Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

SUA SPONTE ORDER

ONOFRIO MODUGNO,

Plaintiff,

-against-

BOVIS LEND LEASE INTERIORS, INC., et al.,

Defendants.

Index No. 702396/12

Motion Date February 25, 2013

Motion Cal. No. 70

Motion Sequence No. 1

The court, sua sponte, recalls its order/decision of April 23, 2013 and hereby renders the following in its place:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits....	EF 13
Exhibits.....	EF 14-16
Affirmation in Opposition.....	EF 18
Affirmation in Reply.....	EF 20
Exhibits in Reply.....	EF 21-23
Affidavit of Service.....	EF 24-25
Notice of Cross Motion.....	EF 27
Affirmation in Support of Cross Motion..	EF 28
Exhibits.....	EF 29-33
Affidavit of Service.....	EF 34
Affirmation in Opp. to Cross Motion.....	EF 35
Affirmation in Reply.....	EF 37
Stipulation.....	HC A

Upon the foregoing papers it is ordered that the motion by defendants Bovis Lend Lease Interiors, Inc. ("Interiors") and Lend Lease (US) Construction LMB Inc. f/k/a Bovis Lend Lease LMB, Inc. ("Lend Lease") pursuant to CPLR 3211(a)(1) dismissing the Complaint of plaintiff, Onofrio Modugno against them because they did not have any involvement in the happening of the plaintiff's incident nor any relationship to or interest in the premises where it occurred and cross motion by defendant LVI Demolition

Services, Inc. s/h/a Mazzocchi Wrecking, Inc. for summary judgment pursuant to CPLR 3212 on the grounds that they did not have any involvement in the happening of the plaintiff's incident nor any relationship to or interest in the premises where it occurred and permitting said defendant to enter judgment with the Clerk of the Court against the plaintiff with statutory costs and disbursements are hereby decided as follows:

Plaintiff, Onofrio Mondugno commenced this action seeking to recover for serious personal injuries allegedly sustained by him on August 16, 2011, when he fell while working at a building under construction located at 130 Liberty Street, New York, New York while he was an employee of one of the contractors performing construction work on the site. Plaintiff alleges that moving defendants were negligent and violated various provisions of the Labor Law.

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendants to discover and remedy it (see id.). As a general rule, "[l]iability for a dangerous or defective condition on property is . . predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, [generally] a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (Ruffino v. New York City Transit Authority, 55 AD3d 819 [2d Dept 2008][internal citations omitted]).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (219 Broadway Corp. v. Alexanders, Inc., 46 NY2d 506 [1979]; Tougher Industries, Inc. v. Northern Westchester Joint Water Works, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; Hoag v. Chancellor, Inc., 246 AD2d 224 [1st Dept 1998]).

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order

to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v. Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 AD2d 248). The evidence submitted by moving defendants in the instant matter consists of an affidavit of Ralph J. Esposito, executive vice president and the principal-in-charge of Lend Lease's New York Office wherein he avers that: Interiors did not own, maintain, operate, control, manage, repair, lease, make use of or perform any work at the premises, nor did Interiors hire or contract with any entity to perform work at the premises; and that while Lend Lease had worked at the construction project site, it left the site when the project ended on February 28, 2011--five months before the plaintiff's accident. This evidence is insufficient to dispose of the action, as such documentation is not considered "documentary evidence" within the intended scope of CPLR 3211(a) (Suchmacher v. Manana Grocery, 73 AD3d 1017 [2d Dept 2010] [internal citations omitted]; Fontanetta v. John Doe 1, 73 AD3d 78 [2d Dept 2010]).

Accordingly, that branch of moving defendants' motion to dismiss plaintiff's Complaint pursuant to CPLR 3211(a)(1) is denied.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary

judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

Moving defendants established a prima facie case that there are no issues of fact via the submission of, the affidavit of Ralph J. Esposito, executive vice president and the principal-in-charge of Lend Lease's New York Office wherein he avers that: Interiors did not own, maintain, operate, control, manage, repair, lease, make use of or perform any work at the premises, nor did Interiors hire or contract with any entity to perform work at the premises; and that while Lend Lease had worked at the construction project site, it left the site when the project ended on February 28, 2011--five months before the plaintiff's accident.

In opposition, plaintiff established that there is an issue of whether moving defendants served as a "general contractor" and/or "construction manager" at the time of plaintiff's accident. As it is undisputed that the parties have not begun discovery, and that all discovery remains outstanding, moving defendants' motion for summary judgment and cross moving defendants' motion for summary judgment pursuant to CPLR 3212 are denied without prejudice as they are premature (see, CPLR 3212[f]; Groves v. Lands End Housing Co., Inc., 80 NY2d 978 [NY 1992]; Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH, 2007 NY Slip Op 1714 [2d Dept 2007]; Yadgarov v. Dekel, 2 AD3d 631 [2d Dept 2003]; George v. New York City Transit Authority, 306 AD2d 160 [1st Dept 2003]). Accordingly, the motion for summary judgment is hereby denied "with leave to renew when discovery . . . is complete" (see, Ramos, supra).

Cross moving defendant presented a prima facie case that there are no triable issues of fact. Cross moving defendants submitted, inter alia, an affidavit of Frank Aiella, the vice-president of LVI who averred that: LVI did not own, maintain, operate, control, manage, repair, lease, make use of or perform any work at 130 Liberty Street at the time of plaintiff's accident.

In opposition, plaintiff contends that the cross motion is premature as discovery has not yet begun.

CPLR 3212(f) states:

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion

> or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

In the instant case, plaintiff has failed to demonstrate that facts essential to opposition may exist but cannot then be stated. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion" (Plotkin v. Franklin, 179 AD2d 746 [2d Dept 1992] [internal citations omitted]).

Accordingly, the cross motion is granted and the case is dismissed as against cross moving defendant, LVI.

This constitutes the decision and order of the Court.

Dated: May 13, 2013

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Howard G. Lane, J.S.C.