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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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DUANE REAVES,

Plaintiff,

-against-

LAKOTA CONSTRUCTION GROUP, INC., JBH LLC, 214-27 NORTHERN BOULEVARD, LLC, BERGON CONSTRUCTION CORP. and ABC CORP.

Defendants.

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Index No. 150350/2012
Motion Seq. 3, 4 and 5

DECISION/ORDER
ARLENE P. BLUTH, JSC

Motion Sequence Numbers 3, 4 and 5 are consolidated for disposition. All motions are denied.

The basic facts of the accident are uncontested. On November 8, 2010, plaintiff was an employee of non-party Luxury Cars of Bayside, Inc., a BMW franchisee ("Luxury Cars") and was working in its internet sales department; the office was located on the second floor of 214-27 Northern Boulevard, Bayside, New York. The lease to the entire building was held by defendant 214-27 Northern Boulevard, LLC ("214-27"). Non-parties John Burns and his wife Agatha Burns were in the car business and the only principals of both Luxury Cars and 214-27. Mr. Burns admitted that he wanted to lease the building at 214-27 Northern Boulevard and upgrade it so it could be used for his car business (there was some testimony that the intent was to sell certified used cars from that location), so he and his wife formed 214-27 and entered the lease

under that corporate entity. The upgrades included work on the outside/facade of the building. Mr. Burns states that he had an oral agreement with defendant Bergon to be the construction manager and Bergon found defendant Lakota to do some of the renovations. Mr. Burns admits that the leaseholder, 214-27, paid Lakota from 214-27's checking account.

During these renovations, the first floor showroom was not open and no car business was being conducted on the first floor. Rather, Lakota used the first floor as a staging area while it was doing work to the outside of the building; equipment, materials and supplies were kept inside. Lakota's crew would arrive in the morning and leave by 3:30 in the afternoon. The construction crew knew that people were working on the second floor and the employees of Luxury Cars knew construction workers were working downstairs. The construction crew did not cordon off or otherwise make a separation between their work area(s) and non-work area(s). That is, there was no path, clearly delineated or otherwise, for people working on the second floor to travel between their staircase and the entrances/exits to the building.

On November 8, 2010, at around 5 or 5:30 p.m. (daylight savings time had just kicked in and it was dark outside), plaintiff, an employee of Luxury Cars working on the second floor, decided to go home for the day. He left his coworkers upstairs, came down the steps, and found the first floor to be pitch black. The lights were off and plaintiff did not know where the switch was. Plaintiff attempted to leave the building through an exit he normally used. However, the door to this exit was locked. Instead of going back upstairs and asking his coworkers for help (he could have asked if someone knew where the light switch was or if someone had a flashlight) or even alerting his coworkers about the issue (after all, they would have the same issue when they wanted to leave), plaintiff decided to walk through a known construction site in the pitch black

toward another door. He slipped on some masonite, which was there to protect the tiled showroom floor, and while trying to recover his balance, he tripped on a pile of panels that were recently delivered and were to be installed on the outside of the building. He fell, suffered injuries, and received worker's compensation benefits through his employer, Luxury Cars.

Plaintiff has sued 214-27, the leaseholder (which hired contractors to perform the work on the first floor and allowed plaintiff and his coworkers to conduct business on the second floor while that construction work was ongoing), Bergon, alleged to be the construction manager/ safety manager/general contractor, and Lakota, the entity doing the work to the facade and using the first floor as a staging area. All three defendants have made motions to dismiss the claims against them.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's

task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Defendant 214-27's motion

214-27 moves to dismiss all claims and cross-claims against it based on three theories.

First, 214-27 claims to be the alter ego of Luxury Cars, plaintiff's employer, and thus seeks dismissal based on Worker's Compensation Law § 11. This argument fails. The fact that Mr. and Mrs. Burns are principals of both Luxury Cars and 214-17 does not, by itself, dissolve the separate corporate identities of each enterprise. "[T]hat two entities have a principal in common is insufficient to establish that they were alter egos" (*Kolenovic v 56th Realty, LLC,*— NY3d —, 2016 NY Slip Op 04005 [1st Dept 2016]). Luxury Cars was already in business when Mr. and Mrs, Burns formed 214-27. The fact that they decided to create a new entity, defendant 214-27, to be the leaseholder of the premises means that they intended to separate the functions of these distinct entities. If they wanted Luxury Cars to lease the premises and hire the contractors, there would have been no need to form 214-27. Clearly, the entities were related, with Luxury Cars funding 214-27 and sharing principals. However, 214-27 did not employ plaintiff and Luxury Cars was not the leaseholder of the premises being renovated. Moreover, 214-27 had separate bank accounts from Luxury Cars and even paid Lakota from 214-27's bank

