated as a single integrated entity (*see Moses*, 147 AD3d at 1047). Shapiro testified that Nest Seekers created Riverside for the sole purpose of owning the Premises. While Riverside is a wholly-owned subsidiary of Nest Seekers, Riverside maintained its own bank account, filed separate tax returns, and rented the Premises to Nest Seekers pursuant to a written lease. Given this testimony, Riverside has not dispelled all questions of fact as to whether it was Nest Seekers' alter ego (*see Reaves v Lakota Constr. Group, Inc.*, 154 AD3d 637, 637 [1st Dept 2017] [denying summary judgment where triable issues of fact exist whether the defendant was the alter ego of plaintiff's employer because it had been incorporated separately and maintained a separate bank account]; *Soodin v Fragakis*, 91 AD3d 535, 536 [1st Dept 2012] [rejecting a claim that the defendant was an alter

ego of the plaintiff's employer where the two were separately incorporated, maintained separate records, and did not integrate their funds or commingle assets]). Accordingly, the motion for summary judgment dismissing the complaint and cross claims against Riverside is denied without regard to the sufficiency of the opposing papers.

**C. AE (Motion Sequence No. 011)**

AE argues that it bears no liability for the happening of the accident because it did not install the decorative panel that struck plaintiff and did not owe her a duty of care.

The elements for a cause of action for negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [citation omitted]). Generally, "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). There are three exceptions to this general rule:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches 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"

(*id.* at 140 [internal citations omitted]).

AE has demonstrated that none of *Espinal* exceptions apply. A contractor launches an instrument of harm when it creates or exacerbates an unreasonable risk of harm (*XX v Dunwell El. Elec. Indus., Inc.*, 188 AD3d 443, 445 [1st Dept 2020]). Although AE designed the Premises, it was not responsible for installing the decorative panel that fell (*see Dinkins v Kansas Fried Chicken, Inc.*, 158 AD3d 420, 421 [1st Dept 2018] [granting summary judgment to an architectural consultant where its obligations did not involve installation of the drop ceiling that

collapsed and fell on plaintiff]). Furthermore, it is uncontroverted that AE's design called for mechanically fastening a tiled panel to blocking behind sheetrock. The padded fabric panel installed at the Premises deviated from AE's design, and plaintiff contends that the installation did not adhere to AE's instructions. The second exception does not apply, especially in the absence of any evidence that plaintiff was aware of AE's involvement (*see Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393, 394 [1st Dept 2008]). Indeed, plaintiff has not alleged that she detrimentally relied on AE's continued performance of its duties, which concluded four years before the accident (*see Baez v 1749 Grand Concourse LLC*, 178 AD3d 520, 523 [1st Dept 2019]). The third exception is inapplicable as plaintiff has not alleged that AE entirely displaced another party's duty to maintain the Premises (*see 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541 [1st Dept 2014] [stating that the architect's involvement in discussing the means and methods and the work and its general responsibility to visit the site does not show that it displaced the owner's duty to maintain]).

Plaintiff has not submitted any opposition to AE's motion. By failing to oppose the motion, plaintiff has abandoned her claims against AE (*see Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449, 450-451 [1st Dept 2020] [granting summary judgment dismissing the common-law negligence and Labor Law § 200 claims as abandoned because plaintiff failed to oppose that part of defendants' motion]).

ATC argues the motion is procedurally deficient because AE has failed to submit the pleadings in accordance with CPLR 3212 (b). This contention lacks merit as the pleadings are annexed to the motion (NYSCEF Doc Nos. 295-298, Horan affirmation, Exs A-D). ATC also posits that a triable issue of fact exists as to whether the design was negligent, but, as discussed above, AE was not responsible for the construction and installation of the subject panel (*see*

*Dinkins*, 158 AD3d at 421). As ATC has failed to raise a triable issue of fact, AE's motion for summary judgment dismissing the complaint and all cross claims is granted.

**E. Plaintiff (Motion Sequence No. 012)**

Plaintiff argues that she is entitled to summary judgment against Riverside and ATC because they created or had actual or constructive notice of the improperly installed decorative panel. Riverside's representative, Barel, was on site during construction and knew or should have known that ATC had glued the panel to the wall. As against ATC, plaintiff submits that it created the condition when it used glue to affix the panel to the wall.

