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SCANNED ON 4/11/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 102712/2010
MIANO, MICHAEL
vs.
BATTER PLACE GREEN LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 102712/10

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to 17, were read on this motion to/for Summary Judgment + Cross to Restore

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1-9

Answering Affidavits — Exhibits — No(s). 16

Replying Affidavits — No(s). 17

Upon the foregoing papers, it is ordered that this motion is CROSS MOTION - 11-16

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
APR 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/3/13

JOAN M. KENNEY, J.S.C.
JOAN M. KENNEY
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Michael Miano,

Plaintiff,

-against-

Battery Place Green LLC,
Albanese Organization, Inc.,
and Turner Construction Co.,

Defendants.

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DECISION AND ORDER
Index Number: 102712/10
Motion Seq. No.: 003

Battery Place Green LLC,
Albanese Organization, Inc.,
and Turner Construction Co.,

Third-Party Action

Third-Party-Plaintiffs,

-against-

Five Star Electric Corp.,

Third-Party-Defendant.

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits, and Memo of Law	1-9
Opposition Affirmation	10
Notice of Cross-Motion, Affirmation, and Exhibits	11-16
Reply Affirmation	17

In this personal injury action, third-party defendant, Five Star Electric Corp. (Five Star), moves for an Order, pursuant to CPLR 3212, dismissing the third-party complaint.

Plaintiff cross-moves for an Order, pursuant to CPLR 5015, restoring the case to the trial calendar.

Factual Background

On November 1, 2007, plaintiff Michael Miano tripped and fell down a stairwell (the accident) located in a building undergoing construction which was owned and managed by Battery Place Green LLC (Battery), and Albanese Organization, Inc. (Albanese). Turner Construction Company (Turner) was the general contractor.

Turner hired Five Star as a subcontractor to provide power and light for the construction project. While Turner was responsible for cleaning and keeping the floors clear of debris, Five Star was responsible for the lighting of the stairwells; including the stairwell where the accident took place. The contract between Turner and Five Star, dated October 12, 2006, contains an indemnification clause which states, in pertinent part:

> "The Subcontractor [Five Star] hereby assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever...to all person...resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work [done by Five Star]...except to the extent...expressly prohibited by statute."

At his examination before trial (EBT), plaintiff stated that the accident occurred after he tripped and fell on debris located on the stairs. (Plaintiff's EBT pgs. 19-20). The last time plaintiff was in this stairwell was a few days prior to the accident, and there had not been any issues with lighting. (Plaintiff's EBT pg. 17). However, plaintiff testified that as he was descending the staircase, on the date of the accident the lighting was very low, and that it was getting darker as he proceeded down. (Plaintiff's EBT pg. 18). He stated that it was dark because a lightbulb was out on the date of the accident, but it was not out when he was at this same location a couple of days prior to the accident. (Plaintiff's EBT pg. 91). Cumulatively, plaintiff stated that the accident occurred when he slipped on "pebbles and a couple of small pieces of cinder block" in low lighting conditions.

Arguments

Five Star argues that this case should be dismissed against it because Five Star did not create the alleged dangerous condition that caused the accident, nor did they have any notice of the alleged dangerous condition. Five Star further contends that it is not obligated to indemnify Turner because the accident was caused by Turner's negligence (ie failure to clean debris, etc.) as opposed to the alleged poor lighting conditions.

Third-party plaintiffs argue that the within motion to dismiss must be denied because the low-light in the stairwell was the dangerous condition which caused the accident, and therefore Turner is entitled to indemnification from Five Star pursuant to the parties' contract.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The 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." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a...hazardous condition (*Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept. 2009]; *Baez-Sharp v New York City Tr. Auth.*, 38 AD3d 229 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the...hazardous condition." To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (see *Strowman v Great Atl. & Pac. Tea Co., Inc.*, 252 AD2d 384 [1998]).

A right to indemnity, as distinguished from contribution, is not dependent upon legislative will, but springs from contract, express or implied, and full, not partial reimbursement is sought. (*McDermott v City of New York*, 50 NY2d 211 [1980]).

Here, plaintiff testified that he fell on debris in the stairwell and the stairwell was poorly lit. Plaintiff never conclusively testified at his deposition that the accident occurred solely because there was poor light on the stairwell area. It is not clear, from the papers submitted, how long the debris and/or the poor lighting conditions existed before the accident, and therefore the notice, or lack thereof of, the dangerous condition cannot be determined at this stage of the litigation. Five Star

claims it had no notice that there was an alleged poor lighting condition in the stairwell area where the accident occurred. Although Turner alleges that Five Star had constructive notice that defective lighting conditions existed at the construction site because it was an alleged recurring event. (Moving Papers, Exhibit F, pg. 30-31). However, Five Star disputed this assertion by pointing to plaintiff's EBT where he testified that a few days prior to the accident the light condition in the stairwell where the accident occurred was fine. At most, a factual dispute exists regarding whether or not Five Star had constructive notice of the poor lighting conditions.

Five Star's argument that it is not contractually obligated to indemnify Turner because the accident was caused by Turner's negligence, is speculative at this juncture of the litigation. If the fact finder decides that the alleged dangerous condition that caused the fall was entirely due to the low-light conditions, then Five Star could be held liable to third-party plaintiffs for any damages owed to plaintiff, pursuant to the parties' contractual indemnification clause. It is hornbook law that only the trier of fact can determine the proximate cause of the accident. (See *Peter McKinnon v Bell Security*, 268 AD2d 220 [1st Dept. 2000]). Consequently, the moving party is not entitled to the relief sought. (See also *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept. 1999]). Additionally, the very question of whether or not defendants were negligent is itself a question for the trier of fact to determine. (see *Eliseo Carrozzi, et al. v Gotham Meat Corp., et al.*, 181 AD2d 587 [1st Dept. 1992]).

Plaintiff's cross-motion to restore is granted, without opposition. Accordingly, it is hereby

ORDERED, that third-party defendant's motion to dismiss the third-party action, is denied, in its entirety; and it is further

ORDERED, that plaintiff's cross motion to restore the case is granted, without opposition

and upon condition that plaintiff file a new note of issue and pay the appropriate fee therefor; and it is further

ORDERED, that no later than May 6, 2013, plaintiff file a note of issue and statement of readiness with, and serve a copy of this Order with notice of entry on, the Trial Support Office (Room 158), along with proof of payment of the appropriate fee; and it is further

ORDERED, that upon receipt of the foregoing, the Clerk of the Trial Support Office shall restore the case to the trial calendar.

Dated: 4/3/13

ENTER:

Joan M. Kenney, J.S.C.