Ansbro v Brookfield Real Props., LLC

2023 NY Slip Op 30663(U)

March 6, 2023

Supreme Court, New York County

Docket Number: Index No. 153511/2019

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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ELIZABETH ANSBRO,

Plaintiff,

- v -

BROOKFIELD REAL PROPERTIES, LLC, CLUNE CONSTRUCTION COMPANY, L.P., S&J ENTRANCE & WINDOW SPECIALIST, INC., BROOKFIELD ASSET MANAGEMENT LLC, BROOKFIELD PROPERTY GROUP LLC, and 666 FIFTH ASSOCIATES LLC,

Defendants.

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INDEX NO. 153511/2019

MOTION DATE 10/07/2022, 10/14/2022, 10/07/2022

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

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BSREP III NERO LLC (incorrectly sued in the main Action as "BROOKFIELD REAL PROPERTIES, LLC"), BROOKFIELD ASSET MANAGEMENT, LLC and BROOKFIELD PROPERTY GROUP LLC,

Third-Party Plaintiffs,

-against-

SCHIFF HARDIN LLP,

Third-Party Defendant.

Third-Party
Index No. 595769/2020

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666 FIFTH ASSOCIATES LLC, BSREP III NERO LLC (incorrectly sued in the main Action as "BROOKFIELD REAL PROPERTIES, LLC"),

Second Third-Party Plaintiffs,

-against-

MADISON SERVICE CORPORATION,

Second Third-Party Defendant.

Second Third-Party
Index No. 595722/2021

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666 FIFTH ASSOCIATES LLC and BSREP III NERO LLC (incorrectly sued in the main Action as "BROOKFIELD REAL PROPERTIES, LLC"),

Third Third-Party
Index No. 595982/2022

Third Third-Party Plaintiffs,

-against-

SY-BEE CONTRACTING CO. INC.

Third Third-Party Defendant.
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 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, 159, 160, 161, 162, 163, 246, 247, 248, 249, 250, 251, 252, 253, 271, 274, 275, 276, 277, 278, 287, 288

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 279, 280, 281, 282, 283, 284, 285, 286

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

Motion sequence nos. 003, 004 and 005 are consolidated for disposition.

This personal injury action arises out of an incident that occurred on September 24, 2018, when a metal armature plate detached from an electromagnetic door locking system and fell, striking plaintiff Elizabeth Ansbro.

In motion sequence no. 003, defendant/second third-party/third-third party plaintiff 666 Fifth Associates LLC (Fifth) and defendant/third-party/second-third-party/third third-party plaintiff BSREP III Nero LLC (BSREP), incorrectly sued in the main action as Brookfield Real Properties, LLC, move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them and for conditional summary judgment on their cross

claims for contribution and indemnity against defendants Clune Construction Company, L.P. (Clune) and S&J Entrance & Window Specialist, Inc. (S&J). Clune opposes the motion.

In motion sequence no. 004, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on liability on her Labor Law § 200 and common-law negligence claim against Clune and S&J and for an order directing an assessment of damages. Clune and S&J oppose the motion.

In motion sequence no. 005, Clune moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against it and for conditional summary judgment on its cross claims for contribution and indemnity against S&J. Plaintiff, Fifth, BSREP and S&J oppose the motion, and S&J cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Plaintiff, Fifth and BSREP oppose and Clune partially opposes the cross motion.

Background Information and Procedural History

The following facts are taken from the parties' statements and counterstatements of material facts and are undisputed unless otherwise noted.

Fifth owns the building and land located at 666 Fifth Avenue, New York, New York. Nonparty Vornado Realty Trust (Vornado) served as Fifth's property manager for the building from June 1, 2018 to August 2, 2018.

Pursuant to a written lease dated October 26, 2010, Fifth, as landlord, leased the entire sixteenth and seventeenth floors and certain below grade space (premises) in the building to third-party defendant Schiff Hardin LLP (Schiff), as tenant, for a 10-year term (the Schiff Lease). Plaintiff was employed by Schiff as an office service coordinator.