account. Mr. Burns separated the companies, treating 214-27 as the leaseholder of the building and as the entity responsible for the renovation. He also took the lease under that name and paid Lakota from its account. The two companies are distinct enough to raise an issue of fact and deny that part of the motion made on this ground. It would be inappropriate to dismiss claims against 214-27 based on Workers' Compensation Law § 11 when, like here, plaintiff's employer and the leaseholder of the premises where a plaintiff is injured are distinct legal entities (*Palmer v Dezer Props.*, 270 AD2d 207, 207, 706 NYS2d 31 [1st Dept 2000], citing *Richardson v Benoit's Elec.*, 254 AD2d 798, 799, 677 N.Y.S.2d 855 [4th Dept 1998]; *see also Soodin v Fragakis*, 91 AD3d 535, 536, 937 NYS2d 187 [1st Dept 2012]).

Next, 214-27 moves to dismiss on the ground that 214-27's actions in allowing construction workers to work on the first floor is not the proximate cause of the accident but merely furnished the occasion for the accident. Because 214-27 hired construction workers and allowed them to spread out on the first floor of the building without ensuring that the workers on the second floor could safely travel to the exit, and because 214-27 failed to make sure that the path to the exit was illuminated after dark, this court cannot eliminate, as a matter of law, 214-27's conduct as a proximate cause of the accident.

In a related argument, 214-27 argues that plaintiff's conduct in walking through a known construction site in the pitch dark was the proximate cause of the accident. While reasonable jurors may assign a percentage of fault to the plaintiff, possibly even a large percentage, this court cannot hold, as a matter of law, that plaintiff was the *sole* proximate cause of his injuries. Reasonable people may consider the lack of lighting, the failure to cordon off the construction area and the failure to create a safe passageway as proximate causes too.

The court recognizes, and defendants have argued, that the lack of a passageway is likely irrelevant here, because plaintiff would not have been able to see a passageway in the dark. However, the fact is that there was no passageway at all. Had there been a passageway/cordoned off area, perhaps plaintiff would have appreciated the danger of proceeding in the dark, or perhaps the construction workers would have appreciated the necessity of keeping materials away from where Luxury Car's employees may pass. And so the fact that it was dark does not automatically render the lack of a passageway irrelevant.

Finally, 214-27 moves for summary judgment claiming that it did not create or have actual or constructive notice of a dangerous condition at the premises. In moving for summary judgment, 214-27 had the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 NYS2d 573 [1st Dept 2008]). It was no secret that Luxury Car's employees were working upstairs; they were entitled have their path to the exit illuminated. Here, although Mr. Burns claimed that he had no idea that his internet sales team had moved into the second floor of the building until the summons and complaint were served[1] (exhibit K, ¶ 21), the deposition of Luxury Car's center operator contradicts this. William Finsilver testified at his deposition that he notified Mr. Burns of the accident "probably within forty eight hours" (Finsilver tr at 36). Mr. Finsilver also testified that Mr. Burns accompanied him a few times to the premises when the construction was being performed *and while the*

[1]The accident was in November 2010; the complaint was filed in May 2012. Even though an ambulance was called and plaintiff received worker's compensation benefits, Burns claims that he knew nothing about Luxury Car's employees on the premises until after the complaint was filed.

internet sales group was working on the second floor (*id.* at 64). Therefore, whether 214-27 was aware that Luxury Car's employees were working on the second floor while the first floor was being used for construction workers is an issue of fact. As no one ever claims to have cordoned off a safe ingress/egress path for those non-construction workers, a jury will decide whether 214-27 had actual or constructive notice of the conditions on the date of the accident. This too is an issue of fact for the jury to decide.

Moreover, if the jury finds that 214-27, the leaseholder, knew that Luxury Cars' employees were working on the second floor, 214-27 would have had a nondelegable duty to keep the premises safe, including providing plaintiff "with reasonably safe means of ingress and egress, and can be held vicariously liable for any negligence by [contractors] that caused the entrance to become unsafe" (*LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287, 851 NYS2d 187 [1st Dept 2008]).

Defendant Bergon Construction's motion

Bergon moves to dismiss based on two theories. First, it claims it had no duty to the plaintiff. Second, it claims it did nothing to contribute to the accident. Rather, factors such as the loose masonite and plaintiff's actions in walking through a known construction site in the pitch black were causes of the accident.

