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SCANNED ON 12/27/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 113875/2001

SANATASS, CHRISTOPHER

VS.

CONSOLIDATED INVESTING

SEQUENCE NUMBER : 010

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 010

otion to/for _____

_____ | No(s). _____

_____ | No(s). _____

_____ | No(s). _____

upon the foregoing papers, it is ordered that this motion is

FILED

DEC 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Ready for trial - TI to serve decision on Trial Support

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: DEC 20 2011

JUDITH J. GISCHE, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Christopher Sanatass and Cynthia Sanatass,

Plaintiffs,

-against-

Consolidated Investing Company, Inc., Consolidated Investing Company, Norbert Natanson, Herbert Rosenberg *as trustee of the last will and testament of* Nathan Shulman, Marion Feldman, Chroma Copy and Dazian, LLC.,

Defendants.

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DECISION/ ORDER
Index No.: 113875-2001
Seq. No.: 010

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
591423/03

Consolidated Investing Company, Inc., Consolidated Investing Company,

3rd party Plaintiffs

-against-

Chroma Copy International, Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc., and C2 Media, LLC.,

3rd party Defendants.

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Chroma Copy International, Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc., and C2 Media, LLC.,

T.P. Index No.:
591038/04

2nd- 3rd party Plaintiffs

-against-

Commercial Cooling Service, Inc.,

2nd-3rd party Defendant.

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Chroma Copy International Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc. and C2 Media, LLC,

3rd-3rd party Plaintiffs,

-against-

J.M. Haley, Inc.,

3rd-3rd party Defendant.

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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Commercial's n/m w/AIM affirm, exhs	1
Consolidated, Chroma, C2 opp w/GLR affirm, exhs	2
Commercial's affirm further support w/AIM, exhs	3
Sanatass' opp w/SLL affirm	4
Steno minutes 10/30/11	5

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a negligence action by Christopher Sanatass ("Sanatass") who asserts he sustained damages proximately caused by violations of the Labor Laws of the state of New York. The motion presently before the court is by Commercial Cooling Service, Inc. ("Commercial") for summary judgment, dismissing the contractual indemnification claims against it by 2nd-3rd party plaintiffs Chroma Copy International, Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc., and C2 Media, LLC ("Chroma" and "C2" sometimes "tenants"). Sanatass,

Consolidated and the tenants oppose the motion.

There has been extensive litigation between the parties, including a successful appeal by Sanatass before the Court of Appeals, granting him partial summary judgment on his Labor Law § 240 [1] claim against the owner (Sanatass v. Consolidated Investing Company, Inc., et al., 10 NY3d 333 [2008]). It is now the law of this case that Consolidated Investing Company, Inc. and Consolidated Investing Company ("Consolidated") are "owners," within the meaning of Labor Law § 240 and therefore liable to the plaintiff for his damages, even though the owner was out of possession when the accident happened and it did not know about, or approve of, the alteration work being done at the subject premises (Sanatass v. Consolidated Investing Company, Inc., et al, *supra*.) The reader is presumed to be familiar with the facts of this case, arguments that have already been raised and decided, as well as prior decisions by this court and those made on appeal.

Background

Consolidated is the owner of the building where plaintiff was working on the 11th floor ("premises") at the time of his injuries. He was in the process of installing an HVAC unit when it fell on him. On the day of the accident, plaintiff was employed by J.M. Haley, Inc., the 3rd-3rd party defendant in this action. J.M. Haley was Commercial's subcontractor on the project which entailed the installation of a large HVAC unit on the 11th floor of the premises.

Consolidated was found vicariously liable for violations of Labor Law § 240 [1] by the Court of Appeals, even though it was an out of possession landlord. Subsequently, Consolidated moved for and was granted for summary judgment on its breach of

contract, defense and indemnification claims against defendants Chroma and C2, based upon the lease provisions pertaining to indemnification.[1] (Order, Gische, J., 1/29/2009). The Chroma defendants were Consolidated's tenants and C2 were Consolidated's tenants by assignment. Consolidated, Chroma and C2 are now jointly represented.

