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INTERIM DECISION AND ORDER

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, IAS PART 11

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ALFRED JOSEPH AYERS III,

Index No.: 116404/07

Plaintiff,

-against-

THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, THE CITY OF NEW YORK and HUNTER COLLEGE,

Defendants.

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JOAN A. MADDEN, J.:

In this personal injury action, defendant the Dormitory Authority of the State of New York ("DASNY") moves for summary judgment dismissing the complaint against it.[1] Plaintiff opposes the motion.

This is a personal injury action arising out of an incident that occurred on September 13, 2006, at the Master of Fine Arts Building at Hunter College located at 450 West 41st Street in Manhattan ("the Building") when a fire started on the top of a sidewalk shed on the south side of the Building. Plaintiff was injured when he landed on the top of the shed, in an attempt to extinguish the fire by jumping to the shed below a second story window of the Building. Plaintiff, a student at Hunter College who was trained in fire suppression during his time in the Air Force, maintains that he undertook to put out the fire as the numerous studios that overlooked the shed were filled with flammable and toxic materials.

DASNY owns the Building which was used by the City University of New York ("CUNY") for Hunter College. At the time of the incident Plaintiff was in the restroom on the

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[1]The claims against Hunter College have been discontinued, and the claim against the City of New York has been dismissed.

second floor of the Building. Plaintiff testified that he saw Richard McGauley,[2] a mechanical engineer at Hunter College, who indicated to him that there was a fire and that the fire hose did not work. According to plaintiff, he could not see where the fire was coming from. Plaintiff testified that he ran a bucket of water to McGauley to put out the fire and also offered to climb down to the scaffolding when the water did not appear to work so that he could use a fire extinguisher to put out the fire from that location. Plaintiff jumped from the window ledge onto the scaffolding and landed on his feet and then fell into a squatting position placing some weight onto his right hand. He was unable to stand up and noticed bone protruding from his ankle. While on the sidewalk shed Plaintiff remembers seeing some debris near the fire area, which he describes as "construction equipment, possibly metal. I remember metal rebar, some wood. I don't know." (See Plaintiff's Dep. at 81).

McGauley testified that he was employed as "an oiler" by Hunter and that he was responsible for maintaining all the mechanical equipment the Building. He testified that he was present on the scene and was the first to notice the fire from the second floor of the Building. McGauley testified at his deposition that he saw a "little fire" on top of the sidewalk shed but did not see any garbage on the shed under the wooden planks. (McGauley Dep., at 118). McGauley further testified that student cigarette butts started the fire, and that he frequently saw students smoke and saw cigarette butts near the fire. McGauley proceeded to throw buckets of water from the second floor window onto the sidewalk shed putting out the fire. He also testified that he had interacted with two DASNY employees for many years at Hunter College to deal with building issues and that DASNY employee Claude Zamor had an office in another Hunter College Building.

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[2]McGauley's name is incorrectly spelled McCauley in the papers submitted in connection with the motion.

DASNY moves for summary judgment, arguing that as an out-of-possession landlord, it does not retain sufficient control or authority over the Building to give rise to a duty owing to plaintiff. In this connection, DASNY contends that while it has title to the Building, it does so only pursuant to its role as a providing financing for CUNY under the Public Finance Law since DASNY is required to hold title to the Building as collateral for the bonds used to finance construction. (See Affidavit of Amy O'Connor, Assistant General Counsel for DASNY (EXH. G). DASNY alternatively argues that even if it owed plaintiff a duty, it had no notice of any dangerous condition leading to the fire. DASNY contends that there could not have been notice of "unspecified garbage" on the top of the sidewalk shed.

In opposition, plaintiff argues that DASNY owes a duty to him, as the shed at issue was part of an ongoing project, and points to evidence showing that CUNY requested that DASNY arrange for the installation of the sidewalk shed. Plaintiff also points to evidence that DASNY was in charge of the facade project necessitating the sidewalk shed including a letter attached to DASNY's moving papers in which an employee of CUNY wrote to a representative of DASNY notifying him of the potential for falling hazards from the facade work at the Building, and a work order for what appears to be the relevant sidewalk bridge.

In reply, DASNY concedes responsibility for the repairs underway at the Building as DASNY employees contracted for the erection of the sidewalk shed. DASNY admits that its contractor is responsible for the shed. However, DASNY argues that it entitled to summary judgment based on evidence that the fire was started by students smoking and CUNY's lack of supervision of its students, and not by any defect in the shed which was constructed from wood in compliance with the New York City Building Code. DASNY also argues that it had no notice of any garbage on the shed.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

As a preliminary matter, as DASNY has conceded that it hired the contractor who performed work on the shed, it is not entitled to summary judgment based on its status as an out-of-possession landlord. See Torres v. City University of New York, 29 A.D.3d 892 (2d Dept. 2006) (affirming denial of DASNY's summary judgment motion where the record shows that DASNY was involved in construction work at CUNY college where plaintiff fell). Thus, the facts of this case are distinguishable from those relied upon by DASNY. See e.g., Garcia v. Dormitory Authority of the State of New York, 195 A.D.2d 288 (1st Dept. 1988) (holding that DASNY cannot be held liable where it did not retain sufficient control over dormitory where accident occurred).

Next, while the shed itself was not defective, there is evidence that there was debris on the shed at the time of the fire. In addition, while there is no evidence that DSNY had notice of the debris, the record raises issues of fact as to whether DSNY's contractors caused or created the condition such that DSNY may be held liable. See Thomas v. J & K Diner, Inc., 152 A.D.2d 421 (2d Dept. 1989) (appeal dismissed, 76 N.Y.2d 77, (1990) (property owner can be held liable for negligence of contractor); Rothstein v. State, 284 A.D.2d 130 (1st Dept. 2001) (same).

While the record raises factual issues as to whether DASNY breached a duty to plaintiff in connection with the debris on the top of the shed, there remains an issue as to whether such a

breach was a proximate cause of plaintiff's injuries. In general, proximate cause is an issue to be decided by the finder of fact. (See Benitez v. New York City Bd. Of Educ., 73 N.Y.2d 650, 659 (1989); See also, Kriz v. Schum, 75 N.Y.2d 25, 34 (1989), quoting Derdiarian v. Felix Contr. Corp., 51 N.Y.2d (1980) ("because the determination of legal causation turns upon questions of foreseeability and 'what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve'"). However, "extraordinary intervening acts which are not foreseeable in the normal course of events may serve as a basis for a ruling, as a matter of law, that the chain of causation has been broken." Monell v. New York, 84 A.D.2d 717 (1st Dept. 1981).

Here, DASNY does not address the issue of proximate cause in its moving papers and, at most, raises the issue indirectly in its reply. Although the court arguably has the authority to search the record and decide the issue under these circumstances (Hunter v. R.J.L. Development, LLC, 44 AD3d 822, 825 [2d Dept 2007]), the court will permit each side to submit papers on the issue of proximate cause in accordance with the briefing schedule set forth below.

In view of the above, it is

ORDERED that on or before July 29, 2013, DASNY shall serve on papers related to the issue of whether any alleged negligence by DASNY was the proximate cause of plaintiff's injuries and plaintiff shall serve any response on DASNY on or before August 12, 2013, with originals to be provided to the Clerk of Part 11, room 351, 60 Centre Street on August 15, 2013, on which date the motion shall be placed on the Part 11 calendar for calendaring purposes only and no appearances shall be required.

A copy of this order is being sent by my chambers to the parties.

DATED: July 9, 2013

J.S.C.