| **Burgund v Cushman & Wakefield, Inc.** |
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| 2017 NY Slip Op 30840(U) |
| April 25, 2017 |
| Supreme Court, New York County |
| Docket Number: 155887/2014 |
| Judge: Kelly A. O'Neill Levy |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19
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JAMES BURGUND,

Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC. and JT&T AIR CONDITIONING CORP.,

Defendants.
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Index No.155887/2014

Seq. No. 002 and 003

Decision and Order

**Kelly O'Neill Levy, J.:**

Defendants Cushman & Wakefield, Inc. (Cushman) and JT&T Air Conditioning Corp. (JT) each move under motion sequences 002 and 003, respectively, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all cross claims against them. Plaintiff opposes. The motions are consolidated for disposition.

## FACTUAL BACKGROUND

In this personal injury action, plaintiff sues for injury sustained on April 18, 2013 when he tripped and fell on a condenser pump of a spot cooler during the course of his work on the second floor of a seven story Verizon-owned[1] central station building (building) located at 360 Bridge Street in Brooklyn. The building was occupied by Verizon and contained Verizon computer and telephone communications equipment. Cushman served as the building's managing agent.

[1]Verizon is the well-known company that supplies telephone services and products. It operates through multiple corporate names and with multiple divisions within its various corporations; among those entities are Verizon, Inc., Verizon New York, Inc., and Verizon Sourcing LLC.

At the time of the accident, Mr. Burgund was employed as a Central Office Equipment Installer for Verizon. He testified that he was stepping off of a ladder during the course of his work when he tripped over a condenser pump, a "squarish" object attached to a spot cooler, which is a portable air conditioning unit. He also testified that he had seen the spot cooler before he climbed the ladder but had not seen the condenser pump.

**ARGUMENTS**

Plaintiff alleges that defendants were negligent and violated sections 200, 240(1), and 241(6) of the Labor Law. Cushman contends that there is no factual issue that it was negligent, that the activity Mr. Burgund was engaged in is not actionable under the Labor Law, and, even if said activity was actionable, Cushman is not subject to liability under Labor Law § 240(1) or § 241(6) because it was neither the building's owner nor the owner's agent or a contractor.

JT similarly contends that it was neither negligent nor in violation of the Labor Law because it was not involved with any work on the second floor of the building where the incident occurred. JT further argues that it did not place any spot coolers in the building nor did it own any spot coolers prior to the time of the accident.

In opposition, plaintiff argues that the motions for summary judgment should be denied as premature as no note of issue has been filed and he has commenced a second action in Kings County Supreme Court (James Burgund v. Verizon New York Inc. et al., Index No. 506150/2016), which he will seek to consolidate with the instant action, and which will provide further evidence to defeat the subject motions. In addition, the deposition of Mr. Lufus Owusu, a Verizon employee and the real estate manager of the building who purportedly has knowledge as to who owned the spot cooler at issue, remains outstanding, as plaintiff has thus far been

unsuccessful in his attempts to serve Mr. Owusu with a judicial subpoena. Moreover, plaintiff argues that even if the motions are not premature, there are questions of fact yet to be resolved.

Furthermore, Cushman and JT each seek an order granting summary judgment as to all cross-claims against them. Because the papers are devoid of any arguments in support of or against any cross-claims with respect to defendants, the court does not reach the merits as to any cross-claims.

**DISCUSSION**

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment. *Zuckerman* at 562. 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 Dep't 2002).

***Motion Sequence 002***

With respect to plaintiff's negligence claim and his claim under Section 200 of the Labor Law, which provides a general duty to protect the health and safety of employees, Cushman argues that there is no evidence that it owned, placed, operated, maintained or otherwise had control over the spot cooler at issue, or even that it had notice of the location of same.

A cause of action sounding in common-law negligence or a violation of Labor Law § 200 "may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed." *Pilato v. 866 U.N. Plaza Assocs.*, LLC, 77 A.D.3d 644, 645 (2d Dep't 2010). "In order to establish liability for a dangerous condition under principles of common-law negligence, a plaintiff must show that the defendant created the condition or had actual or constructive notice thereof." *Candela v. City of N.Y.*, 8 A.D.3d 45, 47 (1st Dep't 2004). Labor Law § 200 has two disjunctive standards for determining an owner or managing agent's liability. *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 128 (2d Dep't 2008); *see De La Rosa v. Philip Morris Mgmt. Corp.*, 303 A.D.2d 190, 192 (1st Dep't 2003) ("Labor Law § 200 applies to an owner or managing agent who exercises control or supervision over the work performed at the accident site"). "The first [standard] is the authority to supervise the work when a plaintiff's injury arises out of defects or dangers in the methods or materials of the work." *Chowdhury*, 57 A.D.3d at 128. "The second standard is applicable to worker injuries arising out of the condition of the premises rather than the methods or manner of the work. When a premises condition is at issue, a property owner [or managing agent] is liable under Labor Law § 200 when the owner [or