Although Commercial has not moved to dismiss the owner's cross claim against it for indemnification and judgment over, one of the issues argued by the parties and presented by this motion is whether the cross claim by the owner against Commercial is now moot because the court previously decided that the tenants have to indemnify Consolidated. Whereas Consolidated and the 2nd-3rd party plaintiffs contend this claim is very much alive, Commercial argues that Consolidated is now made whole because the tenants will indemnify the owner. Thus, Commercial argues it had no reason to seek summary judgment on the owner's cross claims against it, but if the court decides otherwise, Commercial seeks permission to bring (what now would be a late) motion for summary judgment. In the alternative, Commercial argues that the court should consider whether it is entitled to such relief because it was raised in opposition and has been addressed by Commercial in its reply.

The following facts are undisputed, proved, or have otherwise been previously resolved in prior orders:

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[1]Although the parties in these motions refer to the 2nd-3rd party plaintiffs/3rd-3rd party plaintiffs as "C2 Media," this court will continue to refer to these parties as "Chroma" and "C2" to be consistent with its prior orders. At times these parties may also be referred to collectively as "tenants"

Commercial provided maintenance and repair services for the tenant's HVAC for a number of years. When the tenants needed to have an HVAC unit installed at the premises, they hired Commercial pursuant to a separate written agreement between Commercial to do so. The installation contract is between Commercial as seller and C2 as buyer. The installation contract, which is dated January 11, 2000 ("installation contract") does not contain any indemnification language. Commercial argues that for this reason, it is entitled to summary judgment, as a matter of law.

The installation contract states, in relevant part, that it is "subject to the conditions and agreements contained on the reverse side hereof, all of which are hereby made a part hereof." Another page of the contract is also provided. At the top of that page appear the following words: "conditions and agreements forming part of sales contract on reverse side hereof." Commercial contends the contract is complete and these are the two sides of the contract. Consolidated and the tenants argue that there may be more pages to the installation contract, possibly containing provisions pertaining to their claim for contractual indemnification.

The 2nd - 3rd party plaintiffs have also asserted a claim for common law indemnification based on allegations that Commercial entrusted "inherently dangerous" work to an unqualified subcontractor (plaintiff's employer) and, as the over-contractor, only Commercial could have ensured the safe performance of the work by is subcontractor.

Discussion

In deciding whether Commercial is entitled to the grant of summary judgment in its favor, the court considers whether its has tendered sufficient evidence to eliminate

any material issues of fact from this case (E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]; Zuckerman v. City of New York , 49 NY2d 557 [1980]). If met, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact to defeat the motion (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, *supra*).

Relying on the EBT testimony of plaintiff Sanatass, Commercial has established that Sanatass was instructed on how to do his work by Richard Becher, J.M. Haley's project manager. At his EBT, Sanatass testified Becher gave him instructions in person and even provided him with a diagram for the work to be done that Becher himself drew. The only other employees present on the day of the accident were also J.M. Haley employees. Other than Becher, Sanatass spoke to no one else about the assignment/ task Becher instructed him to perform. Becher also instructed Sanatass on the tools and materials he needed to use for the project. When Sanatass was asked about "Commercial Cooling Services, Inc." and whether he had heard of them, he replied that he was unfamiliar with any company by that name and said he had "no idea" whether that company had any involvement with the project at the premises.

Commercial also relies on the EBT of Ted Zafiropoulos, its project manager. Zafiropoulos testified that Commercial had no personnel present on the project to supervise or otherwise. He stated that no one on behalf of Commercial instructed or directed J.M. Haley or its employees on how the project was to be performed. Zafiropoulos distinguished between work Commercial performed for the tenants as part of a service contract versus other "special projects." For special projects, he authorized the hiring of subcontractors and "100% of the time" J.M. Haley was the subcontractor

he hired to do installation work.

Implied or common law contract is an equitable remedy which permits the shifting of loss from one who is only vicariously liable to the actual wrongdoer (McCarthy v. Turner, 17 NY2d 369 [2011] internal citations omitted]). "A party cannot obtain common-law indemnification unless it has been held to be vicariously liable, without proof of any negligence or actual supervision on its own part" (McCarthy v. Turner, 17 NY2d at 377-78). Therefore, liability for indemnification "may only be imposed against those parties (i.e. indemnitors) who exercise actual supervision..." (Id.) Although Commercial hired J.M. Haley for the installation work, the record developed shows that J.M. Haley was solely responsible for the injury producing work. Commercial did not direct or supervise the work being done nor was it contractually required to do so. Since Commercial had no supervisory control over the plaintiff's work, Commercial has met its burden of showing the tenants are not entitled to be indemnified by Commercial.

Whether the HVAC was heavy or suspended over the plaintiff improperly when the accident happened are red herrings and do not raise material triable issues of fact. As a general rule, an employer is not liable for the negligent acts of an independent contractor, unless there is a nondelegable legal duty imposed on the employer (Rosenberg v. Equitable Life Assur. Soc. of U.S., 79 N.Y.2d 663 [12]). An exception to that rule is where the work is so inherently dangerous that the duty cannot be delegated. "Inherently dangerous" refers to a risk that is inherent or apparent to the employer in light of the work contracted to be done (Rosenberg v. Equitable Life Assur. Soc. of U.S., supra). An owner "is not liable where the danger arises merely because

of negligence of the independent contractor or his employees which is collateral to the work and which is not reasonably to be expected..." (Wright v. Tudor City Twelfth Unit, 276 N.Y. 303, 307 [1937]). Nothing in Sanatass' description of the work he was doing suggest that his work was "inherently dangerous." Thought he HVAC was large, it was capable of being wheeled into the room and sat on jacks. Whether the jacks were suitable for the task is a different issue, but it does not expose Commercial to liability under the exception to the general rule. Therefore, Commercial's motion for summary judgment dismissing the cross claims of Chroma and C2 for common law indemnification is granted.

Commercial has provided its installment contract with the C2. The contract refers to "conditions and agreements contained on the reverse side" and the other page provided refers to the "conditions and agreements forming part of sales contract on reverse side hereof." Reading these two page together suggests that they are the two sides of a single page. There is no indemnification language on either page, proving Commercial's claim, that it did not agree nor is it obligated to indemnify any of the 2nd-3rd party plaintiffs.

The affirmation by the 2nd-3rd party plaintiffs' attorney does not raise a triable issue of fact. There is no affidavit by someone with personal knowledge attesting that there are more pages to the contract. Since C2 is a signatory thereto, such information should be available to it. The attorney does not have personal knowledge of the parties' dealings and a motion for summary judgment cannot be defeated by speculation and innuendo. Therefore, Commercial has also proved it did not contractually agree to indemnify any of the 2nd-3rd party defendants.

The court's decision, awarding Consolidated summary judgment on its indemnification claims against the Chroma defendants and C2 is not decisive of whether Consolidated is entitled to indemnification by Commercial. Although Commercial has prevailed in its motion for summary judgment on the 2nd-3rd party action against it, Consolidated's cross claims still have to be tried. Commercial's application, to have the court either extend its time to bring a summary judgment motion against Consolidated or to consider its reply as a motion for summary judgement is denied. A motion for summary judgment against Consolidated is untimely and long overdue as the note of issue was filed in June 2011. There is no good cause shown for why Commercial did not timely bring a motion for such relief (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Conclusion

It is hereby

ORDERED that the motion by 2nd-3rd party defendant Commercial Cooling Service, Inc. for summary judgment dismissing the 2nd-3rd party complaint against it is granted; and it is further

ORDERED that the clerk shall enter judgment in favor of 2nd-3rd party defendant Commercial Cooling Service, Inc. against 2nd-3rd party plaintiffs Chroma Copy International, Inc., Chroma Copy International, L.P., Chroma Copy International, Ltd., Chroma Copy of America, Inc., and C2 Media, LLC dismissing the 2nd-3rd party complaint; and it is also

ORDERED that the remainder of the claims shall continue; and it is further

ORDERED that any relief not specifically addressed is hereby denied; and it is further

ORDERED that this case is ready to be tried; plaintiff shall serve a copy of this order on the Office of Trial Support within twenty (20) days of this decision appearing in SCROLL (Supreme Court Record On-Line Library) as having been entered so the case can be scheduled; and it is further

ORDERED that this constitutes the decision and order of the court.

FILED

Dated: New York, New York
December 20, 2011

So Ordered: DEC 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Judith J. Gische, JSC