SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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FRANCISCA PAGUADA RODRIGUEZ,

Plaintiff,

- v -

MILLER PLUMBING AND HEATING, INC. ,SIRINA FIRE PROTECTION CORP., HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,JGM CONSTRUCTION GROUP, LLC,ARAGON, LLC,

Defendant.

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HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,
Third-Party Plaintiff
-against-

INFINIUM WALL SYSTEMS, INC. d/b/a INFINIUM ARCHITECTURAL WALL SYSTEMS,

Third-Party Defendant

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INFINIUM WALL SYSTEMS, INC. d/b/a INFINIUM ARCHITECTURAL WALL SYSTEMS,

Second Third-Party Plaintiff
-against-

WALL INSTALL, LLC
Second Third-Party Defendant

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INDEX NO. 452253/2016

MOTION DATE 9/28/2022

MOTION SEQ. NO. 005 007

DECISION + ORDER ON MOTION

Third-Party
Index No. 595080/2019

The following e-filed documents, listed by NYSCEF document number (Motion 005) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 169, 175, 189, 200

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 184, 187, 188, 194, 195, 196, 197, 198, 201

were read on this motion to/for DISMISS.

PENDING MOTIONS

On February 15, 2022, Infinium Wall Systems, Inc. d/b/a Infinium Architectural Wall Systems (Infinity) moved for an order pursuant to CPLR § 3212(a) granting summary judgment dismissing the Third-Party Complaint of Hudson Meridian Construction Group, LLC, and all other claims and cross-claims asserted against it, or in the alternative, pursuant to CPLR §3211(a) and 3212(a) dismissing the Third-Party Complaint of Hudson Meridian Construction Group, LLC as time barred under CPLR §213(2).

On March 1, 2022, Hudson Meridian Construction Group, LLC (Hudson) moved for summary judgment dismissing the complaint as to it and all cross-claims.

On October 28, 2022, the court heard oral argument and reserved decision.

The motions are consolidated herein for disposition.

ALLEGED FACTS

Plaintiff alleges she was struck by a falling object, a metal door frame, on July 20, 2011 while she was working in the offices of Halstead Lending Real Estate on the 15th floor of the premises located at 499 Park Avenue, New York, NY (Subject Premises).

Plaintiff, an office cleaner employed by Anthony Marcogliese, testified that on the day of the accident, she was cleaning the interior part of a sliding glass door at the Subject Premises. As she bent down to clean, a metal part of the door with the hose of a vacuum cleaner, a piece of metal from the top part of the door fell on her neck.

In a contract with Halstead Property Company (Halstead), Infinium agreed to supply and install an architectural wall system composed of tempered glass partitions and aluminum frames at the Subject Premises. Infinium supplied the materials per the contract. The system's design

was a proprietary design prepared by Infinium. Infinium contracted with Wall Install, LLC, a sister company, to install the wall system. Wall Install, LLC installed the wall system. The installation was performed by union carpenters hired by Wall Install specifically for the job and supervised by two employees of Wall Install. Wall Install, LLC dissolved in 2012.

Hudson Meridian was the Construction Manager for an "interior fit-out" at 499 Park Avenue, on the 14th and 15th floors, pursuant to a contract with the building owner. With an "interior fit-out", the interior of the space is changed or altered. The structure is there. The client provides drawings for the changes. The "Construction Management Scope of Services" had Hudson Meridian involved with various aspects of the construction, including testing and inspection as well as coordination of the completion of a "punch list".

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary

judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Infinium Owed No Duty of Care to Plaintiff

It is undisputed that Infinium did not install the partitions that allegedly fell on plaintiff, nor did it own occupy or make any special use of the Subject Premises.

A party which has not performed any construction work or otherwise created a dangerous condition at an accident site owes no duty to a plaintiff injured at the site. *See Kenney v City of New York*, 30 A.D.3d 261, 262 [1st Dep't 2006], *citing Manson v. Consolidated Edison Co. of New York*, 220 A.D.2d 374 [1st Dep't 1995]).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property. *Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292 (1st Dept., 1988).

In this case, Infinium had no ownership interest in the subject property, was not on site on the date of the accident and did not create the condition at issue. Therefore, Infinium is not liable to the plaintiff or the third-party plaintiff for the alleged dangerous condition or the alleged accident.

Courts, rather than juries, must determine whether any duty exists. *See Espinal v Melville Snow Contractors, Inc*., 98 N.Y.2d 136 (2002); *Darby v Compagnie National Air France*, 96 N.Y.2d 343 (2001). Thus, the definition and scope of an alleged tortfeasor's duty to a plaintiff is a question of law, *Pink v Rome Youth Hockey Ass'n, Inc*., 28 N.Y.3d 994 (2016); *Pasternack v Laboratory Corp. of America Holdings*, 27 N.Y.3d 817 (2016); *Palka v Servicemaster Management Services Corp*., 83 N.Y.2d 579 (1994).

Mere inaction, without more, establishes only a cause of action for breach of contract. *Espinal v. Melville Snow Contractors, Inc*., 98 NY2d 136 [2002]; *Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp*., 76 NY2d 220, 226 (1990); *Bluestone v J. Tortorella Heating & Gas Specialists, Inc*., 122 A.D.3d 534, 535 [1st Dep't 2014].