In August 2018, BSREP leased the building from Fifth and succeeded to Fifth's interests, including the duties, rights and obligations set forth in the Schiff Lease and first amendment of the lease dated December 31, 2013 (NY St Cts Elec Filing [NYSCEF] Doc No. 26, third-party complaint, ¶¶ 15-16). Nonparty Brookfield Properties (USA 2 LLC) (Brookfield) has served as the building's property manager since August 3, 2018. Second third-party defendant Madison Service Corporation (Madison) maintained the building's Class E fire alarm system and assisted tenants with the fire alarm systems in their leased spaces (NYSCEF Doc No. 109, Joseph Varvaro [Varvaro] affirmation, exhibit M, Ralph Rose [Rose] tr at 78; NYSCEF Doc No. 113, Varvaro affirmation, exhibit Q, Tristan Chambers tr at 20).

In February 2018, Schiff hired Clune to remove and replace two existing glass wall panels and one glass-paneled wood door in the elevator lobby on the seventeenth floor. Clune retained S&J under a written subcontract dated May 3, 2018 (the S&J Subcontract) whereby S&J would provide "all labor, material, equipment and supervision necessary to complete the Glass work" at the premises (NYSCEF Doc No. 187, Janine Mastellone [Mastellone] affirmation, exhibit S). S&J proposal no. 23647 contained additional details and specified that S&J would supply and install back-painted glass panels and a tempered all-glass door (NYSCEF Doc No. 116, Varvaro affirmation, exhibit T).

The wood door was located across from the main entrance to Schiff's office space on the seventeenth floor (NYSCEF Doc No. 108, Varvaro affirmation, exhibit L, plaintiff tr at 66). The door was equipped with a surface-mounted magnetic door lock system. The magnetic portion of the lock was secured to the top of the door frame. A plastic case or sleeve housed a metal armature plate; both were secured with bolts to the top of the door – two for the case and one for the plate. When the door was in a closed position, the magnetic lock on the door frame and the

metal plate on the door "go together and keep the … door … closed" (NYSCEF Doc No. 110, Varvaro affirmation, exhibit N, John Tozour [Tozour] tr at 32).

Foam sat between the case and the plate to mask the sound of metal striking plastic when the plate and the magnet came into contact (NYSCEF Doc No. 111 at 53-55 and 86). Eric Blinder, S&J's project manager, explained that a "swivel bolt" held the plate to the case and allowed the plate to "teeter" when it came into contact with the magnetic lock for a better connection (*id.* at 53-55). To gain access to Schiff's space from the elevator lobby, one had to touch a card to a card reader affixed to a glass panel next to the door to disengage the lock. To exit Schiff's space, one had to press a button affixed to the wall next to the door to disengage the lock (NYSCEF Doc No. 108 at 83).

S&J completed the work in June 2018 (NYSCEF Doc No. 111 at 34-35). Before the panels could be removed, Madison disconnected a speaker strobe affixed to one of the panels from the building's fire alarm system (NYSCEF Doc No. 110 at 80; NYSCEF Doc No. 113 at 26-27). Schiff's security vendor disconnected and removed the card reader (NYSCEF Doc No. 213, Varvaro affirmation, exhibit Z, James Kinney [Kinney] tr at 21-22). The speaker strobe and card reader were reattached and reconnected after the new panels were installed.

The existing magnetic locking system was reused and installed on the new door. Blinder testified that he was not aware of who manufactured the lock or when it was first installed on the wood door, and he told Clune the lock could be reused if there were no prior issues with it (*id.* at 24 and 41). S&J employees removed the case and plate from the wood door, attached them to a steel-clad aluminum rail on the glass door with the same threaded bolts, and installed the case and plate in the same position they had been installed previously (NYSCEF Doc No. 111 at 36-38, 40 and 63-64). Regarding the installation, Blinder stated, "we drill the hole, then we take a

machine thread cap and cap the hole, and then the bolt threads into same hole" (*id.* at 71). Blinder testified that S&J did not inspect the bolts before reusing them, but "[t]hey looked fine" (*id.* at 39). There were no changes made to the door frame itself, and the magnet attached to the door frame was not moved (NYSCEF Doc No. 110 at 37 and 39).

