SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 114647/2007
FRENCH, BONNIE
vs.
HILTON HOTELS
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 114647/07

MOTION DATE

MOTION SEQ. NO. 006

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 86-88

Answering Affidavits — Exhibits ____ | No(s). 92-925, 107

Replying Affidavits ____ | No(s). 160

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 7/3/13

BJ, 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 12

---x

BONNIE FRENCH,

Plaintiff,

-against-

HILTON HOTELS CORP., TISHMAN CONSTRUCTION CORP., and HOME BOX OFFICE, INC.,

Defendants.

---x

HILTON HOTELS CORPORATION and TISHMAN CONSTRUCTION CORPORATION,

Third-Party Plaintiffs,

-against-

HOME BOX OFFICE, INC.,

Third-Party Defendant.

---x

HILTON HOTELS CORPORATION and TISHMAN CONSTRUCTION CORPORATION,

Second Third-Party Plaintiffs,

-against-

JOHN CIVETTA & SONS, INC.,

Second Third-Party Defendant.

---x

Index No. 114647/07

Argued: 2/27/13
Motion Seq. No.: 006

DECISION AND ORDER

Third-Party
Index No. 590555/10

Second Third-Party
Index No. 590826/10

BARBARA JAFFE, J.S.C.:

For plaintiff:	**For HBO:**	**For Hilton:**	**For Civetta:**
David Segal, Esq.	Mark J. Volpi, Esq.	John T. Pieret, Esq.	Jaime L. Lehrer, Esq.
30 Vesey St.	Havkins Rosenfeld *et al.*	Burns, Russo, *et al.*	Ahmuty, Demers, *et al.*
New York, NY 10007	114 Old Country Rd.	390 Old Country Rd.	200 IU Willets Rd.
212-406-9200	Mineola, NY 11501	Garden City, NY 11530	Albertson, NY 11507
	516-620-1700	516-747-7682	516-294-5433

By notice of motion dated February 6, 2012, defendant Home Box Office, Inc. (HBO) moves pursuant to CPLR 3212 for an order dismissing all claims and cross claims against it. Plaintiff and defendants Hilton Hotels Corporation (Hilton), and John Civetta & Sons, Inc. (Civetta) oppose.

I. PERTINENT BACKGROUND

Prior to June 11, 2007, HBO hired PHD Media (PHD), an advertising agency, to create a media campaign for several of HBO's programs. (Affirmation in Support of Motion, Mark J. Volpi, Esq., dated Feb. 6, 2012 [Volpi Aff.], Exh. J). PHD hired media buyer Outdoor Media Alliance (OMA), which then hired non-party National Promotions and Advertising (NPA). (*Id.*).

Pursuant to its contract with OMA, NPA placed posters advertising HBO's programs on the wall or fence of a construction site at 102-108 West 57th Street in New York City. (*Id.*). HBO therein agreed, in paragraph one, that "[]l]ocations are subject to the approval of [HBO], agency and Outdoor Media Alliance." (*Id.*).

On June 11, 2007, plaintiff, while walking by the construction site, allegedly tripped and fell on glue which had fallen to the pavement from a poster. (*Id.*, Exh. A).

On or about November 1, 2007, French commenced an action against Hilton, Tishman Construction Corporation (Tishman) (collectively, Hilton/Tishman), and HBO by summons and complaint. On or about March 18, 2008, defendants answered. (*Id.*, Exh. B).

At a deposition held on June 14, 2011, Christian Serino, a sales manager for NPA, testified that the approval for locations referenced in the contract between OMA and NPA was not applicable to the subject posters which were broadly and randomly distributed throughout the City. (Volpi Aff., Exh. M, at 34).

II. CONTENTIONS

HBO denies liability for French's injuries, claiming that there is no evidence that it supervised, directed or controlled NPA's work, and it denies responsibility for NPA's actions. (*Id.*).

Relying on the contract, plaintiff alleges that in light of the provision for HBO's approval of the locations, HBO cannot avoid liability. (Affirmation in Opposition of David Segal, Esq., dated Mar. 22, 2012 [Segal Aff. in Opp.]). She also argues that excess glue from the posters constituted an ongoing, recorded, and thus foreseeable dangerous condition. (*Id.*).

Hilton/Tishman and Civetta maintain that HBO violated its nondelegable duty under Administrative Code § 10-119 to neither suffer nor permit NPA, a party under its control, to place posters on personal property located on New York City property. (Affirmation in Opposition, John T. Pieret, Esq., dated Feb. 13, 2011 [Pieret Aff. In Opp]; Affirmation in Opposition, Jaime L. Lehrer, Esq., dated Mar. 20, 2012 [Lehrer Aff. in Opp.]). They claim that HBO knew that NPA would be placing posters outdoors and that it had direct contact with NPA about the posters. (*Id.*). In any event, Hilton/Tishman and Civetta assert that issues of fact remain as to HBO's negligence, given the alleged violation of the Administrative Code.

