Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

JASMATTI PERSAUD,

Plaintiff,

-against-

VERIZON SELECT SERVICES INC. d/b/a VERIZON SELECT SERVICES, INC., et al.,

Defendants.

Index Number 9879/12

Motion Date May 28, 2015

Motion Seq. Nos. 1 and 2

Motion Cal. Nos. 155 and 156

VERIZON SELECT SERVICES INC. d/b/a VERIZON SELECT SERVICES, INC.,

Third-Party Plaintiff,

-against-

UNIVERSAL COMONE LLC,

Third-Party Defendant.

The following papers numbered 1 to 35 read on these motions by defendants, Christopher J. Todd and Joseph M. Mattone, as Trustees Under Certain Trust, Dated 12/20/76 (Todd and Mattone) and by Verizon Select Services, Inc., Verizon Business Network Services, Inc., and Verizon Communications, Inc. (the Verizon defendants), and cross motion by third-party defendant, Universal ComOne, LLC (Universal), all for summary judgment dismissing the respective complaints, pursuant to CPLR 3212 and cross motion by plaintiff seeking leave to amend her bill of particulars, pursuant to CPLR 3025 (b).

Papers
Numbered

Notices of Motion - Affidavits - Exhibits	1-8
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Upon the foregoing papers, it is ordered that the Verizon defendants' and defendants, Todd amd Mattone's motions, and third-party defendant, Universal's cross motions, all for summary judgment seeking to dismiss the complaints against them, pursuant to CPLR 3212, and plaintiff's cross motion seeking leave to amend her bill of particulars, pursuant to CPLR 3025 (b), are determined as follows:

Plaintiff, an employee of Capital One Bank, a lessee of premises, allegedly sustained serious personal injuries when she fell on telephone wires being installed at her bank, on May 13, 2009. Defendants, Todd and Mattone, as Trustees, were the owner of the property. Capital One contracted with the Verizon defendants to install the telephones, and the Verizon defendants subcontracted with Universal to perform the work.

Defendants move for summary judgment dismissing plaintiff's complaint, pursuant to CPLR 3212, which complaint claims violations of Labor Law §§ 240, 241, 200 and common- law negligence.

"[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 demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Movants, Todd and Mattone, allege they were out-of-possession landlords. Generally an out-of-possession owner/landlord is not responsible for injuries occurring on the leased premises unless such owner/landlord is contractually obligated to perform maintenance and repairs or has maintained control over the premises (*see, Byrd v.*

Brooklyn 46 Realty, LLC, 129 AD3d 882 [2015]; *Sciammarella v. Manorville Postal Associates*, 87 AD3d 530 [2011]: *Lawrence v. Celtic Holdings, LLC*, 85 AD3d 874 [2011]); *Utica Mutual Ins. Co. v. Brooklyn Navy Yard Development Corp.*, 83 AD3d 817 [2011]). An out-of-possession owner/landlord's duty to repair a dangerous condition is imposed by statute, by contract, or by a course of conduct (*see, Castillo v. Wil-Cor Realty Co., Inc.,* 109 AD3d 863 [2013]; *Vialva v. 40 W. 25th St. Association, L.P.,* 96 AD3d 735 [2012]). Further, an out-of-possession owner/landlord, with no contractual obligation to repair, cannot be liable for injury to a third party absent an allegation that the defective condition allegedly resulting in the accident constituted a specific statutory safety violation (*see, Alnashmi v. Certified Analytical Group, Inc.*, 89 AD3d 10 [2011]). The evidence presented on such motion should be liberally construed in a light most favorable to the non-moving party (*see, Boulos v. Lerner-Harrington,* 124 AD3d 709 [2015]; *Abrams v. Berelson*, 94 AD3d 782 [2012]). The party opposing a motion for summary judgment must present all of the evidence within his knowledge, as if establishing his case at trial (*see, Coley v. Michelin Tire Corp.*, 88 AD2d 651 [1982]; *Five Boro Electrical Contractors Ass'n. v. The City of New York*, 37 AD2d 807 [1st Dept 1971]). The opposing party must not base his opposition on mere suspicions or surmise, unsupported by evidentiary facts (*see, Shaw v. Time-Life Records*, 38 NY2d 201 [1975]; *Meyer v. Staten Island University Hosp*, 117 AD3d 920 [2014]).

Movants Todd and Mattone, contend that they are properly to be considered "out-of-possession" landlords in this matter, as they maintained only a minimal presence on the premises, did not direct or control any of the work being done on the premises; did not contract for the work being performed on the premises; partook of no day-to-day activities on the premises or any regular maintenance and cleaning operations thereat, and were not made aware of any prior complaints or incidents regarding a dangerous condition at the premises. Further, movants contend that the subject triple-net ground lease required the tenant, only, to maintain the condition and safety of the premises.

