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SCANNED ON 1/2/2014

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ANTHONY CASTRO,
Plaintiff,

INDEX NO. 111238/09

-against-

MOTION SEQ. NO. 002

120 BROADWAY HOLDINGS, LLC., E. W. HOWELL CO, LLC., CAPITAL GRILLE HOLDINGS, INC., 120 BROADWAY ACQUISITION JV, LLC., 120 BROADWAY ASSOCIATES LLC, 120 BROADWAY JM, LLC, 120 BROADWAY SM, LLC., SILVERSTEIN PROPERTIES, INC. and SILVERSTEIN 120 BROADWAY LLC.,
Defendants.

FILED
DEC 20 2013
COUNTY CLERK'S OFFICE
NEW YORK

E.W. HOWELL CO., LLC., f/k/a EW HOTELS CO., INC. and CAPITAL GRILLE HOLDINGS, INC.
Third-Party Plaintiff,

THIRD-PARTY INDEX NO. 590961/09

-against-

ROBERT B. SAMUELS, INC.,
Third-Party Defendant.

The following papers were read on this motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and/or 3212.

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

Cross-Motion: ☐ Yes ☐ No

This is a personal injury action, sounding in violations of New York Labor Law sections 200, 240 and 241, brought by Anthony Castro (plaintiff) to recover damages for injuries

allegedly sustained on June 10, 2009 when he fell from a 10-foot fiberglass A-frame ladder while performing electrical instillation work on the lower level at a construction site located at 120 Broadway, New York, New York (work site) during a gut renovation for the construction of a Capital Grille restaurant. Now before the Court is a motion by 120 Broadway Acquisition Jr., LLC., 120 Broadway Associates, LLC, 120 Broadway JM, LLC, 120 Broadway SM, LLC, Silverstein Properties, Inc. and Silverstein 120 Broadway LLC (collectively, moving defendants) to be dismissed from this action, pursuant to CPLR 3211(a)(7) and/or 3212, on the basis that they are not owners of the premises as they are merely membership tiers of one another and they had no active involvement in the project, nor are they identified in the relevant project contracts as the owner or contractor. Third-party defendant Robert B. Samuels (Samuels), plaintiff's employer, submits opposition to the motion on the basis that depositions are outstanding and this motion is premature. Plaintiff submits an affirmation in opposition which refers to and adopts the arguments in Samuels' opposition. Discovery is this matter is not complete, and the Note of Issue has not been filed.

STANDARD

Dismiss

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the

pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). A 3211(a)(7) motion to dismiss "is solely directed to the inquiry of whether or not the pleading, considered as a whole, fails to state a cause of action. Looseness and verbosity must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading" (*id.* at 64-65 [internal citation omitted]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory *(see Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.,* 262 AD2d 188 [1st Dept 1999]).

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to

make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

The Court finds that the moving defendants have met their prima facie burden of establishing their entitlement to summary judgment as a matter of law on the basis that plaintiff fails to state a claim against them under New York Labor Law. Specifically, the moving defendants produced documentary evidence and affidavits by Michael Levy, which establish that they are neither the owners of the premises as they are merely membership tiers of one another and they had no active involvement in the project, nor are they identified in the relevant

project contracts as the owner or contractor. Moving defendants also attach a copy of the lease agreement between 120 Broadway Holdings LLC as landlord and owner and Capital Grille Holdings, Inc., (Capital Grille) as tenant for the restaurant at the premises which is the site of plaintiff's accident, which includes the definition of the demised premises as that portion of the ground floor, mezzanine and concourse levels of the building known as 15-25 Nassau Street also known as 120 Broadway (Amended Notice of Motion, exhibit N). Also attached is the agreement between defendant/third-party plaintiff E.W. Howell Co., LLC, (Howell) as contractor and Capital Grille as "owner" regarding the construction of the Capital Grille restaurant (*id.* at exhibit O), as well as the agreement between Howell as contractor and Samuels as subcontractor (*id.* at exhibit Q). It is worth noting that Howell and Capital Grille are not moving herein for dismissal of the complaint.

Labor Law § 240(1) imposes liability on "[a]ll contractors and owners and their agents", and 241(6) states requirements imposed on "[a]ll contractors and owners and their agents." Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, general contractors, and their agents (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 494 [1993]). Furthermore, "there must be 'some nexus between the owner and the worker, whether by lease agreement or grant of an easement, or other property interest' in order for liability to be imposed under these provisions of the Labor Law" (*Ferreira v Village of Kings Point*, 68 AD3d 1048, 1050 [2d Dept 2009], quoting *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51 [2004]). The burden of establishing this is on the defendant moving for summary judgment (*id.*). Here, the moving defendants have met this burden and in opposition, plaintiff and Samuels fail to raise a triable issue of fact. Accordingly, the herein motion is granted in its entirety.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by 120 Broadway Acquisition Jr., LLC., 120 Broadway Associates, LLC, 120 Broadway JM, LLC., 120 Broadway SM, LLC, Silverstein Properties, Inc. and Silverstein 120 Broadway LLC, pursuant to CPLR 3211(a)(7) and 3212, is granted in its entirety; and it is further,

ORDERED that within 30 days of Entry, counsel for the moving defendants is directed to serve a copy of this Order with Notice of Entry upon the all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/17/13

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**