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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

Denaski

Plaintiff(s),

-v-

498 Seventh Ave LLC et al

Defendant(s).

INDEX NO. 104813-09
~~104418/09~~

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 9, 2012

HON. JUDITH J. GISCHE, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

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

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Eric E. Demski and Pamela Darcy-Demski,

Plaintiff,

- against -

498 Seventh, LLC, George Comfort & Sons, Inc., Geiger Construction Co., Inc and Everest Scaffolding, Inc.,

Defendants.

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Decision/Order
Index No. 114418-2010
Seq No.: 001

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

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

Papers	Numbered
Everest n/m (3212) w/GGS affirm, exhs	1
Pltf's opp w/AMM affirm w/exhs	2
Geiger opp w/ENM affirm	3
Everest reply to Geiger w/GGS affirm	4
Everest reply to Pltf w/GGS affirm	5
Stips to adjourn (various)	6

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

Gische J.;

This is an action for personal injuries. Issue has been joined by all the defendants, including the moving defendant, Everest Scaffolding, Inc. ("Everest"). Everest seeks summary judgment dismissing the complaint, as well as all cross claims against it. Plaintiff opposes the motion as does co-defendant Geiger Construction Co., Inc. ("Geiger"). Once issue has been joined, summary judgment relief is available, even if the note of issue has not yet been filed. Since this motion complies with the

requirements of CPLR 3211 (a), it will be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Facts

The following facts are established or unrefuted:

On October 21, 2008, plaintiff observed chunks of cement falling off a building as he was walking from 37th Street to 36th Street on the west side of 7th Avenue. One of these pieces struck him on the leg and he blacked out. He later learned that the "cement" pieces he had seen were actually pieces of clay or terra cotta that were part of a decorative cornice on the building located at that intersection which was undergoing repointing pursuant to Local Law 11 of 1998 ("Local Law 11/98"). The building, 498 7th Avenue, New York, New York ("building"), is owned by defendant 498 Seventh, LLC ("owner") and managed by George Comfort & Sons, Inc. ("property manager"). Following the accident, plaintiff was hospitalized and underwent surgery. He claims to suffer from ongoing neurological damage and daily pain.

Local Law 11/98 requires periodic inspections of a building's façade and that the inspection be made by an engineer. The owner hired non-party Consulting Associates of New York ("CANY") to do the inspection and prepare a report identifying the work that needed to be done. In its report, CANY noted the deteriorated condition of the façade and that the masonry and terra cotta elements needed extensive repairs because they were unsafe. Following that report, the property manager hired defendant Geiger Construction Co., Inc. ("Geiger") to effectuate the repairs. Plaintiff's accident occurred while Geiger was working on the façade at the 18th floor. Geiger's work entailed cutting, banging and hammering the façade to loosen the cracked

masonry, brick and terra cotta surfaces. While the work was being performed, Geiger had two hanging or suspension scaffolds at the building. One scaffold was on the 7th Avenue side of the building and the other scaffold was on 37th Street side.

Everest had its own, separate contract with the property manager. In its contract dated October 22, 2007, Everest agreed to furnish, install (and later remove) a heavy duty sidewalk shed[1] on either side of the building. Everest provided and installed one sidewalk shed on 7th Avenue and another on 37th Street. The 7th avenue sidewalk shed was 120 feet long, 16 feet high and 17 feet wide whereas the 37th Street sidewalk shed was 130 feet long, 16 feet high and 10 feet wide.

After Everest completed installation of the two sheds, it did not return to do any further work at 498 7th Avenue until after plaintiff's accident. Following plaintiff's accident, the New York City Department of Building's ("DOB") scaffold safety team did an inspection and issued Everest an ECB violation. The ECB violation, dated October 22, 2008, is a stop work order based upon the sidewalk shed "not meet[ing] code specifications." The section of the codes cited in the ECB violation are BC 3307.6 and 27-1021. The stated remedy is that the "shed shall be extended 20 ft beyond the building structure." Everest was also issued a $2,400 fine.

After the accident, Everest and the property manager entered into a new contract dated October 23, 2008 ("new contract"). The new contract was for Everest to extend

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[1]Sidewalk bridges are also known as "sidewalk sheds." Regardless of the terminology used, a bridge or shed is a structure placed above the sidewalk to protect pedestrians. Such bridges or sheds are commonly wood and painted blue. Since the parties use the term "sidewalk shed," the court will do so as well although the contract is actually for a "sidewalk bridge."

the existing sidewalk shed on the 37th street side. Everest was also to furnish and install 370 square feet of mesh catch-all along the perimeter of the sidewalk shed.