Bergon claims that it was merely a construction manager, hired pursuant to an oral contract with John Burns. According to Bergon's witness, Mr. Gonzales, he and Mr. Burns never discussed whether site safety was part of Bergon's responsibilities (Gonzales tr at 185-86). Mr. Burns testified that he understood that Bergon was responsible for site safety and had the

authority to shut the work down if it found unsafe conditions (Burns tr at 171). This is an issue of fact. According to Lakota, Bergon was the general contractor and directed Lakota in its work, including covering the floors (but not with what or how) (Levine tr at 86). Also, according to Lakota, who had worked with Bergon many times before, Bergon was responsible for site safety while Lakota was responsible for the safety of its workers and to keep the general public off the work site (*id.* at 148-51). Without any written agreements specifying the responsibilities of the parties, whether Bergon was responsible for making sure the floor covering was taped down, for cordoning off the area, or for other safety issues, is for the jury to decide.

While Bergon admits that it directed where to place the stored panels over which plaintiff tripped, Bergon claims that the unsecured masonite and plaintiff's decision to walk through a construction site in the dark were proximate causes of the accident, not the location of panels. As the scope of Bergon's responsibilities for the construction - including site safety, illumination and cordoning off areas, etc. - is for the jury to decide, so is the question of proximate cause. Even if the jury does not find that Bergon was responsible for overall safety, it might find Bergon liable for deciding to place the panels so close to unsecured masonite.

Defendant Lakota Construction's motion

Lakota, whose workers left loose masonite on the floor and were the last people to leave the building during daylight, also claims no liability. Lakota moves on three grounds.

Lakota claims that as an independent contractor, who had a contract with 214-27, it owed no duty to the plaintiff. In opposition, plaintiff points out that it is not seeking third-party beneficiary status from 214-27's contract with Lakota. Rather, because Lakota knew that plaintiff

and his coworkers were working on the second floor, plaintiff proceeds under the theory that Lakota created an unreasonable risk of harm to plaintiff by failing to cordon off/barricade the construction area, by failing to keep the lights on so plaintiff could enter and exit the building and by creating a slipping hazard by failing to tape the masonite to the floor. "[W]hen a contractor is alleged to have negligently created or exacerbated a dangerous condition by its own affirmative acts, the scope of defendant's duty should be determined under traditional negligence principles" (*Mizell v Bright Servs., Inc.*, 38 AD3d 267, 267, 832 NYS2d 14 [1st Dept 2007]).

Lakota had the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 NYS2d 573 [1st Dept 2008]). There is no question that Lakota knew people were working upstairs and that Lakota failed to tape the masonite to the floor, and so Lakota cannot claim that it did not create the condition.

Instead, Lakota claims that it cannot be held liable for failing to tape down the masonite because it could not foresee that plaintiff would be in that area. This court can not, as a matter of law, determine that plaintiff walking in that area was unforeseeable. Lakota knew people were working upstairs. Lakota knew that the people who were working upstairs remained on the premises after Lakota workers left for the day. Lakota knew that the Luxury Car employees had to exit the building from the first floor. Lakota knew it did not cordon off any of its work area or otherwise indicate that any specific area was "off limits" to the non-construction workers in the building. And, of course, someone turned the lights off. A reasonable jury could find that because of one or all of those things, Lakota increased the risk of harm to plaintiff.

As discussed above, plaintiff's actions in walking in the dark cannot be said to be so egregious as to mandate dismissal of the case and assign plaintiff's actions as the sole proximate cause of his injuries as a matter of law. A reasonable jury may assign a very high percentage of fault to plaintiff, all the fault to plaintiff, or a small percentage to plaintiff. It is up to a jury to decide how much fault, if any, is attributable to plaintiff. The Court is unable to grant defendants summary judgment on this point.

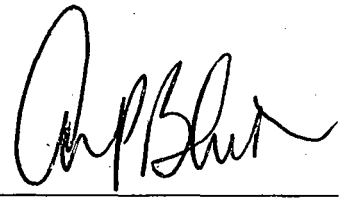
Finally, Lakota's argument that plaintiff was trespassing is without merit. Plaintiff worked in the building and was allowed to be on the first floor. Without cordoning off a "shop area" for Lakota, and making it absolutely clear that only Lakota employees and their express invitees were allowed in, there can be no claim of trespass. Here, there was no barricade or signs.

Accordingly, it is

ORDERED that the motions for summary judgment are denied.

This is the Decision and Order of the Court.

Dated: June 14, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC