

Pagliari v Boston Prop., Inc.

2013 NY Slip Op 30290(U)

January 23, 2013

Sup Ct, New York County

Docket Number: 108022/2008

Judge: Shlomo S. Hagler

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

MICHAEL R. PAGLIARO,
Plaintiff,

INDEX NO.: 108022/2008

MOTION SEQ. NO.: 001

- against -

**BOSTON PROPERTIES, INC.,
90 CHURCH STREET LIMITED PARTNERSHIP,
and TURNER CONSTRUCTION COMPANY,**

DECISION and ORDER

Defendants.

Motion by Boston Properties, Inc. and 90 Church Street Limited Partnership for summary judgment dismissing the complaint and all cross-claims against them.

	<u>Papers Numbered</u>
Notice of Motion with Affirmation of Kenneth S. Ross, Esq., In Support of Motion, & Exhibits "A" through "G"	<u>1, 2, 3</u>
Affirmation of Plaintiff's Counsel Steven J. Horowitz, Esq., in Opposition to Motion & Exhibits "1" through "6"	<u>4, 5</u>
Reply Affirmation of Kenneth S. Ross, Esq., in Support of Motion	<u>6</u>
Transcript of Oral Argument of June 11, 2012	<u>7</u>

FILED

Cross-Motion: No Yes Number of Cross-Motions: _____


FEB 08 2013

Cross-Motion(s) by _____ for _____

**NEW YORK
COUNTY CLERK'S OFFICE**

**Upon the foregoing papers, it is hereby ordered that this Motion is
denied as set forth in the attached separate written Decision and Order.**

Dated: January 23, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one: **Final Disposition** **Non-Final Disposition**

Motion is: **Granted** **Denied** **Granted in Part** **Other**

Check if Appropriate: **SETTLE ORDER** **SUBMIT ORDER**

DO NOT POST **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
MICHAEL R. PAGLIARO,

Plaintiff,

-against-

BOSTON PROPERTIES, INC.,
90 CHURCH STREET LIMITED PARTNERSHIP,
and TURNER CONSTRUCTION COMPANY,

Defendants.

Index No. 108022/2008

Motion Sequence Nos:
001 & 002

DECISION & ORDER

FILED

HON. SHLOMO S. HAGLER, J.S.C.:

FEB 08 2013

In this personal injury action, defendants Boston Properties, Inc. ("Boston Properties") and 90 Church Street Limited Partnership ("90 Church") move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims asserted against them. (Motion Sequence No. 001). Defendant Turner Construction Company ("Turner Construction") separately moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims asserted against it. (Motion Sequence No. 002). Plaintiff Michael R. Pagliaro ("Pagliaro" or "plaintiff") opposes defendants' motions. Both motions are consolidated herein for disposition.

BACKGROUND

The Parties

Plaintiff was employed by the United States Postal Service ("USPS") as a postal carrier. USPS owns a 15 story building at 90 Church Street, New York, New York, containing approximately one million square feet, and operates a post office therein on the first three floors ("the Property"). The Property is located across the street from the World Trade Center site.

On November 17, 1995, the USPS, Boston Properties and 90 Church simultaneously entered into a lease, sublease, and management agreement. The USPS executed a lease to rent the entire Property to 90 Church for a term of thirty (30) years ("Lease"). (See Exhibit "3" to the opposition papers.) At the same time, 90 Church entered into a sublease with the USPS for the USPS to sublet the first three floors of the Property for use as a post office ("Sublease"). (See Exhibit "4" to the opposition papers.) In addition, 90 Church entered into a management agreement with Boston Properties for Boston Properties to manage the entire Property ("Management Agreement"). (See, Exhibit "2" to the opposition papers.) 90 Church is an affiliated entity of Boston Properties. (See Deposition of Ralph Scelfo, senior property manager of Boston Properties, Exhibit "F" to the Turner Construction motion, at p. 34.) Since 1995, Boston Properties has continually maintained an on-site office at the Property. (*Id.*, at p. 12.) The USPS operates its own maintenance department and, according to Boston Properties, is responsible to inspect and maintain the first three floors of the Property. (*Id.*, at p. 13.)