Plaintiff's negligence claims against the defendants are based upon their alleged failure to employ adequate safety measures to protect pedestrians near a construction site. Specifically, plaintiff claims that Everest was required, but failed, to maintain a mesh catch-all at the premises and that it improperly constructed and maintained its scaffolding at the construction site. According to plaintiff, the debris from the 18th floor bounced off the shed before striking him and he claim that had there been a mesh catch-all or netting, the debris would have fallen back onto the shed, not onto the street.

Arguments

Everest contends that it did not negligently constructs its shed and that they complied with the requirements of section 23-1.18 [b][2] of the New York State Code Rules and Regulations (also known as the Industrial Code) (12 NYCRR__) which provides as follows:

> (b) Sidewalk shed construction.
> (2) The outside edge and the ends of the deck of every sidewalk shed shall be provided with a substantial enclosure at least 42 inches in height, consisting of boards not less than one inch thick laid close, or of screening formed of not less than No. 16 U.S. gage steel wire mesh with openings which will reject a one and one-half inch diameter ball, or of corrugated metal sheet of not less than No. 22 U.S. gage or of exterior grade plywood not less than one-half inch thick.

According to Everest, 12 NYCRR 23-1.18[b][2] and New York City Administrative Code 27-1021 [b][6][2] are the same, each providing for the installation of a plywood

[2] The New York City Administrative Code indicates that Subchapter 19, Articles 1-13 sections 27–1007 through 27–1069 were repealed by Local Law 33/2007 § 9,

parapet wall "or" mesh enclosure, not both.

Christopher Downes, the owner of Everest, was deposed and asked why he decided to install vertical plywood instead of netting, considering his claim that he could have installed either one. He stated that Everest only installed netting or mesh if requested by the contractor, managing agent or "whoever's working on the building." In those situations, the installation of netting is something negotiated and in Everest's contract. Here, Everest's contract with the property manager did not call for the installation of netting or mesh.

Downes was also asked how, when constructing the shed, Everest decided what the width of the shed should be, i.e. how much of the sidewalk was covered. Downes testified that he constructed the shed based upon what he believed would be a reasonable distance from the curb. When pressed about what materials he used to make that determination, Downes responded "I don't really know." Downes estimated the sidewalk on 7th avenue was "around 17 feet, probably a couple more feet, maybe 19 feet, I don't know."

Everest contends that the actions by Geiger's employees were the immediate cause of plaintiff's accident because Geiger's employees were banging and hammering on the cornice, causing the piece of terra cotta to fall and strike the plaintiff. Everest denies having any responsibility for directing or supervising Geiger's employees.

Finally, Everest contends that the ECB violation that was issued after plaintiff's accident was for the 37th Street shed – not the shed on 7th avenue where plaintiff was

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effective July 1, 2008. [See Title 28 footnote].

walking when the accident occurred -- and, therefore, the violation should not reflect on whether Everest should have installed mesh or netting on 7th avenue.

Plaintiff contends that Everest has failed to prove it is entitled to summary judgment because, among other things, Everest has not provided the affidavit of an expert familiar with the code provisions and regulations that Everest denies were violated. Plaintiff also claims this motion is premature because it intends to serve an amended bill of particulars before filing the note of issue.

In support of its opposition to Everest's motion, plaintiff provides the sworn affidavit of its own expert, William Marletta, PhD, C.S.P., a safety consultant. Marletta states that he reviewed various materials in this action, including the deposition transcripts, and personally inspected the building where the construction was taking place. He states that he is familiar with construction safety industry practices. Marletta opines that the sidewalk shed Everest erected was in violation of industry standards and did not conform to good and accepted safety practices. Marletta opines that these violations were a substantial contributing factor to plaintiff being injured.

According to Marletta, the tarp for Geiger's swing scaffold did not extend vertically out to the edge of the cornice, meaning the cornice was exposed by some 12 inches. Since work being done by Geiger entailed banging and hammering, these vibrations caused a loose piece of debris to fall past the tarp. The piece apparently then bounced or ricocheted into the street where it struck plaintiff. This information is taken by Marletta from an incident report that the property manager prepared after the accident.