Plaintiff testified that the new door was installed on a Saturday in June, and the following Monday, she noticed the door wobbled and made a "wah-wah-wah-wah-wah" noise when she opened it (NYSCEF Doc No. 108 at 112 and 115), seemingly from the top of the door (*id.* at 305). The same day, Plaintiff told Kinney, Clune's project manager, about the noise (*id.* at 268), and he replied that the door would not make the noise if she waited an extra second after she used her access card or pushed the release button (*id.* at 270). Apart from this initial complaint, plaintiff made no other complaints about the door to anyone at Clune (*id.* at 117 and 124), but she did complain to her supervisor at Schiff, who told her it was "okay" (*id.* at 115-116). Plaintiff also complained about the noise to another Schiff employee, but was not aware if anything was done about it (*id.* at 309-310), and she never complained about the door to anyone at BSREP, Brookfield or S&J (*id.* at 121-122). The door continued to make the same noise almost every time she opened it (*id.* at 114).

The accident occurred shortly after plaintiff arrived for work on September 24, 2018. Plaintiff testified that she touched her card to the reader next to the door and pulled the door open. Upon opening it, she heard a "wah-wah-wah-wah" sound, and thought the door was going to fall (NYSCEF Doc No. 108 at 73). Approximately 20 minutes later, plaintiff left her office and walked to the elevator lobby. She pressed the button to open the door with her left hand and pushed the door open with her right (*id.* at 84). As she pushed on the door, the metal plate fell and struck her head (*id.*). Plaintiff testified the plate weighed about five pounds and measured

two inches wide by six to eight inches long (*id.* at 89). She was unaware of any prior incidents involving the magnetic locking system (*id.* at 266).

Kinney testified that he was not familiar with magnetic locking systems and did not inspect the glass door after it was installed (NYSCEF Doc No. 213 at 19 and 25). He could not recall receiving any complaints about the door from plaintiff, her supervisor, Vornado or anyone at the building before the accident (*id.* at 70-73).

Clune's vice president testified that he was unaware of any post-installation issues with the door (NYSCEF Doc No. 110 at 57 and 86).

Blinder testified that he believed the plate fell because someone had touched it (*id.* at 81). In his experience, the security vendor may have touched the plate when it reconnected the electrical wiring to the lock, or someone may have adjusted the bolt fastening the plate to the door (*id.* at 81-82). Blinder was not aware of any post-installation complaints about the door (*id.* at 78-79).

Vornado's acting property manager at the building states in an affidavit that she could not recall receiving a complaint about the door from anyone at Schiff before Vornado ceased acting as the building's property manager (NYSCEF Doc No. 114, Varvaro affirmation, exhibit R, Villafane aff, ¶¶ 3-4).

The building's new senior property manager as of August 3, 2018, testified that he was unaware of any requests to service the lock before the accident or of any prior incidents where someone was struck by a lock component (*id.* at 52 and 71).

Plaintiff commenced this action sounding in negligence against BSREP, incorrectly sued herein as Brookfield Real Properties, LLC, Clune and S&J by filing a summons and complaint (NYSCEF Doc No. 1). Plaintiff subsequently filed a supplemental summons and amended

complaint adding Brookfield Asset Management LLC, Brookfield Property Group LLC (together, Brookfield) and Fifth as defendants (NYSCEF Doc Nos. 2-3). She alleges that defendants were negligent in the ownership, operation and maintenance of the premises, that Clune and S&J violated New York Labor Law § 200, and that res ipsa loquitur applies to her accident (NYSCEF Doc No. 106).

Fifth, BSREP, Brookfield, Clune and S&J served answers asserting cross claims against each other (NYSCEF Doc Nos. 8, 10, 15 and 16). BSREP and Brookfield commenced a third-party action against Schiff for contractual indemnification (NYSCEF Doc No. 26), which Schiff answered (NYSCEF Doc No. 36). The claims and cross claims against Brookfield Real Properties, LLC, Brookfield and Madison have been discontinued (NYSCEF Doc Nos. 4, 39 and 86).

Discussion

A party moving for summary judgment under CPLR 3212 "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.*).

Motion Sequence No. 003

Fifth and BSREP argue that, as out-of-possession landlords, they did not have a duty to maintain the premises and did not create or have actual or constructive notice of a dangerous condition. They seek conditional summary judgment on their cross claims for contribution and common-law indemnification against Clune and S&J.