managing agent] created the dangerous condition causing an injury or when the owner [or managing agent] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice." *Id*; *Mendoza v. Highpoint Assocs., IX, LLC*, 83 A.D.3d 1, 9 (1st Dep't 2011); *Mackey v. Consol. Edison Co. of N.Y.*, 34 Misc. 3d 1204(A) (Sup. Ct. 2011) (citing *Lombardi v. Stout* 80 N.Y.2d 290 [1992]) ("The statute applies to owners, contractors and agents who either controlled or supervised the injured worker or created an allegedly dangerous condition or had actual or constructive notice of it"); *see also Picchione v. Sweet Const. Corp.*, 60 A.D.3d 510, 512 (1st Dep't 2009).

Here, Mr. Burgund testified at his deposition that the spot cooler at issue was not Verizon equipment because it did not have a Verizon stamp on it and all of Verizon's equipment was stamped accordingly. He also testified that Jack Collins, a Verizon employee and business agent for the union, told him that the spot cooler was not Verizon equipment but belonged to an outside contractor, specifically either Tri-State[2] or JT. Mr. Burgund testified that Mr. Collins was informed by Mr. Owusu that Mr. Owusu's records indicated that the spot cooler did not belong to Verizon, but neither Mr. Collins nor Mr. Owusu has been deposed. Mario Frangella, the Senior Project Manager for Cushman, when asked at his deposition if "Verizon employees would place [spot coolers] or Cushman & Wakefield employees would place [spot coolers]," he responded "[i]t could be either/or, but they would hire a contractor to do it." (Frangella, Tr. 33-34). While Mr. Frangella maintained that Verizon spot coolers were placed at the direction of Verizon property management and that spot coolers on the second floor were in place at the beginning of

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[2]Tri-State is a corporation that supplies filters and heating, ventilation, and air conditioning products and merchandise. Tri-State is a named defendant (Tristate Filter & HVAC Supplies, Inc.) in the aforementioned Kings County Supreme Court action.

Cushman's work as managing agent, he also testified that he did not know whether Cushman ever provided spot coolers for use at the building, including six months up to and including the date of the accident (Frangella, Tr. 29), and that he did not know who physically placed the spot coolers on the second floor (Frangella, Tr. 35).

Cushman's contention that Mr. Frangella's testimony of "alternate facts" would be inadmissible as speculative is misplaced. Mr. Frangella is not merely providing alternative explanations as to who placed the spot cooler but is testifying that either company had the authority to order or place spot coolers on the second floor. According to Mr. Frangella, he observed two or three spot coolers on the second floor of the building before April 2013, stating that they were in place as of September or October 2012 when he began his duties at the building. (Frangella, Tr. 28, 30, 51). He surmised that those spot coolers could not have belonged to Cushman since Cushman did not "come on" until 2013, but testified that Cushman at some later point could have had spot coolers placed and would have hired a contractor to place them. (Frangella, Tr. 53, 34) Because the incident occurred in April 2013, several months after Cushman arrived, and because the spot cooler did not have an identifying Verizon stamp, as Mr. Burgund testified was customary of Verizon equipment, there is a question of fact as to whether Cushman placed the spot cooler at issue and created a dangerous or defective condition.

As to the Labor Law § 240(1) and § 241(6) claims, Cushman argues that Mr. Burgund was not engaged in any kind of construction or alteration of the building necessary for him to be afforded statutory protection under the Labor Law. Mr. Burgund contends that he was performing construction and alterations within the building.

Under Labor Law § 240(1), a worker must establish that injuries were sustained while engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." "'[A]ltering' within the meaning of Labor Law § 240(1) 'requires making a *significant* physical change to the configuration or composition of the building or structure.'" *Rhodes-Evans v. 111 Chelsea LLC*, 44 A.D.3d 430 (1st Dep't 2007) (citing *Panek v. County of Albany*, 99 N.Y.2d 452, 457-58 [2003] quoting *Joblon v. Solow* 91 N.Y.2d 457, 465 [1998]) (emphasis in original).

