SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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JONATHAN N. DAVIS,

Plaintiff,

–against–

AUGUSTO ANGIOLETTI, 88 GREENWICH OWNER LLC, COOPER SQUARE REALTY INC., BLACK DIAMOND LLC and LEHRER McGOVERN BOVIS, INC.,

Defendants.

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AUGUSTO ANGIOLETTI,

Third-Party Plaintiff,

–against–

BLACK DIAMOND LLC and LEHRER McGOVERN BOVIS INC.,

Third-Party Defendants.

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LEND LEASE (US) CONSTRUCTION LMB INC., f/k/a BOVIS LEND LEASE LMB, INC. f/k/a LEHRER McGOVERN BOVIS, INC.,

Second Third-Party Plaintiff,

–against–

MENSCH MILL & LUMBER CORPORATION and NASTASI WHITE WEST COMPANY, LLC,

Second Third-Party Defendants.

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FIRSTSERVICE RESIDENTIAL NEW YORK INC. f/k/a COOPER SQUARE REALTY INC.,

Third Third-Party Plaintiff,

–against–

DECISION & ORDER

INDEX NO. 162279/2014

MOTION SEQUENCES 002, 003

MENSCH MILL & LUMBER CORPORATION and
NASTASI WHITE WEST COMPANY, LLC,

Third Third-Party Defendants.

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88 GREENWICH OWNER LLC,

Fourth Third-Party Plaintiff,

–against–

MENSCH MILL & LUMBER CORPORATION and
NATASHI WHITE WEST COMPANY, LLC,

Fourth Third-Party Defendants.

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HON. JAMES E. D'AUGUSTE, J.S.C.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 153, 154, 155, 156, 157, 158, 173, 174

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 175, 176, 177, 196

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

Motion sequences 002 and 003 are herein consolidated for disposition.

In motion sequence 002, defendant Firstservice Residential New York Inc. f/k/a Cooper Square Realty Inc. ("Firstservice") moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint ("Complaint") of plaintiff Jonathan Davis ("Davis") and all cross-claims and counterclaims asserted against it.

In motion sequence 003, defendants Black Diamond LLC ("Black Diamond") and 88 Greenwich Owner LLC ("Greenwich") move pursuant to CPLR 3212 for summary judgment dismissing the Complaint and all cross-claims asserted against them.

BACKGROUND

The relevant facts are taken from the parties' pleadings, exhibits and deposition testimony submitted in connection with the above-mentioned motion briefs.

This action arises out of an injury that Davis suffered while leasing the residential condominium Unit 1713 (the "Unit") located at 88 Greenwich Street, New York, New York (the "Property"). The Unit is a loft apartment with a loft ladder that leads up to the bedroom loft area (NYSCEF Doc. No. ["NYSCEF"] 98, 13:22-14:2). On February 22, 2014, Davis was descending the Unit's loft ladder when the second step from the top (the eighth step from the bottom) cracked or split causing him to fall and sustain injury (*id.* at 41:4-7, 51:2-52:2). There is no evidence of any complaints or issues with the loft ladder prior to Davis's injury.

The Property was originally acquired by Black Diamond in 1999 (NYSCEF 146, 16:16-19) and thereafter converted from office space to residential rentals prior to 2005 (*id.* at 16:23-17:8). On December 23, 2005, Greenwich purchased the Property from Black Diamond.

Between 2007 and 2008, Greenwich converted the Property from residential rentals to a condominium (NYSCEF 145, 19:20-20:5) named 88 Greenwich Club Residences (the "Condominium") (NYSCEF 100, 10:18-10:23). To date, all the residential Condominium units have been sold to individual owners, but Greenwich remains the owner of the retail portion of the Property (NYSCEF 158). On August 1, 2007, FirstService was retained by the Condominium as the managing agent for the common elements of the Condominium (NYSCEF 157, par 1).

In 2009, Angioletti purchased the Unit from Greenwich (NYSCEF 99, 12:11-12:14). Davis leased the Unit from Angioletti and occupied the Unit from June 2011 to October 2014 (NYSCEF 98, 11:5-11:14).

On December 11, 2014, Davis commenced this action against the Unit owner, Angioletti, the former Property owner, Greenwich, and the managing agent, Firstservice, by service of a summons and complaint asserting causes of action for negligence and nuisance. On April 24, 2015, Davis subsequently amended the complaint to include additional defendants Black Diamond, another former Property owner, and Lend Lease (US) Construction LMB Inc., f/k/a Bovis Lend Lease LMB, Inc. f/k/a Lehrer McGovern Bovis, Inc. ("Lend Lease"), a construction manager (NYSCEF 13).

The various defendants subsequently filed third-party complaints and asserted various cross-claims and counterclaims against the other co-defendants seeking indemnification (NYSCEF 10, 21, 29, 34, 47, 52, 69).