Plaintiff relies on an affidavit from her expert, licensed engineer Andrew Yarmus, P.E. (Yarmus), who reviewed the deposition transcripts, blueprints, photographs of the Premises and other exhibits (NYSCEF Doc No. 335, Peters affirmation, Ex AA [Yarmus aff], ¶ 5). Yarmus states that "[i]t is an undisputed principle of construction, site safety, and engineering that a properly installed decorative plank should never fall down from the wall it is mounted upon, without being overloaded or otherwise similar pulled upon" (*id.*, ¶ 19). He states the blueprints specified that "the contractor must provide blocking where required," and states that the contractor was responsible for conforming its work "to generally accepted construction practices by mechanically fastening the planks to the blocking or studs behind the drywall using nails, screws, or other mechanical fastening devices" (*id.*, ¶ 20). In this instance, photographs appear to show that ATC had glued the panel that fell to the drywall surface instead of mechanically fastening it to studs and blocking (*id.*, ¶ 18). Yarmus further opines that glue can degrade over time, which compromises its adherent properties and can cause objects affixed with glue to fall (*id.*, ¶ 22). He also claims that if glue was used, it should have been applied evenly across the

entire back of the decorative panel (*id.*, ¶ 23). A photograph of the back of the panel taken after the accident showed "12 'dots' of glue" (*id.*, ¶ 20), which was inadequate (*id.*, ¶ 23).

**1. Riverside's Liability**

Plaintiff has not dispelled all questions of fact as to whether Riverside had actual or constructive notice of an allegedly dangerous condition. Plaintiff alludes to Shapiro's testimony that Barel was Riverside's on-site representative, but it is unclear from the record whether Barel was present when the panel was installed or whether he was aware whoever had installed it had disregarded AE's installation instructions.

Moreover, plaintiff has failed to set forth a proper foundation for the admission of the photographs. "In order to admit the photographs proffered at trial into evidence, the plaintiff was required to authenticate them by laying a proper foundation, which generally requires proof that the photographs were taken close in time to the accident and fairly and accurately represent the conditions as they existed on the date of the accident" (*Davidow v CSC Holdings, Inc.*, 156 AD3d 682, 682 [2d Dept 2017]; *Rivera v Port Auth. of N.Y. & N.J.*, 127 AD3d 415, 415-416 [1st Dept 2015] [admitting photographs of the accident location based on the "plaintiff's clear and unequivocal testimony that photographs … fairly and accurately depicted the conditions" at the time she fell]). Plaintiff testified that she did not know who took the photographs or when they were taken. She did not submit an affidavit attesting to their authenticity or stating that the photographs fairly and accurately depicted the panel and the wall at the time the accident occurred. None of the other witnesses testified that they took the photographs (*see Cordova v 653 Eleventh Ave. LLC*, 190 AD3d 637, 638 [1st Dept 2021] [finding that the photographs were properly authenticated by the plaintiff's supervisor]). Gulivindala stated only that he saw the dislodged panel shown in a photograph in an upright position when he visited the Premises after

the accident, not that the photographs fairly and accurately depicted the back of the dislodged panel and the wall from which it fell. Consequently, Yarmus's opinion, in which he relied upon the unauthenticated photographs, lacks probative value (*see Pascocello v Jibone*, 161 AD3d 516, 516 [1st Dept 2018] [precluding the defendant's biomechanical engineer "from offering an opinion based on photographs for which no proper foundation had been established"]).

**2. ATC's Liability**

Plaintiff also has not dispelled all questions of material fact as to ATC's liability. Plaintiff argues that ATC caused and created a dangerous condition by using glue to affix the decorative panel to the wall. She urges the court to disregard Chau's self-serving denial that ATC did not fabricate or install the panel as a feigned issue of fact. "Evidence may be said to be incredible as a matter of law when it 'is demonstrably false … [or] contradicts every other piece of evidence in the record'" (*Venezia v LTS 711 11th Ave.*, 201 AD3d 493, 496 [1st Dept 2022] [citation omitted]; *see also Hutchison v Estate of Kursh*, 198 AD3d 509, 509 [1st Dept 2021] [stating that testimony is incredible as a matter of law when it is "manifestly untrue, or impossible to believe"]). Here, plaintiff has presented conflicting testimony as to whether ATC installed the panel, and ATC's invoice is inconclusive as it does not list the upholstered decorative panel as an interior finish it agreed to provide (NYSCEF Doc No. 329, Peters affirmation, Ex U]). Moreover, it is well settled that issues of witness credibility are best left to the factfinder (*see Delvalle v 1733 Unico LLC*, 202 AD3d 568, 570 [1st Dept 2022]). Thus, "[Chau's] testimony is not incredible as a matter of law and cannot be ignored without improperly making a determination as to credibility on summary judgment" (*Venezia*, 201 AD3d at 496]).

**3. The Doctrine of Res Ipsa Loquitur**

Plaintiff's reliance on the doctrine of res ipsa loquitur is unavailing. A plaintiff may rely on the doctrine of res ipsa loquitur to establish a defendant's liability when: "(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff" (*Valdez v Upper Creston, LLC*, 201 AD3d 560, 561 [1st Dept 2022]). Granting summary judgment on liability based upon res ipsa loquitur is granted only in rare instances (*see Maroonick v Rae Realty, LLC*, — AD3d —, 2022 NY Slip Op 02952, *1 [1st Dept 2022]), and "only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v Rais Constr. Co*., 7 NY3d 203, 209 [2006]). Plaintiff has not established that this is one of those instances (*see Barney-Yeboah v Metro-North Commuter R.R*., 25 NY3d 945, 946 [2015], *revg* 120 AD3d 1023 [1st Dept 2014] [denying summary judgment to plaintiff who was struck by a ceiling panel on a train that led to the train's HVAC system]). Furthermore, plaintiff has not established that the panel was under the exclusive control of Riverside or ATC.