In opposition, Clune contends that Fifth and BSREP did not relinquish control over the premises because the Schiff Lease allowed them to perform "Restorative Work." Clune also asserts that it did not create an unsafe condition, is not in contractual privity with them, and is not liable for the actions of S&J, an independent contractor. Plaintiff has not opposed the motion.

It is well settled that an out-of-possession landlord is not liable for a dangerous condition in a leased premises " 'unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision' " (*De Paz v 4221 Broadway Owner LLC*, — AD3d —, 2023 NY Slip Op 00947, *1 [1st Dept 2023] [citation omitted]). Fifth and BSREP have met their prima facie burden through the submission of the Schiff Lease, which establishes that both are out-of-possession landlords with a limited right of reentry (*id.*).

The pertinent portions of the Schiff lease provide that Fifth and BSREP were responsible for making necessary structural and nonstructural repairs to building systems and common areas, while Schiff is responsible for making non-stuctural repairs to the premises. Fifth and BSREP also retained the right to enter the premises to perform Restorative Work to the premises, which is partially defined as "repairs or replacements to the Building and Building Systems, including

changing the arrangement or location of … doors and doorways … as are not located in the Premises or other Common Areas" (NYSCEF 107).

Maintenance and repair of an electromagnetic door locking system is not a structural issue (*see Richer v JQ II Assoc., LLC*, 166 AD3d 692, 694 [2d Dept 2018] [defect in magnetic door lock not structural repair]; *Angwin v SRF Partnership*, 285 AD2d 570, 571 [2d Dept 2001] [improperly secured magnetic door lock not significant structural defect]). Therefore, the Schiff lease provisions establish that neither Fifth nor BSREP was contractually obligated to perform nonstructural repairs at the Premises, including repairing the magnetic locking system, and that their right to enter and perform Restorative work is not relevant here as such work would not encompass the door at issue. Moreover, Fifth and BSREP demonstrate that they did not create or have actual or constructive notice of a dangerous condition related to the door.

Clune thus fails to raise a triable issue of fact as to whether Fifth and BSREP had a duty here which they violated. Plaintiff's failure to oppose the motion is deemed an abandonment of her claims against Fifth and BSREP (*see Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 [1st Dept 2012]). Accordingly, the motion of Fifth and BSREP for summary judgment dismissing the complaint is granted, and the cross claims asserted against them are also dismissed (*see Digirolomo v 160 Madison Ave LLC*, 194 AD3d 640, 641 [1st Dept 2021]). In light of the dismissal of the complaint against Fifth and BSREP, their motion seeking conditional summary judgment on their cross claims against Clune and S&J is denied as moot.

Motion Sequence Nos. 004 and 005

Plaintiff moves for summary judgment on her Labor Law § 200 and common-law negligence claims against Clune and S&J. She alleges that Clune and S&J failed to exercise reasonable care in performing their contractual duties and launched a force or instrument of harm

by failing to secure the components of the magnetic locking system, relying in part on an affidavit from Michael Panish, a contractor licensed in the State of California who is familiar with door lock and security equipment. (NYSCEF Doc No. 130, Varvaro affirmation, exhibit A, Panish aff, ¶¶ 3 and 5). Plaintiff maintains that Clune is vicariously liable for S&J's negligence because the work involved an inherent danger and Clune had assumed a nondelegable duty, and, moreover, that Clune is primarily liable because it controlled the worksite and had constructive notice of the condition. She also argues that summary judgment is warranted on her res ipsa loquitur claim.

Clune argues that it was not in contractual privity with plaintiff, did not owe her a duty of care, and did not create or have constructive notice of a dangerous condition related to the door. It also denies that it supervised S&J's work on the door or that the "inherently dangerous" exception to the rule against holding a principal vicariously liable for an independent contractor's negligence is applicable. Nor are Labor Law § 200 or res ipsa loquitur applicable. Clune also seeks conditional summary judgment on its cross claims for contribution and indemnity against S&J.

S&J cross-moves for summary judgment dismissing the complaint on the ground that it was not in contractual privity with plaintiff and did not owe her a duty of care.

