

<b>Tolk v 11 W. 42 Realty Invs., L.L.C.</b>
2022 NY Slip Op 31858(U)
June 14, 2022
Supreme Court, New York County
Docket Number: Index No. 150752/2016
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

JEFFREY TOLK

INDEX NO. 150752/2016

- v -

MOT. DATE

11 WEST 42 REALTY INVESTORS, L.L.C. et al

MOT. SEQ. NO. 002

The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s). _____
Replying Affidavits	ECFS DOC No(s). _____

In this action based on alleged violations of labor laws and code regulations, plaintiff Jeffrey Tolk (Tolk) seeks recovery for personal injuries against defendants 11 West 42 Realty Investors, LLC (Realty), owner of the building located at 11 West 42<sup>nd</sup> Street, New York City (Building) and CJS Industries Inc. (CJS), the general contractor retained by Michael Kor, a tenant in the Building, for a construction project at its leased premises (Project). Both CJS and Realty commenced third-party actions against Architectural Flooring Resources, Inc. (AFR), a subcontractor of CJS on the Project. CJS also named Tishman Speyer (Tishman), the Building’s manager, as a third-party defendant in its third-party action against AFR. Thereafter, AFR started a third-party action against John Knopf Flooring, Inc. (JKF), the sub-subcontractor on the Project and the employer of Tolk.

By this motion (sequence number 002; NYSCEF Doc. No. 110), pursuant to CPLR § 3212, AFR seeks summary judgment (1) dismissing the third-party actions of CJS and Realty as against AFR, and (2) with respect to AFR’s contractual indemnity claim against JKF. JKF opposes AFR’s motion (JKF Opposition; NYSCEF Doc. No. 133). Realty, along with Tishman (collectively, Realty Defendants), also oppose AFR’s motion (Realty Opposition; NYSCEF Doc. No. 130). Issue has been joined and the motions have been timely brought before note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts are as follows. Michael Kor, a tenant of the Realty, retained CJS as the general contractor in connection with the Project, which consisted of “gutting and renovation of several of the upper floors” of Michael Kor’s leased premises in the Building (AFR Affirmation, ¶ 14). CJS retained AFR as the subcontractor to install the floorings in the tenant’s space and, in turn, AFR hired JKF, as the sub-subcontractor, to perform the actual flooring work (*id.*). Tishman, as the managing agent of the Building, has the responsibility of keeping the common areas of the Building clean, including the area where Tolk’s accident occurred (*id.*, ¶ 16). On May 14, 2015, the date of the accident, Tolk was an employee of JKF, and his work duties included the installation of flooring, carpeting and tiling in Michael Kor’s leased space (*id.*, ¶ 17).

Dated: 6.14.22

  
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HON. LYNN R. KOTLER, J.S.C.

1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

[\* 1]

AFR's witness, Oscar Rojas, testified that on the day of the accident, the building management required all construction workers performing work on the Project to enter the Building through its rear entrance (*id.*, ¶ 20, referencing Rojas deposition at 49; NYSCEF Doc. No. 122). This testimony was confirmed by Tolk, who testified that he and his co-workers entered the Building through the rear freight loading dock area (*id.*, referencing Tolk deposition at 23; NYSCEF Doc. No. 119). There was a desk near the rear entrance where all workers had to "check in" with security, and several feet away from the desk was a doorway that led to a metal staircase going to the sub-basement of the Building where they could take a freight elevator up to the construction site (*id.*, ¶ 21, referencing Tolk deposition at 35-46). Tolk slipped and fell on the staircase on his way down, and he later testified that there was wetness on the staircase, but did not see it prior to his fall (*id.*, ¶ 22, referencing Tolk deposition at 53-54). With the help of co-workers, Tolk walked to the sub-basement where he saw a building maintenance worker moving a 55-gallon container of liquid on wheels, with a hose dripping liquid, and the worker allegedly stated that he was sorry (*id.*, referencing Tolk deposition at 69). Tolk also testified that he only took directions from his JKF foreman and did not interact with CJS or AFR (*id.*, ¶ 17, referencing Tolk deposition at 29). Moreover, Rojas testified that he did not direct or control JKF's workers and that AFR did not monitor or maintain the staircase where Tolk's accident occurred (*id.*, ¶¶ 18-19, referencing Rojas deposition at 44 and 50).