Infinium denies that it breached its contract, and there is no evidence in the record that it did. However, even if Infinium was in breach of contract, a breach of contract will give rise to tort liability to third persons such as the plaintiff in only three (3) situations: (a) where the contracting party "launches a force or instrument of harm"; (b) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (c) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. *Espinal*, 98 N.Y.2d at 140.

Infinium did not install the partitions, and thus cannot be said to have launched a force or instrument of harm. Infinium did not assume any continuing obligations to the owner or occupants of the building, and there is no evidence that the plaintiff relied on any continuing performance by Infinium, so detrimental reliance as in *Moch Co. v. Rensselaer Water Co*., 247 NY 160, 167 [1928] is not an issue in this case.

Infinium did not displace any other party's duty to maintain the premises safely, as in *Palka v Servicemaster Mgt. Services Corp*., 83 NY2d 579, 582 [1994]. Infinium supplied materials to construct office partitions and arranged to have them installed. Other parties were responsible for maintaining the premises while it was under renovation.

Infinium has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not owe a duty of care to plaintiff, nor did it launch an instrument of harm.

Hudson Meridian's only argument in opposition to Infinium's motion for summary judgment argues that there is no evidence establishing that the installation by Wall Install was completed on the date of the accident. However, that date is not material to Hudson Meridian's claim against Infinium, and there is evidentiary support for Infinium's position. The plaintiff testified that there was no ongoing construction on the 15th floor on the date of her accident, and no witness has placed anyone from Infinium or Wall Install at the Subject Premises on the date of the accident. Hudson Meridian did not submit any evidence to raise an issue of material fact in opposition to Infinium's motion or respond to its Statement of Material Facts.

Accordingly, Infinium has no liability to the plaintiff or to the third-party plaintiff and is entitled to summary judgment dismissing the Third-Party Complaint filed by Hudson Meridian Construction Group, LLC.

Based on the foregoing the court need not reach Infinium's argument that it is entitled to dismissal based on a statute of limitations defense. However, were the court to reach that issue it would deny Infinium's motion based on the expiration of the statute of limitations because the underlying claim in this litigation has yet to be adjudicated or settled, and therefore, the

limitations period applicable to Hudson Meridian's third-party claim for indemnification has not begun to run. *See McDermott v. City of New York*, 50 NY2d 211, 217 (1980).

Hudson Meridian's Motion for Summary Judgment is Granted

Similar to the arguments raised by Infinium, Hudson Meridian argues that it owed no duty to plaintiff [*Green v. State*, 222 AD2d 553, 554 (2d Dept 1995)], that it could not have caused or created the condition complained of and therefore it is entitled to summary judgment [*Maloney v Consolidated Edison Co. of NY*, 290 AD2d 540, 541 (2d Dept 2002)].

Hudson Meridian further argues that there are no facts alleged to support a cause of action for public or private nuisance.

In opposition plaintiff argues that the agreement under which Hudson Meridian operated as Construction Manager required Hudson Meridian to act on behalf of the owner during the construction project including having Hudson Meridian coordinate the completion of a "punch list". Plaintiff further argues that by the agreement's plain meaning, Hudson Meridian could step in, stop activities if they were dangerous or would subject others to harm on site.

However, Hudson Meridian correctly counters that even assuming, that Hudson Meridian was an agent for the building owner, where the accident is the result of a dangerous or defective condition at the work site, it must be shown that defendant either caused the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice.

Evidence of notice of a hazard must be specific in order to create an issue of fact; general awareness of the danger of a particular condition is legally insufficient to constitute constructive notice (*Piacquadio v Recine Realty Corp*., 84 NY2d 967, 969[1994]), as is vague testimony that

does not establish the length of time an allegedly hazardous condition existed before the subject accident (*Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2d Dept 2006]).

Moreover, the First Department has held that to be held liable under common-law negligence where the alleged defect or dangerous condition arises from the contractor's methods, a construction manager must be found to have exercised supervision or control over the injury-producing work [*Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 236 (1st Dept 2007)]. However, "[t]he general duty to supervise the work and ensure compliance with safety regulations does not constitute such control of the work site as would render the supervisory entity liable for the negligence for the contractor who performs the day-to-day operations." *Id.* " … (M)onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200 (a theory of common law negligence) (*see Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210-211 [1998])." *Dalanna v. City of New York*, 308 A.D.2d 400 (2003).

Hudson Meridian is entitled to summary judgment dismissing plaintiff's common-law negligence claims. Hudson Meridian owed no duty to plaintiff. Defendant made out a *prima facie* case that it did not cause the dangerous condition, and the record is devoid of any evidence that it had actual or constructive notice of the alleged dangerous or defective condition.

WHEREFORE it is hereby:

ORDERED that the motions for summary judgment of defendants Infinium Wall Systems, Inc. d/b/a Infinium Architectural Wall Systems and Hudson Meridian Construction Group, LLC, are granted and the complaint is dismissed against them; and it is further

ORDERED that the cross-claims against said defendants are dismissed; and it is further

ORDERED that 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

Infinium Wall Systems, Inc. d/b/a Infinium Architectural Wall Systems and Hudson Meridian Construction Group, LLC 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.

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9/29/2022
DATE

SABRINA KRAUS, J.S.C.

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