After the terror attacks at the World Trade Center on September 11, 2001, the entire Property became contaminated from debris and suffered severe damage. Boston Properties, as agent for 90 Church, retained Turner Construction to perform necessary construction services. (See Deposition of Robert Schubert, senior vice president for construction of Boston Properties ["Schubert EBT"], Exhibit "4" to the opposition papers, at pgs. 16-18.) Turner Construction acted as the general contractor and was responsible for all aspects of the project such as plumbing, electrical and HVAC work, but it sub-contracted all the work to others. (See Deposition of Keith Balvin, project superintendent for Turner Construction, Exhibit "E" to Turner Construction's motion, at p. 17.) Specifically, Turner Construction sub-contracted the replacement of duct-work in the area where the

accident occurred to Nelson Air. (*Id.*, at p. 32.) Turner Construction admitted that it, or more likely Nelson Air, possibly installed a “lot of duct work” and the associated support brackets. (*Id.*, at p. 55.) Turner Construction completed the project in or about August or September, 2004. (*Id.*, at p. 53.) Boston Properties confirmed that Turner Construction “replaced or installed for the first time” the duct-work at issue. (See Schubert EBT, Exhibit “4” to the opposition papers, at p. 31.)

The Accident

On October 31, 2006, plaintiff was working as a postal carrier on the second floor of the Property. His postal supervisor asked him to bring mail from the second floor sorting area to the “box” area located on the first floor. Plaintiff took the elevator to the first floor and proceeded left toward two sets of swinging doors (utilized for equipment or freight) approximately 30 feet away. He walked through a “man” door (used for people without freight) on the left to enter the “box” area. Approximately six feet beyond the “man” door, plaintiff tripped over a metal bar measuring approximately 18 inches in length near a column. The object plaintiff tripped over was a metal support bar extending to a large duct running from the floor to the ceiling. (See Exhibit “1” to the opposition papers.) The duct was most likely a toilet exhaust duct (or an air duct) as there is a toilet underneath it. (See Schubert EBT, Exhibit “4” to the opposition papers, at p. 49.) The bar was raised about one and a half inches above the floor and was the same greyish color as the floor. The metal bar was later cut smaller and a yellow caution tape was added to the floor area surrounding the duct as depicted in Exhibit “1” to the opposition papers.

DISCUSSION

It is well settled that “[t]he proponent of a summary judgment motion 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.” (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].)

ARGUMENTS

Boston Properties claims that it and 90 Church can not be held liable for plaintiff’s personal injuries because they did not have responsibility to inspect or maintain the USPS’s area where the accident occurred. Moreover, Boston Properties and 90 Church argue that there is neither evidence establishing that they created the alleged dangerous condition nor had actual or constructive notice of this condition. Turner Construction similarly argues the above two points and emphasizes that it had completed its work at the Property more than two (2) years before the accident occurred. Plaintiff contends that Boston Properties and 90 Church owed a duty, pursuant to the Lease, Sublease, and Management Agreement, to maintain the USPS’s first floor space, including the duct-work and the protruding metal support bar that was an apparent trip-hazard. Plaintiff also argues that Turner Construction caused and created the condition that gave rise to plaintiff’s accident.

Landowner's or Possessor's Duty of Care and Duty to Warn

A landowner or possessor has a duty to exercise reasonable care to maintain its premises in a safe condition. (*Basso v Miller*, 40 NY2d 233, 238 (1976).) For the landowner to be held liable for a dangerous condition on its premises, the injured party must prove that the landowner created the alleged dangerous condition or had actual or constructive notice of the condition. (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 (1986).) However, a landowner's or possessor's duty to maintain reasonable safe premises is separate and distinct from his or her duty to warn of a dangerous condition. (*Cohen v Shopwell, Inc.*, 309 AD2d 560, 561 [1st Dept 2003].) "[E]ven if the alleged dangerous condition qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the property owner's broader duty to maintain the premises in a reasonably safe condition." *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 72 [1st Dept 2004].)