DISCUSSION

For the reasons stated below, Firstservice's motion for summary judgment is granted and Black Diamond and Greenwich's motion for summary judgment is denied.

The Complaint's two causes of action assert that: (1) the loft ladder was a defective, dangerous, and/or a hazardous condition caused by the defendants' negligence, and (2) the loft ladder was a private or public nuisance, or a trap for the unaware (NYSCEF 13, ¶¶ 64, 67, 72).

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citations omitted]). "Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action" (*id.* [internal quotation marks and citations omitted]). "The moving party's failure to

make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [internal brackets, quotation marks, citations, and emphasis omitted]).

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" *(Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]). "Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). "The existence of one or more of these elements is sufficient to give rise to a duty of care" (*id.*). "Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property" (*id.*).

Davis contends that the loft ladder constituted a dangerous condition created as a result of defendants' negligence in the design and construction of the loft ladder based on the unrebutted expert affidavit from Michael Panish ("Panish"). In the affidavit, Panish opines that the step of the loft ladder failed because it "deviated from good and acceptable construction customs and standards that go back decades". He further states that it "[i]t was reasonably foreseeable at the time the ladder was constructed that it would eventually fail with a person stepping on it due to the cheap materials and improper construction methods used" (NYSCEF 160, ¶¶ 4, 6) because the loft ladder "was fabricated in a substandard manner which used butt joints and employed the improper use of drywall screws to attach the step(s) to the wooden rails", which is "completely inappropriate" (*id.* at ¶ 7).

FIRSTSERVICE

Firstservice establishes its prima facie entitlement to summary judgment because it demonstrates that it does not owe Davis a duty to repair or maintain the interior of the Unit, which would include the loft ladder (*Balsam v Delma Eng'g Corp.*, 139 AD2d at 296).

Robin Klasewitz ("Klasewitz"), a general manager for Firstservice, is responsible for the management of the Property. Klasewitz testified during her deposition that repairs within a unit of the Condominium would be handled by the unit owner and that the Condominium would handle repairs within the walls such as common systems or plumbing, but not the repairs related to the interior (NYSCEF 100, 21:4-20), and that based on the Condominium bylaws, in the event that the Unit required a repair of the loft ladder, it would be Angioletti's responsibility to arrange for the repair and submit the appropriate forms to Firstservice because the Condominium is not responsible for interior repairs to a unit (*id.*at 53:10-54:7;).

There is no evidence in the record that Firstservice was ever informed that there was an issue with the loft ladder prior to Davis's injury. Davis testified during his deposition that he: (1) was not familiar with Firstservice, (2) was only aware that it was related to the Property, and (3) does not recall ever speaking with an employee of Firstservice (NYSCEF 98 143:2-14). Angioletti is only familiar with Firstservice as the entity to which he paid the Condominium maintenance fees (NYSCEF 99, 52:7-11). No party raises a triable issue of fact that would preclude the granting of Firstservice's unopposed motion for summary judgment.

As a result, dismissal of the Complaint and the related cross-claims asserted by Angioletti (NYSCEF 14, p 5), 88 Lend Lease (NYSCEF 21, ¶ 12), Greenwich (NYSCEF 22, p 10-11), and Black Diamond (NYSCEF 70, ¶¶ 12-13) as against Firstservice is warranted. Furthermore, the third third-party action seeking indemnification against third third-party defendants Mensch Mill

& Lumber Corporation ("Mensch") and Natashi White West Company, LLC ("Natashi") is dismissed as well.

BLACK DIAMOND and GREENWICH

Davis raises triable issues related to the identity of the responsible party for designing, constructing, and installing the loft ladder that are sufficient to warrant denial of Black Diamond and Greenwich's motion for summary judgment. Davis alleges that Black Diamond or Greenwich created the dangerous condition by negligently designing, constructing, and installing the loft ladders during the period in which they owned the Property.

Generally "[a]n out-of-possession owner who has relinquished control over the premises will not be held liable for subsequent injuries resulting from dangerous conditions on the premises" (*Morris v Freudenheim*, 273 AD2d 885, 885 [4th Dept 2000]). "Additionally, where a defective condition exists, the duty to maintain the property falls on the successor in title in possession" (*Turrisi v Ponderosa Inc.*, 179 AD2d 956, 958 [3d Dept 1992]).

"A narrow exception exists, however, and liability may be imposed where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known" (*Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 898 [1991]). "This is so even where a nuisance exists" (*Camillery v Getty Ref. & Mktg. Co.*, 170 AD2d 567, 568 [2d Dept 1991]).

Assuming that Davis's allegations are true and the loft ladder was a dangerous condition that existed during Black Diamond or Greenwich's ownership of the Property, liability will be imposed against them as prior owners, if Angioletti did not have a reasonable amount of time to discover the condition and subsequently remedy the condition after discovery after acquiring the Unit (*id.*).