Plaintiff, Fifth and BSREP argue that S&J should be estopped from denying that it performed the actual installation work because S&J belatedly identified Sy-Bee Contracting Co., Inc. as its subcontractor.

A. Labor Law § 200

As plaintiff was not an employee as defined by Labor Law § 2(5), she has no standing to assert a Labor Law § 200 claim (*Sakthivel v Industrious Staffing Co., LLC*, — AD3d —, 2023

NY Slip Op 00044, *1 [1st Dept 2023] [staff accountant not employee under Labor Law § 200]; *Sowa v S.J.N.H. Realty Corp.*, 21 AD3d 893, 895 [2d Dept 2005] [hairdresser struck by a window not employee under Labor Law "because she was not hired to perform the task that caused her injury"]; *Tobias v DiFazio Elec., Inc.*, 288 AD2d 209, 209 [2d Dept 2001] [chef not employed for purposes of Labor Law]). Accordingly, plaintiff's motion for summary judgment on her Labor Law § 200 claim is denied.

B. Res Ipsa Loquitur

A claim of res ipsa loquitur "permits the inference of negligence to be drawn from the circumstance of the occurrence" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). A res ipsa loquitur claim is established on a showing that "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*id.* [internal quotation marks and citation omitted]). It is rare for a court to grant a plaintiff summary judgment based on a res ipsa loquitur theory, 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]).

Here, plaintiff satisfies the first and third elements, as a component of a magnetic locking system generally does not fall in the absence of negligence (*see e.g. Pavon v Rudin*, 254 AD2d 143, 145 [1st Dept 1998] ["[d]oors mounted on pivot hinges do not generally fall in the absence of negligence"]), and her opening of the door immediately before the accident is insufficient to establish that the plate fell through her voluntary action or contribution (*id.*).

However, plaintiff fails to demonstrate, prima facie, that defendants had exclusive control of the door. Although plaintiff is not required to show that Clune or S&J had sole physical access to the door (*see Jeanty v New York City Hous. Auth.*, 176 AD3d 502, 502 [1st Dept 2019]), it is undisputed that Schiff retained control of the premises in the three months between the lock's installation and the accident and employed its own security vendor who was responsible for wiring and connecting the lock, and its employees regularly used the door (*see Nikollbibaj v City of New York*, 106 AD3d 789, 790 [2d Dept 2013] [refusing to set aside jury verdict where "a rational person could have concluded that the door and frame from which the magnetic lock had fallen were accessible to and used by numerous persons and, hence, were not instrumentalities within the exclusive control of any of the defendants"]; *Angwin v SRF Partnership, LP*, 28 AD3d 593, 594 [2d Dept 2006] [contractor who installed magnetic door lock which fell and struck the plaintiff was not in exclusive control of premises]). Thus, plaintiff's motion for judgment on her res ipsa loquitur claim is denied.

C. Common-law Negligence

To prevail on a claim for negligence, the plaintiff must establish the existence of a duty owed from the defendant to the plaintiff, the defendant's breach of that duty, and an injury proximately caused by the defendant's breach (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]). As there can be no liability in the absence of a duty (*id.*), the existence and scope of a duty is a question of law for the court to decide (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]).

1. Vicariously Liability

A principal who hires an independent contractor is not vicariously liable for the independent contractor's negligent acts because the principal has no right to control the manner

in which the work is done (*Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]). Here, Clune has demonstrated that it did not perform the work at issue, and did not supervise or control S&J's performance of the work (*see Calandrino v Town of Babylon*, 95 AD3d 1054, 1055 [2d Dept 2012] [no evidence that the general contractor had installed subject pipe or supervised its subcontractor who did]). The mere presence of Clune personnel at the premises is insufficient to establish actual or constructive control over S&J (*see Farnsworth v Brookside Constr. Co., Inc.*, 31 AD3d 1149, 1150 [4th Dept 2006], *lv denied* 7 NY3d 713 [2006]; *Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002]).

In opposition, plaintiff contends that exceptions to the rule apply, to wit, "'where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty'" (*Leeds v D.B.D. Servs.*, 309 AD2d 666, 667 [1st Dept 2003], quoting *Tytell v Battery Beer Distrib.*, 202 AD2d 226, 226-227 [1st Dept 1994]).