On November 12, 2020, CJS moved for summary judgment seeking dismissal of all claims and cross claims against it (motion sequence no. 001), and the basis for the motion was that Tolk's accident "occurred in a common area of the Building that was not a part of the construction project" (*id.*, ¶ 11, referencing CJS pleadings; NYSCEF Doc. Nos. 67-81). In a decision dated June 11, 2021, this court granted summary judgment in favor of CJS, dismissing Tolk's complaint as against CJS, and the cross claim of the Realty Defendants for common law indemnity as against CJS (Prior Decision; NYSCEF Doc. No. 106). The relief sought by AFR in this motion is based upon, in large part, the findings and rulings in the Prior Decision (AFR Affirmation, ¶¶ 2, 23).

On January 11, 2022, the appellate court modified the Prior Decision with respect to a Labor Law claim in Tolk's complaint, reinstated such claim, and otherwise affirmed (*Tolk v 11 West 42 Realty Investors, LLC*, 201 AD3d 491 [1<sup>st</sup> Dept 2022]), as discussed in detail below. On May 6, 2022, Tolk filed a note of issue with a demand for trial by jury (NYSCEF Doc. No. 140).

### **Applicable Legal Standards**

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion should be denied if the movant fails this showing (*id.*). Where this showing is made, the burden shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action (*id.*).

In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]). The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Moreover, because granting summary judgment is the functional equivalent of a trial, it is a drastic remedy that should not be granted if there is doubt with respect to the existence of a disputed fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Where different conclusions may reasonably be drawn from the evidence, the motion should also be denied (*Jaffe v Davis*, 214 AD2d 330 [1<sup>st</sup> Dept 1995]). On the other hand, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

## Discussion

As a preliminary matter, AFR points out that Tolk has no direct cause of action against it, and since Tolk's claims against CJS have been dismissed by the Prior Decision, the third-party action of CJS against AFR "no longer exists" (AFR Affirmation, ¶ 24).<sup>1</sup> AFR also asserts that, in opposing CJS's summary judgment motion, Realty had a fair chance to participate and be heard, but this court held that "since the accident occurred in a portion of the building that was remote from, and unconnected to the construction site, Labor Law Section 241 (b) was not violated," and that "since the dangerous condition (wetness on the stairs) was not cause by CJS, Labor Law § 200/common law negligence was not violated" (*id.*, ¶ 26; paraphrasing the Prior Decision). Based on the findings and rulings in the Prior Decision, AFR argues that the third-party action of Realty against AFR "must be dismissed based upon *res judicata*" (*id.*, ¶ 25, citing *Brown v Christopher St. Owners Corp.*, 256 AD2d 78 [1<sup>st</sup> Dept 1998] [plaintiff's subsequent action under labor law section 202, which had not been addressed in the first action, was "properly dismissed based on *res judicata* grounds because the second action arose out of the same transaction"] [internal citations omitted]).

Opposing the motion, Realty points out, among other things, that AFR has not filed a Note of Issue; Michael Kors has not "appeared in this case;" and the Prior Decision was being appealed by Tolk, where the basis for his appeal was "whether the location of the accident was part of the construction site or not" (Realty Opposition at ¶ 3).