Movants have submitted sufficient evidence to affirmatively establish that they neither created or compounded said alleged condition, nor had actual or constructive notice of the alleged dangerous condition prior to the accident (*see, Stewart v. Shervil Holding Corp.*, 94 AD3d 977 [2012]; *Healy v. Bartolomei*, 87 AD3d 1112 [2011]). Plaintiff's opposition is devoid of evidence that movants either created the alleged dangerous condition , made the condition worse, or had actual or constructive notice of said condition (*see, Lawrence v. Norberto*, 94 AD3d 822 [2012]; *Sarisohn v. 341 Commack Road, Inc.*, 89 AD3d 1007 [2011]),

Based on the evidence presented, plaintiff, in opposition, has failed to demonstrate

that movants retained sufficient control over the premises to remove Todd and Mattone from being considered "out-of-possession" landlords. Plaintiff has failed to tender sufficient evidence to demonstrate a duty on behalf of moving defendants, or the presence of any material issue of fact sufficient to defeat movants' entitlement to judgment as a matter of law (*see, Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851 [1985]). As such, Todd and Mattone's motion seeking summary judgment is granted.

Plaintiff cross-moves, pursuant to CPLR 3025 (b), to amend her bill of particulars to specify the sections of the Industrial Code plaintiff claims were violated by defendants in this action with regard to plaintiff's claim under Labor Law § 241(6). In opposition, defendants contend that the instant action is not properly a Labor Law action. There is no dispute that plaintiff was a teller employed by Capital One Bank, the lessee of the subject premises, and was not involved in the installation of the telephone lines at the premises. Plaintiff's reliance on the matter of *Mordkofsky v V.C.V. Dev. Corp*., 76 NY2d 573 (1990), to demonstrate that plaintiff's accident falls under the protection afforded by the Labor Law, is misguided, as that decision correctly reached the opposite conclusion. *Mordkofsky* determined that in order to invoke the protection of the Labor Law, a plaintiff must not only have been hired by an owner or contractor to work at the construction site, but must be engaged in the erection, demolition, excavation, repairing, altering, painting, cleaning or pointing of the building or structure, or in a task that was necessary and incidental to the construction work plaintiff was hired to perform (*see, Prats v. Port Auth. Of N.Y, & N.J.*, 100 NY2d 878 [2003]; *Martinez v. City of New York*, 93 NY2d 322 [1999]; *Gallagher v. Resnick*, 107 AD3d 942 [2013]; *Martinez v. City of New York*, 73 AD3d 993 [2010]). In the case at bar, plaintiff was not a person employed by the owner or contractor to perform any of the covered activities enumerated in the Labor Law, thus rendering the statute inapplicable, requiring the dismissal of the Labor Law causes of action in the matter, and the granting of Todd and Mattone's motion.

As the Verizon defendants have also moved for summary judgment dismissing plaintiff's complaint as against them, such motion is likewise granted to the extent of dismissing the Labor Law causes of action against the Verizon defendants.

Further, third-party defendant, Universal, in a cross motion to plaintiff's motion to amend her bill of particulars, sought summary judgment dismissing plaintiff's causes of action based upon Labor Law §§ 200 and 240, which cross motion is granted with regard to all of plaintiff's Labor Law causes of action, for the reasons aforementioned.

With respect to the branch of the Verizon defendants' motion seeking summary

judgment, on the remaining negligence cause of action, on the ground of common law and contractual indemnification against third-party defendant, Universal, Article 12 of the subcontract between those parties, dated June 18, 2007, stated that subcontractor, Universal, will indemnify and defend the Verizon defendants from and against all claims, damages, liabilities and judgments for injuries resulting from the acts or omissions of the subcontractor or anyone directly or indirectly employed by it. Such clause demonstrated an intention to indemnify which was clearly expressed in the language and purpose of the agreement, entitling the Verizon defendants to contractual indemnification from Universal (*see, Drzewinski v. Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774 [1987]; *Shea v. Bloomberg, L.P.*, 124 AD3d 621 [2015]), because such clause did not require the promisor to indemnify the promisee for promisee's own negligence (*Brooks v. Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Goryev v. Tomchinsky*, 114 AD3d 723 [2014]). However, where, as here, a triable issue of fact exists regarding the promisee's negligence, summary judgment on a contractual indemnification claim must be denied as premature (*see, McLean v. 405 Webster Ave. Associates,* 98 AD3d 1090 [2012]; *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]). Further, as Universal was not an insurer, its duty to defend was no broader than its duty to indemnify (*see, Sawicki v. GameStop Corp.*, 106 AD3d 979 [2013]), so that branch of the motion is also denied as premature. Similarly, the branch of the motion seeking common-law indemnification is denied as premature, as plaintiff's injury has not yet been shown to be attributable solely to Universal (*see, Arrendahl v. Trizechahn Corp.*, 98 AD3d 699 [2012]).

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the motion by defendants, Todd and Mattone, as Trustees, for summary judgment dismissing the complaint and all cross claims against them, is granted. The branch of the motion by the Verizon defendants, seeking summary judgment dismissing plaintiff's complaint, is granted to the extent that plaintiff's Labor Law-based causes of action against movant are dismissed, leaving only the common law negligence cause of action extant. The branch of the Verizon defendants' motion, seeking indemnification against Universal, is denied as premature. The cross motion by Universal for summary judgment, regarding plaintiff's Labor Law causes of action against it, is granted. The cross motion by plaintiff, seeking leave to amend her bill of particulars, is denied as moot.

Dated: August 12, 2015

Howard G. Lane, J.S.C.

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