The inherently dangerous activity exception "applies when it appears both that 'the work involves a risk of harm inherent in the nature of the work itself [and] that the employer recognizes, or should recognize, that risk in advance of the contract'" (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 381 [1995] [citation omitted]). It does not apply when the accident results from "more or less usual negligence" (*Raben v Conde Nast Publs.*, 2 AD3d 117, 118 [1st Dept 2003] [internal quotation marks and citation omitted]).

Here, plaintiff does not establish that the risk of harm arose from a danger inherent in installing the magnetic locking system, instead of from ordinary negligence (*see Saini*, 299 AD2d at 245 [installation of temporary boiler]; *Goodman v 78 West 47th St. Corp.*, 253 AD2d 384, 387 [1st Dept 1998] [removal of air conditioning system]). Consequently, plaintiff has not demonstrated that the accident was caused by inherently dangerous work.

The nondelegable duty exception "has been defined as one that 'requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted'" (*Kleeman*, 81 NY2d at 274 [citation omitted]). This exception applies:

> "where the employer (1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer"

(*Rosenberg v Equitable Life Assur. Socy.*, 79 NY2d 663, 668 [1992]).

Plaintiff has not identified a nondelegable duty imposed upon Clune by statute or contract, or that it had a duty to keep the premises in a reasonably safe condition (*see e.g. Stanton v Oceanside Union Free Sch. Dist.*, 140 AD3d 731, 734 [2d Dept 2016], *lv denied* 28 NY3d 913 [2017] [licensee did not have duty to keep school athletic field in reasonably safe condition during soccer festival]). Nor has plaintiff shown that the work involved a special danger inherent therein. Thus, she fails to establish that the nondelegable duty exception applies.

2. Primary Liability under *Espinal*

In *Espinal* (98 NY2d at 140 [citations omitted]), it was held that a contractor may be held liable in tort to a third party with whom it is not in contractual privity:

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

Plaintiff focuses solely on the first *Espinal* exception, which applies where the contractor "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable

risk of harm to others, or increases that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *DeGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019], *lv denied, lv dismissed* 35 NY3d 963 [2020] [stating that the "exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition"]).

Plaintiff maintains that Clune and S&J failed to exercise reasonable care in the performance of their contractual duties and created a dangerous condition when they secured the plate to the door without using Loctite, a thread locking agent. Her expert states that it is generally accepted industry practice to use Loctite to glue the threads of a bolt to a tapped hole, and that hardware manufacturers often provide pre-coated bolts or a thread lock liquid with their products (NYSCEF Doc No. 130, ¶¶ 13 and 22). The expert opines that the initial installation of the magnetic locking system fell below the standard of care that an installer should have taken to ensure that none of the components could loosen and fall (*id.*, ¶ 20), and that the installer should have applied a thread locking agent to the three pre-drilled holes in the case (*id.*, ¶¶ 23-25).

However, the expert's affidavit lacks probative value. While he states that use of a thread locking agent is an accepted industry standard, he fails to "offer concrete proof of the existence of the relied-upon standard as of the relevant time, such as 'a published industry or professional standard or … evidence that such a practice had been generally accepted in the relevant industry' at the relevant time" (*Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009] [citation omitted]). While he also opines that S&J failed to inform Clune or Schiff of the need to routinely service and inspect the locking system's hardware based, in part, on how often the door was used (NYSCEF Doc No. 130, ¶¶ 34-36), he does not cite a specific

industry standard or practice in support (*Griffith v ETH NEP, L.P.*, 140 AD3d 451, 452 [1st Dept 2016]).

Moreover, the expert's opinion lacks an evidentiary basis (*see Min Zhong*, 208 AD3d at 443 ["[o]pinion evidence must be based on facts in the record"]), as three witnesses testified that Schiff retained its own security vendor to attend to the lock, and the expert did not address testimony that the plate was mounted on a swivel bolt and did not explain whether using Loctite would affect how the plate moved when it connected with the magnetic lock. Other than the expert's affidavit, plaintiff has not offered any other proof to show that the locking system was negligently or improperly installed (*compare Jean-Francois v Port Auth. of N.Y. & N.J.*, 137 AD3d 450, 450 [1st Dept 2016] [contractor's testimony, expert affidavit and installation manual sufficient to satisfy plaintiff's prima facie burden]). Thus, plaintiff's motion for summary judgment against Clune and S&J based on the first *Espinal* exception is denied.