In the Prior Decision, this court rejected the Realty Defendants' argument that CJS's summary judgment motion was premature in that "Michael Kors has not appeared in the action" (Prior Decision at 2). This court also ruled in favor of CJS and found that the staircase where Tolk fell "does not constitute a passageway" within the meaning of Industrial Code Rule 23.17 (d) because "it was an open and common area and was remote for the work site," and thus Labor Law § 241 (b), which imposes a "non-delegable duty on all contractors and owners" in connection with a construction site, was not violated by CJS (*id.* at 3). The court further ruled that Labor Law § 200, which "codifies the common law duty of owners and contractors to provide construction workers with a reasonable safe to work," was not violated by CJS because it "met its burden by showing it did not cause or create the water condition on the or near the stairwell where plaintiff fell" (*id.* at 4). In addition, the court ruled that the Realty Defendants' common law indemnity claim against CJS failed because nothing in the record showed that CJS caused or created the wet condition on the stairs, nor did CJS have actual or constructive notice of the condition, and Tishman's own witness testified that Tishman was responsible for cleaning and maintaining the Building (*id.* at 5). On appeal, the First Department observed that because the staircase on which plaintiff fell was generally used by the construction workers to access the Building's basement, "the staircase was a passageway for Labor Law § 241 (6) purposes" (201 AD3d at 492 [citation omitted]). Therefore, with respect to the Prior Decision which dismissed the complaint against CJS, the First Department "modified, on the law, to reinstate plaintiff's Labor Law § 241 (6) claim to the extent it is predicated on violation of 12 NYCRR 23-1.7 (d), and otherwise affirmed" the other rulings of the Prior Decision (*id.*).

Accordingly, based on the First Department's decision, AFR's motion seeking summary judgment dismissing Realty's third-party action against AFR is granted only to the extent of dismissing the Labor Law § 200 and common-law negligence claims of Realty in such action.

As noted above, in this motion, AFR also seeks contractual indemnity as against the third third-party defendant JKF. JKF opposes the motion and argues that its subcontractor indemnity agreement with AFR has a "negligence trigger," and that there must be a finding that JKF was negligent before it is obligated to indemnify AFR (JKF Opposition at 9-10). JKF also argues that, based on the Prior Decision, there is "no evidence" that it was negligent and thus the indemnity agreement is "not enforceable"

<sup>1</sup> Apparently, because all claims and cross claims against CJS were dismissed by the Prior Decision, CJS did not respond to AFR's motion, which seemingly also seeks dismissal of CJS's third-party action. Because the time for CJS to oppose AFR's motion had long passed before the First Department issued its ruling modifying the Prior Decision, the instant decision does not prejudice CJS's right to prosecute its third-party claim against AFR, to the extent such claim is consistent with the rulings herein, as discussed below.

(*id.*). JFK further argues that any common law claim against it must also be dismissed because “it was the employer of the plaintiff, the plaintiff is receiving workers compensation benefits due to his employment,” and the plaintiff did not sustain a “Grave Injury” as defined by the Workers’ Compensation laws (*id.* at 10).

In the First Department’s decision, the staircase where Tolk slipped and fell was deemed a passageway, even though it was not an integral part of the Project’s construction site. In such regard, the issue of who shares the ultimate responsibility for maintaining the safety of the staircase-passageway has not been determined, and JFK’s unilateral assertion that it was not negligent is unpersuasive. It is also noteworthy that the parties in this action have engaged in protracted litigation over what is seemingly not a “Grave Injury” claim, and thus an amicable settlement and resolution of such claim by the parties so as to conserve the resources of this court is encouraged.

### Conclusion

Based on the foregoing, it is hereby

**ORDERED** that the summary judgment motion of Architectural Flooring Resources, Inc. (AFR) seeking dismissal of the second third-party action by 11 West 42 Realty Investors, LLC (Realty) is granted only to the extent of dismissing the Labor Law § 200 and common-law negligence claims of Realty in such action; and it is further

**ORDERED** that the summary judgment motion of AFR seeking contractual indemnity as against the third third-party defendant John Knopf Flooring, Inc. is denied without prejudice; and it is further


**ORDERED** that the right of CJD Industries, Inc. to prosecute its third-party claim against AFR is not prejudiced by this decision, to the extent such claim is consistent with the rulings herein.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

6/14/22  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.