At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of April, 2023.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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MOHAMED SHERIF SULTAN,

Plaintiff,

- against-

Index No. 524472/2017

6810 WAI INC., BAI' DAR CAFÉ, INC., THREE STAR GENERAL CONSTRUCTION, INC., THREE STAR CONSTRUCTION, CO., ASIF ALI, 3 STAR CONSTRUCTION & WATERPROOFING CORP. and BAI' DAR CAFÉ, INC.,

DECISION AND ORDER

MOTION SEQ. #07

Defendants.

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6810 WAI INC.,

Third-Party Plaintiff,

- against-

3 STAR CONSTRUCTION CO., and ASIF ALI, Individually,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	139-155
Opposing Affidavits (Affirmations)	157-160
Reply Affidavits (Affirmations)	162

Upon the foregoing papers in this personal injury action, defendant/third-party

plaintiff 6810 Wai, Inc. ("6810") moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint of plaintiff Mohamed Sherif Sultan (Mot. Seq. 7).

Factual Background

On October 16, 2016, plaintiff allegedly suffered injuries while he was on a sidewalk, near the entrance of a ground floor commercial business located at 6810 3rd Avenue, Brooklyn, NY ("premises") operated by defendant Bai' Dar Café, Inc. Defendants/third-party defendants Three Star General Construction Inc., Three Star Construction, Co., 3 Star Construction & Waterproofing Corp., 3 Star Construction Co. ("3 Star") are all related entities, and their alleged principal, Asif Ali ("Ali"), was hired by 6810, the owner of the premises, to repair the façade of the building. Plaintiff a pedestrian, while on the sidewalk adjacent to the premises, was struck by a bucket that had fallen from the roof of the building while construction was ongoing, resulting in various injuries.

Procedural History

On or about December 20, 2017, plaintiff commenced this action by filing a summons and complaint against 6810, Bai' Dar Café, Inc., and Three Star General Construction, Inc., asserting a common-law negligence claim. 6810 joined issue on or about April 10, 2018. On or about June 22, 2018, 6810 filed a third-party summons and complaint naming 3 Star Construction Co. and Mr. Ali as third-party defendants. On or about August 23, 2018, plaintiff served an Amended Complaint, naming Three Star

Construction, Co., and Mr. Ali, as additional defendants. 6810 served an answer to the Amended Complaint on September 4, 2018, denying all substantive allegations, and asserting cross-claims against the newly added defendants. Three Star General Construction, Inc., Three Star Construction, Co., 3 Star Construction Co., and Mr. Ali have never appeared, and both the plaintiff and 6810 moved for a default judgment against them, which was subsequently granted by order of this Court (Walker, J.) on or about May 17, 2019. By order dated November 4, 2020, the action was consolidated with a separate action bearing Index No. 511486/2019. On April 1, 2021, 6810 filed the instant motion for summary judgment. The motion was subsequently assigned to this part. A note of issue has not been filed.

The Parties' Positions

6810's Contentions

6810 contends that plaintiff's accident was caused solely by the negligence of its subcontractor and independent contractor 3 Star Construction Co. 6810 asserts it did not direct or control the means in which 3 Star performed its work on the premises, and that brick and mortar restoration on the façade of a building is not inherently dangerous work. Further, 6810 contends that in order for a plaintiff to recover, the inherently dangerous nature of the work itself must have caused the accident; which it maintains is not the case here. 6810 further asserts that it was not negligent in its hiring of the subcontractor, it did not provide any materials to 3 star to conduct its work and did not control the bucket that allegedly struck plaintiff, which was being used by 3 Star at the time of the accident. As

such, 6810 claims that it did not owe a duty to plaintiff and cannot be held liable for the injuries he sustained.

In this regard, 6810 notes that a property owner is generally not liable for the tortious acts of its subcontractors if the owner does not control the manner in which the contractor performs its work. According to 6810, neither it, nor non-party Tommy Lui, who was voluntarily assisting 6810 and on the roof of the premises when the accident occurred, controlled how 3 Star was to perform its work and was not apprised of the methods or materials utilized in connection with the work. 6810 further asserts that it was not negligent in its selection of 3 Star to perform the work because it was not aware of any facts that would have caused a reasonably prudent employer to further investigate the backgrounds of 3 Star. 6810 also contends that it was not under a non-delegable duty when it engaged 3 Star to perform the construction work at the premises.

Plaintiff's Opposition

In opposition, plaintiff initially argues that 6810's motion is procedurally defective and should be denied. Plaintiff asserts that 6810 submitted a statement of material facts that does not cite to evidence as required by 22 NYCRR 202.8-g. As to the merits, plaintiff contends that Multiple Dwelling Law § 78 confers a non-delegable duty upon 6810 to maintain its premises in a reasonably safe condition, and therefore is an applicable exception to the general rule that an owner is not liable for the torts of an independent contractor it employs. Plaintiff argues that 6810 has failed to eliminate questions of fact as to whether it acted as a reasonable premises owner. According to

plaintiff, there is zero admissible evidence before this Court that would indicate that 6810 took even a single step to act reasonably to keep its premises safe. Plaintiff maintains that 6810 owed him a duty, as a patron of the ground floor café, to prevent him from being exposed to a dangerous condition.