As plaintiff has failed to meet her prima facie burden, that part of the motion for summary judgment on the issue of Riverside's and ATC's liability is denied without regard to the sufficiency of the opposing papers.

**4. Plaintiff's Comparative Negligence**

Plaintiff has demonstrated her entitlement to partial summary judgment on the issue of her comparative negligence (*see Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st

Dept 2020] [dismissing affirmative defenses for comparative negligence where the defendant failed to "explain how plaintiff was negligent or culpable"]).

Riverside did not address this branch of plaintiff's motion. ATC argues that plaintiff's comparative negligence remains an issue because it is not known why the panel fell. It relies on *Smith v Wisch* (77 AD2d 619 [2d Dept 1980], *lv denied* 51 NY2d 709 [1980]) and *Lynn v Lynn* (216 AD2d 194 [1st Dept 1995]), but those cases are distinguishable. In *Smith*, the Court reasoned it would have been speculative to conclude that the decedent's fall from a fenced deck implicated another party's negligence, especially where the decedent's co-worker testified that the decedent had been warned numerous times against leaning on fences (77 AD2d at 620). In *Lynn*, the Court rejected plaintiff's invocation of the *Noseworthy* doctrine because she and the defendant's decedent, plaintiff's brother, were similarly situated with respect to their knowledge of how the accident occurred (216 AD2d at 195). Unlike those situations, ATC had a full opportunity to question plaintiff on her conduct, and whether that conduct contributed to the happening of the accident. Thus, ATC has failed to raise a triable issue of fact.

**F. ATC (Motion Sequence No. 012)**

On its cross motion, ATC contends that it bears no liability for the happening of the accident because it owed no duty of care to plaintiff as it was not an owner, tenant or managing agent of the Premises and did not install the decorative panel that fell on her.

It is well settled that "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). ATC correctly argues that it bears no liability as it was not an owner or tenant in possession of the Premises. That said, a third-party contractor who, in the course of performing services under a contract, negligently creates or exacerbates an

unreasonable risk of harm may be liable to a plaintiff (*XX*, 188 AD3d at 445). As discussed above, triable issues of fact exist as to whether ATC created the allegedly dangerous condition. According, ATC's cross motion for summary judgment dismissing the complaint and the cross claims asserted against it is denied without regard to the sufficiency of the opposing papers.

Accordingly, it is

ORDERED that the part of the motion brought by defendants Riverside Unit C, LLC. and Nest Seekers International LLC for leave to amend their answer (motion sequence no. 010) is granted, and said defendants shall serve and file an amended answer to include the affirmative defense as pled on the first page in Exhibit K (NYSCEF Doc No. 290) within 30 days of service of this order with written notice of entry; and it is further

ORDERED that the part of the motion brought by defendants Riverside Unit C, LLC. and Nest Seekers International LLC for summary judgment (motion sequence no. 010) is granted to the extent of granting summary judgment to defendant Nest Seekers International LLC and the complaint and all cross claims are dismissed as against defendant Nest Seekers International LLC, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion brought by defendant AE Design Inc. d/b/a Andres Escobar & Associates for summary judgment (motion sequence no. 011) is granted, and the complaint and all cross claims are dismissed as against said defendant; and it is further

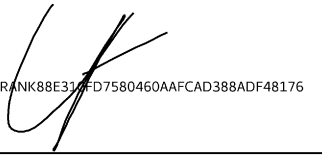
ORDERED that the said claims and cross claims as against defendants Nest Seekers International LLC and AE Design Inc. d/b/a Andres Escobar & Associates are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Nest Seekers International LLC and AE Design Inc. d/b/a Andres Escobar & Associates dismissing

the claims and cross claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment brought by plaintiff Amanda Alberico (motion sequence no. 012) is granted to the extent of granting plaintiff partial summary on the issue that plaintiff is free from comparative fault or culpable conduct in the happening of the accident, and the balance of the motion is otherwise denied; and it is further

ORDERED that the cross motion of defendants A.T.C. Construction Group and A.T.C. Construction Group Corp. s/h/a ATC Construction Group and Anthony Thomas Chau Construction Group Corp s/h/a Anthony.Thomas.Chau.Construction Group Corp. for summary judgment dismissing the complaint and the cross claims asserted against them (motion sequence no. 012) is denied.




5/19/2022
DATE

LYLE E. FRANK, J.S.C.

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