Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY



Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.:715845/2020

ROBERTO BORJAS,

Motion Date: 5/20/2024

Plaintiff,

Motion Cal. No.: 4

-against-

Motion Sequence No.: 11

GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., SOROS FUNDING MANAGEMENT LLC, and REIDY CONTRACTING GROUP LLC,

Defendants.

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REIDY CONTRACTING GROUP LLC,

Third-party Plaintiff,

-against-

TECHNO ACOUSTICS HOLDINGS, LLC, d/b/a TECHNO ACOUSTICS,

Third-party Defendant.

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GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., SOROS FUND MANAGEMENT LLC, incorrectly sued as SOROS FUNDING MANAGEMENT, LLC,,

Second Third-party Plaintiffs,

-against-

TECHNO ACOUSTICS HOLDINGS, LLC, d/b/a TECHNO ACOUSTICS,

Second Third-party Defendant.

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REIDY CONTRACTING GROUP LLC, GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., SOROS FUND MANAGEMENT LLC, incorrectly Sued as SOROS FUNDING MANAGEMENT LLC,

Third Third-party Plaintiffs,

-against-

CHELSEA FLOOR COVERING ACQUISITION CORP.,

Third Third-party Defendant.
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CHELSEA FLOOR COVERING ACQUISITION CORP.,

Fourth Third-party Plaintiffs,

-against-

COMMERCIAL FLOORING MANAGEMENT, LLC,

Fourth Third-party Defendant.
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The following efiled papers numbered 149-154, 159-160, 162, 164 submitted and considered on this motion by Third Third-Party Defendant / Fourth Third-Party Plaintiff Chelsea Floor Covering Acquisition Corp. seeking an Order of summary judgment pursuant to CPLR §3212, dismissing all claims crossclaim, and counterclaims as against it. The motion is **denied** as set forth below:

| Motion Sequence 11 | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation in Support-Affidavits-Exhibits..... | EF 149-154 |
| Affirmation in Opposition-Affidavits Exhibits..... | EF 159-160, 162 |
| Affirmation in Reply-Affidavits-Exhibits..... | EF 164 |

**Relevant Factual and Procedural Background**

This action stems from an incident on April 15, 2015, wherein the plaintiff, Roberto Borjas (hereinafter "Borjas"), sustained personal injuries while working on a construction project at 250 West 55th Street, New York, New York. Borjas, employed by Techno Acoustic Holdings, LLC (hereinafter "Techno"), was applying compound to sheetrock on the 38th floor using a scaffold provided by Techno. The scaffold allegedly collapsed due to faulty wheel locks that caused the wheels to go into a cracked, uneven floor area, resulting in Borja's injuries.

Borjas brought claims against Gladden Properties LLC, Boston Properties Inc., Soros Fund Management LLC, and Reidy Contracting Group LLC (hereinafter "Reidy"), alleging violations of New York State Labor Law §§ 200, 240(1-3), 241(6), and common law negligence.

Reidy, the general contractor, had subcontracted Chelsea Floor Covering Acquisition Corp. (hereinafter "Chelsea") to perform the flooring work at the premises. Chelsea, in turn, subcontracted the work to Commercial Flooring Management, LLC (hereinafter "CFM"). The issues in this case involve whether Chelsea's oversight and the work performed by CFM contributed to the hazardous condition that resulted in Borjas' accident. Chelsea has moved for summary judgment to dismiss all claims, crossclaims, and counterclaims against it.

**Law and Application**

CPLR §3212 provides:

> (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.
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> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of

> subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...
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> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Summary judgment is a drastic measure that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]*; 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]*; Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2nd Dept. 2004]). "The movant 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" (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])."On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party" (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d at 335 [2011]; *see also Moonilal v R.C. Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593 [2d Dept 2024]).

"[A] party that enters into a contract to render services may be said to have assumed a duty of care, and thus, be potentially liable in tort to third persons, where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]; *Palka v Servicemaster Mgt. Services Corp.*, 83 NY2d at 589 [1994]; *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d at 226 [1990]; *see also Verderosa v County of Suffolk*, 226 AD3d 845, 846 [2d Dept 2024]; *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781 [2d Dept 2023]). In this case, conflicting testimonies and evidence raise issues of fact as to whether Chelsea created a dangerous condition and whether the area was properly barricaded.

Chelsea contends that it did not perform any of the actual flooring work and therefore should not be held liable. Chelsea argues that all physical work was conducted by its subcontractor, CFM, and asserts that the accident was due to the faulty wheel locks on the scaffold, provided by Techno, and not the cracked floor. Here, Chelsea must show that it did not negligently launch a force or instrument of harm, and that the cracked floor was properly barricaded to prevent accidents (*see Id.* at 136-140; *Calle v 16th Ave. Grocery, Inc.*, 219 AD3d 450, 451 [2d Dept 2023]).

Chelsea points to the testimony of Richard Caruso, who testified that CFM performed all labor and that the area of the cracked floor was properly barricaded with cones and caution tape after the work was completed. However, the plaintiff, Roberto Borjas, testified that there were no visible warning signs or barricades at the time of his accident. Borjas also testified that the accident was due to both the faulty wheel lock and the cracked floor. These conflicting testimonies presents material issues of facts regarding Chelsea's position and whether the cracked floor area was adequately secured *(see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Golovnya v Artemchenko*, 210 AD3d 1058 [2d Dept 2022]; *Roofeh v 141 Great Neck Rd. Condominium*, 85 AD3d 893, 894 [2d Dept 2011]; *Mazzio v Highland Homeowners Ass'n and Condos*, 63 AD3d 1015, 1016 [2d Dept 2009]).

Moreover, Chelsea's President, Dennis Bosco Jr., (hereinafter "Bosco") testified that Chelsea did not have any personnel performing labor on the project and that all work was subcontracted to CFM at the time of the accident. Despite this, evidence shows Chelsea recommended and provided the self-leveling product used for the floor, which eventually cracked and required remediation. These facts and Bosco's testimony raise further material issues of fact regarding Chelsea's role and responsibility in creating the hazardous cracked floor that may have contributed to Borjas' accident (*see Brunson v Korkovilas*, 208 AD3d 842 [2d Dept 2022]; *Cho v Demelo*, 175 AD3d 1235, 1237 [2d Dept 2019]). Hence, in the light most favorable to the non-moving parties, Chelsea failed to establish that it did not negligently launch a force or instrument of harm, and that the cracked floor was properly barricaded and fenced off to prevent accidents .

Further, Chelsea's argument that the indemnity clause should absolve them from liability lacks merit. The clause stipulates that Chelsea must indemnify Reidy for claims arising from the subcontracted work, provided these claims result from acts or omissions by Chelsea or CFM. Chelsea claims that since they did not perform any work, they are not the proximate cause of the accident and the indemnify clause between them and Reidy should not trigger. However, the proffered exhibits, including testimonies about Chelsea's involvement in providing and recommending the self leveling material; the conflicting evidence regarding the manner in which the accident occurred; and whether the cracked floor was properly barricaded indicates that Chelsea potentially contributed to the hazardous condition leading to Borjas's accident. Therefore, Chelsea's reliance on the indemnity clause not triggering does not exempt them from liability.

Since Chelsea failed to sustain their prima facie burden, we need not consider the sufficiency of the opposition papers (*see Id.* at 843; citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, it is hereby

**ORDERED**, that the Third Third-Party Defendant / Fourth Third-Party Plaintiff Chelsea Floor Covering Acquisition Corp.'s motion for summary judgment is **denied** in its entirety.

This constitutes the decision and order of the court.

Dated: July 18, 2024

**Hon. Chereé A. Buggs, JSC**