In *Rhodes-Evans*, a Verizon field technician suffered a back injury when the ladder she was on slipped beneath her as she was splicing fiber optic cable in a cable box located in a parking garage. 44 A.D.3d 430 (1st Dep't 2007). The First Department found that splicing a fiber optic cable located in a box did not constitute making a significant physical change. The court further reasoned that "[n]o fair reading of the record supports plaintiff's claim that she was 'installing a *new* and enhanced fiber optic telephone system . . . in a place where no such service previously existed.'" *Rhodes-Evans v. 111 Chelsea LLC* at 433 (emphasis added). The court noted, "[a]s plaintiff herself testified, her job assignment was 'to locate a certain fiber and splice it into an existing fiber in the building.'" *Id.*

Unlike in *Rhodes-Evans* where the Verizon technician was merely splicing existing fiber optic cable in an existing cable box, Mr. Burgund was installing an entirely new piece of equipment, namely a "TA 3000," which sends out a connection from the building to an outside plant, and was running 300 foot cables from a "frame" to the new equipment. (Burgund, Tr. 31). Mr. Burgund was therefore making an alteration pursuant to Labor Law § 240(1). *See Sarigul v. N.Y. Tel. Co.*, 4 A.D.3d 168, 169 (1st Dep't 2004).

Labor Law § 241(6) provides, in relevant part, "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Because there is a question of fact as to whether Cushman placed the spot cooler at issue–as discussed above–there remains a question of fact as to whether Cushman provided "reasonable and adequate protection and safety to the persons employed therein."

Cushman further argues that even if plaintiff was afforded statutory protection under Labor Law § 240(1) and § 241(6), Cushman was only responsible for supervising the installation of a large air conditioning unit which was unrelated to the work plaintiff was performing when his injury occurred. This argument is also unavailing.

Labor Law § 240(1) "imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work," *Barreto v. Metro. Transp. Auth.*, 25 N.Y.3d 426, 433, reargument denied, 25 N.Y.3d 1211 (2015), but "[o]nly upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an agent under sections 240 and 241." *Voultepsis v. Gumley Haft Klierer, Inc.*, 60 A.D.3d 524, 525 (1st Dep't 2009) (internal quotation marks omitted). Plaintiff argues that pursuant to a "Master Services Agreement" between Verizon and Cushman entered into as of September 1, 2012, Cushman served as the building's managing agent. Mr. Frangella testified that Cushman, as "managing agent," was "responsible for the operations of the building, just to managerially help out Verizon employees in that building

regarding building issues, roofs, facade [and] repairs." Because there is evidence that Cushman was "responsible for the operations of the building" and "managerially" assisted "Verizon employees" in the building regarding "issues", there is a question of fact as to whether Cushman was an agent under the Labor Law.

***Motion Sequence 003***

Plaintiff's claims against JT are dismissed. JT has met its initial burden of showing that no triable material issue of fact exists with respect to its ownership or control of the spot cooler at issue. According to the testimony of Nicholas Castell, an employee of JT, JT's role was limited to servicing and installing an air conditioner on the roof of the building, he and his partner were the only two on the project, they never went to the second floor where the spot cooler at issue was located, and JT did not own any spot coolers prior to 2013. Additionally, Mr. Frangella testified that JT did not have any involvement with the spot coolers on the second floor and was not involved with the assembly or construction of the ducts connected to the spot coolers. (Frangella, Tr. 50-51, 154).

The burden then shifts to plaintiff to provide evidence that material factual issues exist. In this regard, plaintiff testified that he was told by Mr. Collins that the company that supplied the spot cooler was either Tri-State or JT. Unlike with Cushman where it served as managing agent and where there is testimony by a Cushman employee that Cushman could have placed the spot cooler at issue, there is no such relationship or testimony with respect to JT. The only connection between JT and the subject spot cooler is the hearsay testimony of Mr. Burgund that Mr. Collins told him the company that supplied the spot cooler was either Tri-State or JT. *See, e.g., Del*

*Giacco v. Noteworthy Co.*, 175 A.D.2d 516, 518 (3d Dep't 1991) (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]) (explaining that "[b]ald assertions, speculation, mere conclusions, expressions of hope or unsubstantiated allegations and assertions are simply insufficient to successfully oppose a motion for summary judgment"). Plaintiff's proffered evidence is insufficient to overcome JT's prima facie case.

**CONCLUSION AND ORDER**

For the reasons stated above, the court finds that Cushman failed to offer sufficient evidence to make a prima facie showing that the claims asserted against it are deficient as a matter of law, and there are issues of fact yet to be resolved. The court further finds that JT did offer sufficient evidence, and plaintiff failed to establish that there exist material factual issues. Accordingly, it is hereby

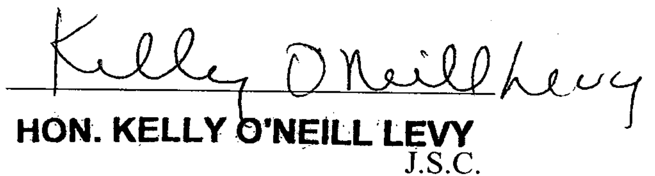
ORDERED that Cushman & Wakefield, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that JT&T Air Conditioning Corp.'s motion for summary judgment is granted and the complaint is dismissed against JT&T Air Conditioning Corp. only.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: April 25, 2017 ENTER:



HON. KELLY O'NEILL LEVY
J.S.C.