Marletta also opines that, based on CANY's pre-pointing report, Everest was

aware of the "extensive damage" to the terra cotta and brick masonry at roof and that these conditions were "unsafe." According to Marletta, Everest knew, or should reasonably have anticipated, that such decrepit structures posed a substantial risk to pedestrians below and, therefore, Everest should have installed a mesh catch all. Marletta opines that even if Everest did not have a contractual obligation to install netting or mesh, Everest ignored industry standards for pedestrian safety by not installing one. Thus, Marletta opines that Everest had a duty to consider all the details of the building and project in deciding what kind of protection pedestrians needed. He also opines that the shed was not built wide enough as it did not extend the full width of the sidewalk and Downes apparently guessed how wide the sidewalk was.

Plaintiff identifies the following codes and regulations as applicable to the facts of this case and having been violated:

BC 3307.6.2 (NYC Construction Code)

BC 3314.1 (NYC Construction Code)

12 NYCRR § 23-1.33

BC 3307.6 applies to "Sidewalk Sheds" and BC 3307.6.2 sets forth requirements about the "areas to be protected." Those requirements are as follows:

> Protection shall be provided for those sidewalks or walkways that are in front of the building to be constructed, altered, or demolished. Sidewalks or walkways in a plaza or other similar space that lead from the street to an entrance or exit into or out of the building that cannot be officially closed shall be similarly protected.
>
> Where deemed necessary by the commissioner, the deck shall cover the entire width of the sidewalk or walkway in front of the building, except for reasonably small clearances at the building line and the curb. In all other instances, the

> sidewalk shed shall protect the sidewalk or walkway to a minimum 5 foot (1524 mm) width. Sidewalk sheds may extend beyond the curb to such extent as may be approved by the Department of Transportation pursuant to a permit from such department.
>
> Unless constructed solely to comply with Section 3307.3.1, Item 3, sidewalk sheds shall extend 5 feet (1524 mm) past the building when the building is less than 100 feet (30 480 mm) in height, and 20 feet (6096 mm) past the building when the building is over 100 feet (30 480 mm) in height, regardless of whether such extensions are in front of the property being developed or in front of adjacent property. Extensions of sidewalk sheds complying with the foregoing shall be constructed so as not to unreasonably obstruct, either visually or physically, entrances, egress, driveways, and show windows of adjacent properties.

BC 3314.1 applies to protection of persons passing by construction, demolition or excavation operations:

> 3314.1 Scope. All scaffolds shall be erected and maintained so that the safety of public and property will not be endangered by falling material, tools or debris, or by collapse of the scaffold.

Section 12 NYCRR § 23-1.33 [a][1] of the Industrial Code applies to construction sites, even when the person injured is not a construction worker. This code section provides, in relevant part, that "reasonable and adequate protection and safety shall be provided for all persons passing by areas, buildings or other structures in which construction, demolition or excavation work is being performed." 12 NYCRR § 23-1.33 [a] [2] requires that every construction site "shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as not to endanger any person passing by."

Geiger adopts all of plaintiff's arguments, adding that even if Everest did not

cause the terra cotta to fall, Everest had a duty to keep pedestrians safe from falling debris by building a shed wide enough or installing a mesh catch all.

In reply Everest first urges the court to reject Geiger's opposition as untimely. Everest also claims it did not have to provide an expert's affidavit to support its motion because the jury can easily look at the code and decide whether or not the sidewalk shed was negligently erected. Everest states further that Marietta's affidavit should not be considered by the court because it is "hollow," filled only with assumptions without any factual basis. Everest also claims that Marietta has not addressed BC 3307.6.4 [6] which sets forth the requirements for the construction of sidewalk sheds. This section requires that:

> 6. The outer side and ends of the deck of the shed shall be provided with a substantial enclosure at least 3 feet 6 inches (1067 mm) high. Such enclosure may be vertical or inclined outward at approximately 45 degrees, and shall consist of boards laid close together and secured to braced uprights, of galvanized wire screen not less than no. 16 steel wire gage with a ½ inch (13 mm) mesh, of corrugated metal, or of solid plywood. Temporary removal of portions of the enclosure shall be permitted for handling material.

Everest argues that Industrial Code 23-1.18 applies to sidewalk shed construction and that section 23-1.18 [b][2] requires that:

> The outside edge and the ends of the deck of every sidewalk shed shall be provided with a substantial enclosure at least 42 inches in height, consisting of boards not less than one inch thick laid close, or of screening formed of not less than No. 16 U.S. gage steel wire mesh with openings which will reject a one and one-half inch diameter ball, or of corrugated metal sheet of not less than No. 22 U.S. gage or of exterior grade plywood not less than one-half inch thick.