On its motion, Clune has shown that it did not launch an instrument of harm as it did not install the locking system (*see Butnik v Luna Park Hous. Corp.*, 200 AD3d 993, 995 [2d Dept 2021] [general contractor did not launch instrument of harm because subcontractor performed work at issue]; *Kenny v Turner Constr. Co.*, 155 AD3d 479, 480 [1st Dept 2017], *lv dismissed* 31 NY3d 1112 [2018] [general contractor who did not perform defective work did not owe plaintiff duty of care]). Thus, Clune is entitled to summary judgment on the ground that it did not owe plaintiff a duty of care based on the first *Espinal* exception.

On S&J's cross motion for summary judgment, however, it has not dispelled all questions of material fact, as its contention that it subcontracted the installation work to Sy-Bee is not supported by any documentary evidence. S&J relies solely upon Blinder's testimony, which is inconclusive as he first testified that three S&J employees were involved in the installation work

at issue (NYSCEF Doc No. 111 at 34-36), but then later clarified that the three workers were "technically" Sy-Bee employees (*id*. at 75). This testimony, standing alone, is insufficient.

Nor has S&J established that it did not owe plaintiff a duty of care by launching an instrument of harm, as it does not demonstrate, *prima facie*, that the dangerous condition was not created when the locking system was installed (*see Lopez v New York Life Ins. Co*., 90 AD3d 446, 448 [1st Dept 2011] ["because defendant[ ] failed to explain how this undisputed hazardous condition occurred, the burden of the moving defendant cannot be satisfied by relying solely on the limited duty owed by a contractor"] [emphasis removed]; *Grant v Caprice Mgt. Corp*., 43 AD3d 708, 709[1st Dept 2007] [issue of fact whether the contractor negligently installed a window that fell out of its track]). S&J did not inspect the bolts before reusing them and offers only speculation that Schiff's security vendor adjusted the armature plate after the glass door was installed.

Accordingly, it is

ORDERED that the motion of defendant/second third-party/third-third party plaintiff 666 Fifth Associates LLC and defendant/third-party/second third-party/third third-party plaintiff BSREP III Nero LLC, incorrectly sued in the main action as Brookfield Real Properties, LLC, for summary judgment dismissing the complaint and all cross claims against them (motion sequence no. 003) is granted, and the complaint and all cross claims against them are severed and dismissed, and the balance of the motion is otherwise denied; and it is further

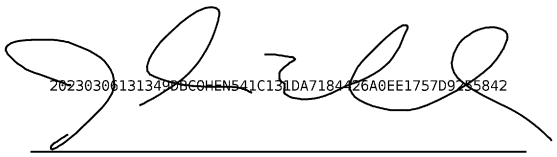
ORDERED that the motion of plaintiff for partial summary judgment on liability on her Labor Law § 200 and common-law negligence claim against defendants Clune Construction Company, L.P. and S&J Entrance & Window Specialist, Inc. and for an order directing an assessment of damages (motion sequence no. 004) is denied; and it is further

ORDERED that the motion of defendant Clune Construction Company, L.P. for summary judgment dismissing the complaint and all cross claims against it (motion sequence no. 005) is granted, and the complaint and all cross claims against it are severed and dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that the cross motion of defendant S&J Entrance & Window Specialist, Inc. for summary judgment dismissing the complaint and all cross claims against it (motion sequence no. 005) is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant/third-third party plaintiff 666 Fifth Associates LLC, defendant/third-party plaintiff/third third-party plaintiff BSREP III Nero LLC, incorrectly sued in the main action as Brookfield Real Properties, LLC, and defendant Clune Construction Company, L.P., 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 remaining parties appear in Part 58 for a settlement/trial scheduling conference on March 29, 2023 at 12:00 noon.



3/6/2023
DATE

DAVID B. COHEN, J.S.C.

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