Plaintiff further argues that two additional exceptions to the independent contractor rule apply herein. First, plaintiff argues that the façade repair work that 3 Star was engaged in was inherently dangerous, and therefore 6810 can be held liable for its torts, and second, that 6810 was grossly negligent in the selection of its independent contractor. Specifically, plaintiff asserts that 6810 was negligent in permitting Tommy Lui, its agent, to hire a contractor that he only knew from observing it performing work at another building. Plaintiff maintains that further inquiry should have been made of 3 Star before hiring it to perform work at the subject premises.

6810's Reply

6810 asserts that the evidence in this case shows that it did not cause plaintiff's accident, but that it was the actions of 3 Star, an independent contractor, that caused plaintiff's injuries. 6810 points out that when the accident occurred, it had contracted with 3 Star to repair the façade of the building to ensure that it remained safe to the public. 6810 also emphasizes that yellow caution tape was placed around the premises to cordon off the area from pedestrians, and that plaintiff had stepped over the tape into the area that was cordoned off when the accident occurred. 6810 contends that plaintiff seeks

to hold it strictly liable for the negligent acts of its contractor regardless of fault while ignoring jurisprudence to the contrary.

6810 further contends that Multiple Dwelling Law § 78 is inapplicable to this case because the statute is not designed to render a building owner an insurer, but to make a premises reasonably safe for the purpose for which they were intended to be used, or which the landlord should reasonably anticipate. Plaintiff, it argues, has not set forth any facts that raise any questions as to whether Multiple Dwelling Law § 78 was violated. Moreover, the alleged condition that caused plaintiff's accident was not part of the premises, not associated with the structure, or any appurtenance thereto, but instead the result of a falling bucket that was under the exclusive control of its subcontractor 3 Star.

In addition, 6810 contests plaintiff's attempt to amend the bill of particulars to include an alleged violation of Multiple Dwelling Law § 78. 6810 argues that plaintiff did not seek leave of court or a stipulation as required by CPLR 3025 (b) and has essentially ambushed it by amending his bill of particulars and annexing the amended pleading to his opposition papers eight months after it filed its summary judgment motion.[1] 6810 also disputes plaintiff's procedural argument, pointing out that all relevant citations are contained in its motion papers and asserting that a mere technical error should not preclude the grant of summary judgment. Lastly, in the event the court

[1] Pursuant to CPLR 3042 (b), a party may amend his or her bill of particulars once, as of course without leave of the court, before the filing of a note of issue (CPLR 3042[b]). Here, since a note of issue has not yet been filed, plaintiff is not required to seek leave to serve his amended bill of particulars. As such, the court will address plaintiff's allegations related to Multiple Dwelling Law § 78.

determines that its motion is procedurally defective, 6810 requests that its motion be denied without prejudice with leave to renew.

Discussion

As a preliminary matter, the court finds that 6810's statement of material facts substantially conforms to the requirements of 22 NYCRR 202.8-g. As such, the court now turns to the merits of 6810's motion. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*see Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]he court must [then] evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated" (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d

Dept 1987] [internal citations omitted]). "[M]ere conclusory statements, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988] [internal citations omitted). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004] [internal quotation marks omitted], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]).

> "A building owner cannot be liable for injuries caused to a person as a result of a defective condition on the premises unless it can be shown that the owner created the condition or that it had actual or constructive notice of the condition for such a reasonable period of time that in the exercise of reasonable care, the owner should have corrected it" (*Trujillo v Riverbay Corp.*, 153 AD2d 793, 794 [1st Dept 1989]).

Here, there is no evidence that 6810 created the condition, a falling bucket, since the evidence reveals that 6810 was not actively involved in the construction that was ongoing at the premises. Moreover, there is no evidence that 6810 had actual or constructive notice of a dangerous defect on the property. The falling bucket was not a permanent defect or one that was likely to be discovered.

Tommy Lui testified in his deposition that 3 Star had begun construction the same day as plaintiff's accident. The evidence presented in this case indicates that plaintiff's injury was caused by the actions of 6810's subcontractor, 3 Star, who caused a bucket to fall from the roof of the premises while it was in the process of making repairs to the

façade of the building. There is no evidence in the record that any action on the part of 6810 caused the bucket to fall from the roof and strike plaintiff.