In reply to plaintiff's and Civetta's opposition, HBO denies involvement in the placement of the posters, and asserts that even assuming that it exercised a general supervisory power over NPA, such a role would not give rise to liability for NPA's acts. It denies that any public danger caused by NPA was foreseeable, arguing that because NPA had never placed posters at that location, there was no "ongoing problem" with HBO's posters, and that the danger of falling glue is not inherent to the placement of posters. (*Id.*). Rather, the placing of posters does not

constitute an activity so important to the community that responsibility for it should not be placed with NPA. (Affirmation in Reply, Mark J. Volpi, Esq., dated Mar. 26, 2012). In reply to Hilton/Tishman's Opposition, HBO denies any direct relationship with NPA and argues that plaintiff should have sued NPA directly. It argues that its knowledge that NPA would place its posters does not constitute knowledge that the posters would be placed in violation of the Administrative Code which, it asserts, does not impose a nondelegable duty for posting operations, and observes that there is no other applicable exception to the rule that a principal is not responsible for the acts of an independent contractor. HBO also argues that Administrative Code § 10-119 is not applicable as it was created to prevent litter and preserve aesthetics, not to protect passersby from slipping on glue, and moreover, the fence does not fall within its scope as it was not approved by the City and was not located on City-owned property. (Affirmation in Reply, Mark J. Volpi, Esq., dated Mar. 19, 2012).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must submit admissible evidence to demonstrate the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

In general, a party that retains an independent contractor is not responsible for the contractor's negligent acts, unless it: (1) negligently selected, instructed or supervised the

contractor; (2) engaged in work that is especially or inherently dangerous; or (3) was made responsible by a specific nondelegable duty, which may be created by statute, regulation or common law. (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]; *Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 520 [1st Dept 2011]). The contractor, and not the principal party, is responsible for its own negligent acts because the acts are largely within the contractor's, and not the principal party's, control. (*Kleeman*, 81 NY2d at 274). The same rule, and any exceptions to it, applies to a sub-contractor hired by a contractor in its work for a principal party. (*See Eastern Airlines v Joseph Guida & Sons Trucking Co., Inc.*, 675 F Supp 1391, 1395 [ED NY 1987]).

Here, there is no allegation that HBO negligently selected, instructed or supervised NPA, or that the work was especially or inherently dangerous, or that the placing of posters constitutes a nondelegable duty. Rather, the evidence shows that a fourth party selected NPA, and that HBO was never in direct contact with NPA. Although the contract provides that locations are subject to HBO's approval, no such approval was ever obtained for the location in issue. At most, HBO maintained general supervisory power over NPA which does not establish that HBO should be saddled with liability for NPA's conduct. (*See Goodwin v Comcast Corp.*, 42 AD3d 322 [1st Dept 2007 [mere retention of general supervisory powers over an independent contractor cannot form basis for imposition of liability against principal]).

An especially or inherently dangerous activity is one that is dangerous even if all available precautions are taken to protect against its potential harm. (*Chainani v Bd. of Educ. of City of* NY, 87 NY3d 370, 382 [1995]; *Torres v Allied Tube & Conduit*, 281 AD2d 243, 243 [1st Dept 2001]). Examples of inherently dangerous activities include blasting, certain types of construction, and work with high tension electric wires. (*Chainani*, 87 NY3d 370, 382). No

authority is cited for the proposition that the gluing of posters on a fence constitutes an especially or inherently dangerous activity.

Pursuant to New York City Administrative Code § 10-119:

> It shall be unlawful for any person to paste . . . [a] poster . . . upon any personal property maintained on a city street or other city-owned property pursuant to a franchise, concession or revocable consent granted by the city or other such item or structure in any street, or to direct, suffer or permit any . . . other person under his or her control to engage in such activity . . .

Statutes that impose nondelegable duties explicitly so provide. (*See*, *e.g.* Labor Law § 241). Here, there is nothing in the ordinance providing that the duty imposed is nondelegable. Consequently, the ordinance does not constitute a basis for liability being imposed on HBO.

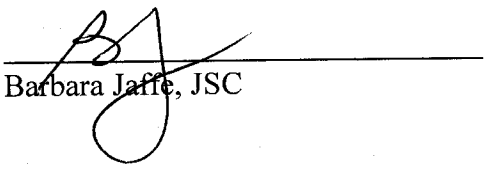
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Home Box Office's motion for an order dismissing the complaint, cross claims, and first third-party complaint is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: July 3, 2013
New York, New York