It is undisputed that Angioletti acquired the Unit in 2009, roughly five years prior to Davis' injury in February 2014. "While the issue of whether enough time has passed so as to provide the new owner a reasonable opportunity to discover the existence of a defective condition in order to remedy it is generally a triable question of fact" (*Brazell v Wells Fargo Home Motge., Inc.*, 42 AD3d 409, 410 [1st Dept 2007]), the court has previously ruled that a two year period sufficiently affords a new owner an opportunity to discover and repair a dangerous condition. (*Mazurick v Chalos*, 172 AD2d 805, 806 [2d Dept 1991] [court held that prior owners' liability ceased when ownership and control were relinquished prior to the injury because a two-year period was sufficient for the court appointed receiver to discover and remedy dangerous condition for property]).

This court finds that the extensive amount of time that has passed since Angioletti acquired the Unit from Greenwich, roughly 5 years prior to the injury, is sufficient to shield Black Diamond and Greenwich from liability as prior owners (*Marrero v Marsico*, 218 AD2d 226, 228-29 [3d Dept 1996] ["Thus, the passage of a reasonable time since the transfer of title can insulate a former landowner from liability for a dangerous condition that existed at the time of the conveyance]"). The record is devoid of any evidence that Black Diamond or Greenwich retained control over the Property or the right to reenter the Unit for inspection and repairs after the respective sales *(Mazurick.* 172 AD2d at 806 [2d Dept 1991] ["[w]here an owner of property is no longer in possession and control of the property, and retains no right to reenter for purposes of inspection and repair, then he cannot be held liable for defects in the property"]).

However, the transfer of title does not relieve Black Diamond and Greenwich from the liability that may be imposed against the party that affirmatively created the dangerous condition as a result of the construction work performed on the Property (*Marrero*, 218 AD2d at 229 [3d

Dept 1996] ["liability for the creation of the dangerous condition during its construction work is not dependent upon its status as the owner of the property" and "conveyance of the property cannot relieve it of its independent liability for creating the dangerous condition during the construction work"]).

This court agrees that the movants' collective deposition testimony fails to definitively resolve, as a matter of law, the identity of the party responsible for constructing or installing the loft ladders. The evidence in the record that references the loft ladders is limited to a conceptual estimate from Glen Ravn ("Ravn"), vice president of Lend Lease from 1989 to 2000 (NYSCEF 149, 17:5-9), and testimony from Jodi Gerstman ("Gerstman"), CFO of Worldwide Holdings Corp., who oversaw the sale of the Property from Black Diamond to Greenwich (NYSCEF 146, 13:3-8).

Ravn oversaw the conversion of the Property from offices to rental apartments (NYSCEF 149, 20:4-6), but left Lend Lease prior to the project's completion (*id.* at 21:7-12). During his deposition, Ravn did not have a recollection of whether the loft ladders or lofts were installed during of the conversion (*id.* at 30:9-13). Ravn testified that the unsigned conceptual estimate for the budget "is not a contract" and "doesn't mean any of this happened" despite the estimate referencing "loft rails & ladders" (NYSCEF 163, 1 [a]; 29:20-30:8).

Gerstman testified during her deposition that she recalled hearing that Thor Equities, the parent entity of Greenwich, was converting the apartments into condominiums, which included constructing lofts (NYSCEF 146 (17:17-18:2). Gerstman further testified that there were no lofts during the time period when the building was rental units and she recalled discussions that lofts were being installed during the condominium conversion, but did not recall the identity of the party that made the statement (*id.* at 27:24-28:15).

The testimony from Ravn and Gerstman is insufficient to resolve the triable issues as to who is responsible for the design, construction, and installation of the loft ladder. Consequently, Black Diamond and Greenwich's motion for summary judgment dismissing Davis's Complaint and the related counterclaims and cross-claims against them should be denied.

Lastly, Davis does not assert any claims under the Labor Law statutes and concedes that those Sections are not applicable here, rendering those arguments by Black Diamond and Greenwich moot (NYSCEF 164, ¶ 18).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Firstservice Residential New York Inc. f/k/a Cooper Square Realty Inc. is granted and the amended complaint together with any cross-claims and counterclaim is dismissed as against Firstservice Residential New York Inc. f/k/a Cooper Square Realty Inc; and it is further

ORDERED that the motion for summary judgment by defendants Black Diamond LLC and 88 Greenwich Owner LLC is denied; and it is further

ORDERED that the third third-party complaint of Firstservice Residential New York Inc. f/k/a Cooper Square Realty Inc. against third third party defendants Mensch Mill & Lumber Corporation and Nastasi White West Company, LLC, together with any third third-party cross-claims or counterclaims is dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED:

MAY 17 2022

ENTER:

HON. JAMES E. d'AUGUSTE J.S.C.