While 6810's agent, Tommy Lui, was present on the roof of the building when plaintiff's accident occurred, there is no evidence that he took any action on behalf of 6810 that caused the accident to occur. Nor is there any evidence that 6810 was aware of the bucket or its potential to fall for such a reasonable period of time that it could have discovered and corrected said condition. Thus, the primary question presented in the instant case is whether 6810, as a building owner, can be held liable for the torts of its subcontractor, 3 Star.

"The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993] [internal citations omitted]). However, there are various exceptions to the general rule which "fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or inherently dangerous and, finally, instances in which the employer is under a specific nondelegable duty" (*Id.* at 274-275 [internal quotation marks and citations omitted]; *Bennett v State Farm Fire & Cas. Co.*, 198 AD3d 857, 859 [2d Dept 2021]).

Plaintiff has alleged several of the exceptions to the general rule are applicable to 6810. Specifically, plaintiff alleges that 6810 was negligent in hiring 3 Star. "[T]he duty to investigate a prospective employee, or to institute specific procedures for hiring

employees, is triggered only when the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" (*Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 879 [2d Dept 2006] [internal quotation marks omitted]). There is no evidence in the record that 6810 knew of any facts regarding 3 Star or any of its employees prior to contracting with it that would have led it to make further inquiries concerning its ability to perform its duties safely. "[A]n employer is not liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that the employer either knew, or in the exercise of reasonable care, might have ascertained that the contractor was not properly qualified to undertake the work" (*Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 569-570 [1st Dept 2015]).

There is no evidence that 3 Star was incompetent or otherwise unsuitable or that 6810 knew, or should have known, that there was any risk that it would not perform its duties without injury to the public. Furthermore, there is no evidence in the record that 6810 negligently instructed or supervised 3 Star in the performance of its work. The evidence indicates that 6810 exercised no control over the methods or manner in which 3 Star performed its work. 6810 therefore cannot be held liable for the negligent hiring, instruction, or supervision of 3 Star.

> "[New York] State has long recognized an exception from the general rule where, generically, the activity involved is dangerous in spite of all reasonable care. This 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] [internal quotation marks and citations omitted]).

For example, blasting at a construction site and working with high tension electric wires have been deemed inherently dangerous activities (*Id.*). Plaintiff alleges that 6810 hired 3 Star to perform brick and mortar restoration to the façade of the premises is inherently dangerous. The Court of Appeals has found that such work can be rendered safe with the use of warnings and barriers (*Rohlfs v Weil*, 271 NY 444, 448 [1936]). "Courts take judicial notice of the fact within common knowledge that work performed on scaffoldings on the outside of buildings abutting on highways is attended with danger to those using the sidewalk and that reasonable measures, such as barriers or warning notices, to prevent such danger must be employed" (*Id.*). Here, there is evidence that 3 Star used construction tape to warn pedestrians and cordoned off the area where the construction work was to occur. Therefore, it cannot be said that the exterior brick and mortar restoration work was of such a dangerous nature, no matter how skillfully or carefully performed, as to create a non-delegable duty on the part of 6810, thereby imputing liability (*Joshua R. by Carmen N. v 101 Delancey Realty, LLC*, 167 AD3d 422 [1st Dept 2018] [independent contractor's work repairing building façade deemed not inherently dangerous]).

Moreover, at the time of the accident, the result of a falling bucket was in the exclusive control of 3 Star. Thus, the risk to plaintiff arose from the manner in which the

work was performed and "the accident was the result of ordinary negligence" not the inherent danger of the work being performed (*Nelson*, 129 AD3d at 569).

Plaintiff argues that pursuant to Multiple Dwelling Law § 78, 6810 is liable for his injuries because it had a non-delegable duty to maintain the premises in a reasonably safe condition. The statute provides that, "[e]very multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair" (Multiple Dwelling Law § 78). However, the court finds that Multiple Dwelling Law § 78 is not applicable herein, as plaintiff's accident "occurred as a result of the means and methods of the work, not due to a condition of the premises" (*Id.*). Accordingly, the non-delegable duty exception to the general rule concerning independent contractors does not apply under the circumstances of this case "where the plaintiff's injuries were not the result of the premises being in disrepair," but rather the result of 3 Star's negligence in the manner in which it performed its work (*Stagno v 143-50 Hoover Owners Corp.*, 48 AD3d 548, 549 [2d Dept 2008]).

As none of the exceptions to the general rule applicable to independent contractors apply herein, 6810 has made a prima facie showing of entitlement to judgment as a matter of law. In opposition, plaintiff fails to raise a genuine question of material fact that would preclude the grant of summary judgment. Accordingly, 6810's motion for summary judgment against plaintiff is granted and plaintiff's complaint is dismissed as against it.

Conclusion

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied. Accordingly, it is hereby

ORDERED that 6810's motion (mot. seq. no. 7) for summary judgment is granted. The action severed and shall continue against the remaining defendants.

This constitutes the decision and order of the court.

E N T E R

J. S. C.

Hon. Wavny Toussaint
J.S.C.