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

PRESENT: HON. JUDITH J. GISCHE　　　　PART 10

Index Number : 400046/2007
NOLAN, MICHAEL
vs.
J.C.S. REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

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

at oral argument π conceded only issues left 1/19/09 (stip filed) pertain to ordinary negligence.

FILED
FEB 08 2010
NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: FEB 03 2010

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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Michael Nolan,

Plaintiff (s),

-against-

J.C.S. Realty, LLC, The Proctor & Gamble Company and As the World Turns,

Defendant (s).

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DECISION/ ORDER
Index No.: 400046/2007
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**
Defs P&G, ATWT n/m (CPLR 3212) w/BC affid, WJF affirm, exhs . . .	1
Def JCS x/m (CPLR 3212) w/PLR affirm, exhs	2
Pltf's opp to JCS x/m w/EJP affirm, exhs	3
Defs P&G, ATWT opp to JCS x/m, reply w/WJF affirm	4
JCS reply w/PLR affirm, exh	5
Stip so ordered 11/18/09	6

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

Plaintiff Michael Nolan ("plaintiff") alleges he was injured while unloading carpet at the premises owned by defendant J.C.S. Realty, LLC ("Realty"). He has asserted Labor Law claims against each named defendant (sections 240, 241 [6]) as well as claims of ordinary negligence (Labor Law § 200). Issue has been joined and the note of issue was filed on February 20, 2009.

Presently before the court is a motion and cross motion for summary judgment by the defendants. At oral argument plaintiff withdrew his Labor Law violation claims

against the defendants and all claims against Televest, incorrectly sued herein as "Proctor & Gamble" and "As the World Turns." Hereinafter Proctor & Gamble and As the World Turns will be referred to as "Televest," although no longer a part of this case.

Televest's motion was filed timely brought, within 120 days of the note of issue being filed and it was filed on June 22, 2009. The cross motion by Realty for summary judgment was served June 22, 2009 which is within 120 days after the note of issue was filed. Realty did not, however, file its cross motion with the court until September 16, 2009. Plaintiff argues that because Realty's motion was not filed within a 120 days of the filing of the note of issue, it is untimely and should be denied for that reason, without reaching the merits.

A motion on notice is "made" when it is served (CPLR 2211). This is also true of a cross motion (Rosario v D.R. Kenyon & Son, 258 AD2d 265 [1st Dept 1999]). Therefore, the cross motion by Realty for summary judgment is timely, although it was filed after the 120 day period to "make" a motion had expired (Russo v. Eveco Development Corp., 256 AD2d 566 [2nd Dept 1998]). Since the cross motion is timely, it will be decided on the merits. The court's decision and order is as follows:

Arguments

Plaintiff claims that on March 7, 2005 he was injured when some improperly stored rolls of carpet he fell on him. At the time of his accident, plaintiff was employed as a stagehand/bayman by J.C. Studios, LLC ("Studios"), a non-party to this action. *Studios* leased space at the premises located at 1268 East 14th Street, Brooklyn, New York ("premises"). The premises are owned by Realty. Realty and Studios have some officers in common. Pursuant to an operating agreement between and Televest made

in March 2005, Studios provided production facilities, services and personnel for As the World Turns.

Plaintiff was deposed and testified at his deposition ("EBT") that he was instructed by Sal Rotondo to get a roll of carpet from one of the racks located in the bay area of the studio. On the day of the accident Rotondo was employed by Studios as its crew chief and he was plaintiff's supervisor. Plaintiff testified at his EBT that Rotondo was the only person that he reported to, although there were other Studios workers in his crew (Nolan EBT p.13).

The rack where the carpet was stored was bolted to the wall and several feet off the ground. Plaintiff opened an 8 foot aluminum A-frame ladder and was standing on the second step from the top with one hand on one of the rolls when several rolls of carpet and linoleum tumbled down onto him. One of them hit him on the chest, knocking him to the floor.

Realty contends it is entitled to summary judgment dismissing the complaint because it did not supervise or control plaintiff's work or any of the Studios' employees. Michael Stiegelbauer, the manager of Realty was deposed. Steigelbauer testified at his EBT that decisions about how rolls of carpet and linoleum were removed from these racks was made by Studios, in particular Larry Scotty ("Scotty"), one of Studio's employees and its facilities manager who was in charge of the bay. Steigelbauer testified that although Realty employees were present on a daily basis at the premises they collected rent and paid bills, but had no involvement with Studios' employees.

In opposition to Realty's motion, plaintiff argues that there is an issue of fact whether Realty indirectly controlled how the rolls in the bay area were stored because

Studios and Realty have officers in common and Scotty, the facilities manager of Realty also owns a percentage of Studios.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

Having withdrawn all his Labor Law claims, the only remaining issue for the court to decide is whether Realty is entitled to summary judgment dismissing plaintiff's remaining claim for ordinary negligence. Where a plaintiff contends that the owner of the premises is liable for his injuries, the owner, to prevail on its motion for summary judgment, must prove that it did have the authority to control the activity that caused injury (Rizzuto v. Wegner Contr. Co., 91 N.Y.2d 343, 352 [1998]; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 [1993]). If the owner has direct supervision or control over plaintiff's work or the work's safety, this establishes the requisite supervisory control (Rizzuto v. Wegner Contr. Co., 91 N.Y.2d at 352-53; Havlin v. City of New York, 17 AD3d 172, 172-73 [1st Dept 2005]).

Plaintiff's own deposition testimony shows that he took directions from Rotondo and was instructed by Rotondo how to do his job. Rotondo was a Studios' employee, just like plaintiff. The EBT testimony of Realty's witness (Steigelbauer) is that Realty was only involved on the business side of Studios' operations and was not involved in

how Studios did its job or stored its props.

Plaintiff's argument, that both companies have officers in common, does not raise a triable issue of fact. There is no claim by plaintiff that at the time of his accident he was supervised by anyone other than Rotondo. Even if Scotty was an officer of both companies, there is no claim by plaintiff that Rotondo was really employed by Realty. Even had that argument been made, plaintiff has not come forward with any triable issues of fact that either company was negligent in the manner the rolls of carpet were maintained, had notice of a dangerous condition, or created the condition.

Realty has met its burden on this cross motion for summary judgment dismissing plaintiff's claim of negligence. The plaintiff has not come forward with triable issues of fact to defeat the cross motion. Therefore, Realty's cross motion for summary judgment is granted and the remaining claim against Realty is hereby dismissed.

Conclusion

In accordance with the foregoing,

IT IS HEREBY:

ORDERED that the motion by Televest (incorrectly sued herein as "Proctor & Gamble" and "As the World Turns") for summary judgment is granted since plaintiff has voluntarily withdrawn all claims against that defendant (see stip so ordered 11/18/09); and it is further

ORDERED that defendant J.C.S. Realty, LLC's cross motion for summary judgment is also granted since all Labor Law claims against that defendant were also withdrawn by plaintiff against that defendant and J.C.S. Realty, LLC has prevailed on

plaintiff's remaining claim against it for ordinary negligence; and it is further

ORDERED that the clerk shall enter judgment in favor of Defendant Televest (incorrectly sued herein as "Proctor & Gamble" and "As the World Turns") and Defendant J.C.S. Realty, against plaintiff Michael Nolan, dismissing the complaint in its entirety and all cross claims between the defendants; and it is further

ORDERED that any relief not expressly addressed herein is denied; and it is further

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

Dated: New York, New York
February 3, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.