Discussion

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the cause of action has no merit, sufficient to warrant the court, as a matter of law, to direct judgment in its favor (Bush v. St. Claire's Hosp., 82 NY2d 738, 739 [1993]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The defendant's motion must be denied if it fails to produce admissible evidence demonstrating the absence of any material issues of fact (Winegrad v. New York Univ. Med. Ctr., supra; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]; Silverman v. Perlbinder, 307 AD2d 230 [1st Dept. 2003]).

Everest contends that it did not create the dangerous condition alleged and that, in any event, it complied with all applicable codes and regulations in constructing the shed. The issue of whether a dangerous condition exists depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (Schechtman v. Lappin, 161 AD2d 118 [1st Dept. 1990]). Furthermore, a defendant's compliance with statutory or regulatory enactments does not preclude a finding that the defendant violated a common-law duty (Kelly v. Metropolitan Ins. and Annuity Co., 82 A.D.3d 16 [1st Dept 2011]).

Regardless of whether there is a code or regulation requiring that Everest erect a catch-all mesh or netting on the sidewalk sheds it built, Everest still has a common law duty to take minimal precautions to protect pedestrians traversing the area where re-pointing is being done from falling debris. Consequently, Everest's argument, that it complied with all codes and regulations, does not, alone, warrant the grant of summary judgment in its favor, as a matter of law.

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Nor, however, is plaintiff correct that Everest's failure to provide an expert's affidavit warrants denial of summary judgment. This is not a medical malpractice action where a medical expert's affidavit is essential (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Thus, it is up to the defendant to decide whether or not to provide such an affidavit on its motion.

Everest argues that the codes and regulations it relies on are easy to follow and clearly prove its defense, that it did not negligently construct the sidewalk shed. Although the absence of a defense expert's affidavit is not fatal to defendant's motion in the technical sense, Everest's averments about which codes and regulations are applicable to sidewalk sheds are contained in the affirmation of its attorney and based on Downe's testimony. It is Everest's attorney who states that "[n]either the New York City Building Code nor the New York City, nor case law require sidewalk sheds to have both parapet walls and netting around their perimeters..." Downe's testimony is simply that he complied with "Chapter 33." These statements have no probative value as they are, on one hand, the statement of an attorney and on the other hand, simply the opinion of one of the parties. As a general rule, where the issues on trial involve professional or scientific knowledge or skill not within the range of ordinary training or intelligence, an expert's opinion is valuable (Dufel v. Green, 84 N.Y.2d 795 [1995]).

Plaintiff's expert opines that given the condition of the building's terra cotta and masonry work, Everest should have used a mesh catch-all or netting to make sure none of the falling pieces would strike pedestrians below (see, Kelly v. Metropolitan Ins. and Annuity Co., supra). Everest contends Marletta's opinion is hollow and based upon conjecture. The court disagrees. Marletta's affidavit is based upon his review of

various documents produced in discovery, deposition transcripts, an on-site inspection and his own experience in such matters. His opinion is also supported by facts found in the record. Marletta's affidavit is not "hollow" and, to the contrary, contains statements that would be useful to the average juror. In any event, a defendant seeking summary judgment cannot merely point to the deficiencies in the plaintiff's case to satisfy its own burden which is to prove its freedom from negligence (see, Totten v. Cumberland Farms, Inc., 57 AD3d 653, 654 [2nd Dep't 2008]).

Since the court only has Everest's owner's statement about what the applicable codes and regulations require when erecting a sidewalk shed, defendant has failed to prove its prima facie case, which is that it was not negligent in erecting its shed. The plaintiff has, in any event, raised triable issues of fact. Contrary to Everest's arguments, it has not proved that it did not violate any of the codes and regulations it claims apply or that the code sections and regulations which plaintiff claims apply are inapplicable. Everest has not shown it is entitled to summary judgment dismissing the complaint and cross claims against it, as a matter of law. Therefore, Everest's motion is denied.

Arguments by plaintiff that Everest brought its motion too soon because it anticipates serving an amended bill of particulars have not factored into the court's decision, denying Everest's motion.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that Everest's motion for summary judgment is denied for the reasons stated; and it is further

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

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

Dated: New York, New York
March 9, 2012

So Ordered:

Hon. Judith J. Gische, JSC