In this case, it is quite apparent that Boston Properties and 90 Church have displaced the USPS as the owner of the Property to maintain the premises in a reasonably safe condition. Under Article 11 of the Lease, 90 Church undertook to make "all repairs and replacements (whether structural or non-structural, foreseen or unforeseen, ordinary or extraordinary) necessary to maintain the Demised Premises." (See Exhibit "3" to the opposition papers.) Similarly, under paragraph 3 of the Management Agreement, Boston Properties bore the responsibility and duty for maintenance of the Property. (See Exhibit "2" to the opposition papers.) However, in the Sublease, 90 Church and the USPS effectively modified Article 11 of the Lease, to the extent that the USPS took back responsibility to maintain and repair its sub-leased premises on the first three floors "except that Sublessor [90 Church] shall provide maintenance and repair services . . . in accordance with

Exhibit D annexed hereto.” In paragraph 2 of Exhibit D, 90 Church was contractually obligated to operate and maintain the “building systems” within the USPS’s subleased premises such as plumbing and air-handling systems including the “ducts.” (See Exhibit “5” to the opposition papers.) Notwithstanding defendants’ assertions that the USPS exclusively maintained and repaired its subleased premises on its own, the inescapable conclusion is that Boston Properties and 90 Church were contractually duty bound to maintain the subject toilet exhaust duct and the protruding metal support bar that was an apparent trip-hazard.

Constructive Notice

While the duty of defendants 90 Church and Boston Properties to maintain the premises in a reasonably safe condition has been established, that does not end the inquiry, as the plaintiff must prove that the defendants created the alleged dangerous condition or had actual or constructive notice of the condition. Plaintiff alleges that defendants 90 Church and Boston Properties had constructive notice. To constitute constructive notice, the dangerous condition or defect must be visible and apparent for a sufficient length of time to permit defendants to discover and remedy it. (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455 [1st Dept 2011].) Defendants 90 Church and Boston Properties acknowledged that it retained Turner Construction who “replaced or installed for the first time” the duct-work at issue. (See Schubert EBT, Exhibit “4” to the opposition papers, at p. 31.) Defendants 90 Church and Boston Properties also admitted that its employees were in the precise area where the apparent dangerous condition existed “hundreds” of times for at least two years prior to the accident. (*Id.*, at p. 30.) Thus, it is a question of fact whether defendants 90 Church and Boston Properties may have had constructive notice of the dangerous condition.

Cause and Create Dangerous Condition

Plaintiff argued that Turner Construction caused and created the condition that gave rise to plaintiff's accident. While Turner Construction stated that it generally installed duct work during the construction phase at the Property, Turner Construction contends there was no proof that it specifically installed the duct at issue as there was no identifying "tag" displayed. This, however, is belied by the deposition testimony of Robert Schubert of Boston Properties who testified that Turner Construction, either directly or through one of its sub-contractors, "replaced or installed for the first time" the duct-work at issue. (*See*, Schubert EBT, Exhibit "4" to the opposition papers, at p. 31.) Thus, whether Turner Construction caused and created the condition that gave rise to plaintiff's accident is also a question of fact.

Open and Obvious Hazards

While the parties did not argue whether or not the subject toilet exhaust duct and the protruding metal support bar was an open and obvious condition which was neither a defect nor an inherently dangerous condition, a brief discussion of this issue is necessary. Whether a hazard is open and obvious or latent is generally fact specific and thus usually an issue that should be decided by the jury. (*Tagle v Jakob*, 97 NY2d 165, 168 [2001].) Nonetheless, a court may determine a condition to be open and obvious as a matter of law "when the established facts compel that conclusion and may do so on the basis of clear and undisputed evidence." (*Id.*, at 168 [internal citations omitted].) "Proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence." (*Westbrook*, 5 AD3d, at 72-73.)

In the instant case, there is a question of fact whether the subject exhaust duct and protruding metal support bar was an open and obvious condition which may have been a hazard and/or inherently dangerous.

CONCLUSION

Inasmuch as there are triable issues of fact, summary judgment in this case is inappropriate.

Accordingly, it is

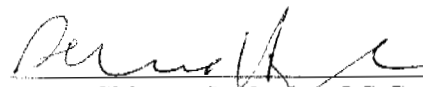
ORDERED, that the motion (sequence number 001) of defendants Boston Properties, Inc. and 90 Church Street Limited Partnership for summary judgment is denied; and it is further

ORDERED, that the motion (sequence number 002) of defendant Turner Construction Company for summary judgment is denied.

The foregoing constitutes the decision and order of this Court.

ENTER :

Dated: January 23, 2013
New York, New York


Hon. Shlomo S. Hagler, J.S.C.

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