MAR 2 6 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2

EZEQUIEL GUTIERREZ,

Plaintiff,

Index No. 302313/14

DECISION/ORDER

- against -

Present:
HON. ELIZABETH A. TAYLOR

M.S.T. WHITTIER LLC AND MST HOLDING COMPANY,

Defendants.

M.S.T. WHITTIER LLC AND MST HOLDING COMPANY,

Third-Party Plaintiffs,

Third-Party Index No. 83694/15

- against -

BRONX BANANAS CORP.,

Third-Party Defendant.

The following papers numbered 1 to ___ read on this motion, _____

No___On Calendar of _____	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1-2
Answering Affidavit and Exhibits	3-4
Replying Affidavit and Exhibits	5
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

The branch of the motion pursuant to CPLR 3212, for an order granting summary judgment, dismissing the Labor Law claim, is denied as moot.

It is noted that plaintiff withdraws his Labor Law claim.

The branch of the motion pursuant to CPLR 3212, for an order granting summary judgment, dismissing the common law negligence claim, is denied.

Plaintiff commenced this personal injury action to recover damages for injuries, allegedly sustained on November 19, 2013, when he was struck in the head, face and shoulder, by falling debris at the premises located at 727 Drake Street, Bronx, New York. Movants, defendants third-party plaintiffs own the subject premises. Movants

allege that at the time of the accident, the subject premises were being leased by third-party defendant Bronx Bananas Corp. Movants contend that they are out-of-possession landlords that were not contractually obligated to make repairs at the premises, and that the alleged dangerous condition was not a significant structural or design defect. Movants further argue that they did not have actual or constructive notice of a dangerous condition.

It is well settled that "[a] landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Malloy v Friedland*, 77 AD3d 583 [1st Dept 2010] [citations and quotations omitted]). To establish entitlement to summary judgment, movant must establish that it had no duty to maintain the alleged defective condition (*see Paniagua v Bridge Food Ctr. Corp.*, 59 AD3d 356 [1st Dept 2009]).

In support of the motion, movants submit, among other things: 1) plaintiff's deposition transcript; 2) a copy of the lease for the premises; and 3) the deposition transcript of Stanley Title. Plaintiff testified that he was employed by Bronx Bananas for approximately three years. He asserts that Bronx Bananas, located at 735 Drake Avenue, was a produce warehouse and he was responsible for preparing orders, receiving deliveries, and unpacking boxes. He testified that he left 735 Drake Avenue and entered the subject premises to get a broom, when a 60 - 70-pound motor fell approximately 25 feet, striking him in the head, face and shoulder. Mr. Title testified that he is the owner of the movants and manages, with his wife and son, the properties owned by the entities. He asserts the subject premises, 727 Drake Avenue, is adjacent to 735 Drake Avenue, located in a one-story building and that both properties were leased to Bronx Bananas. Mr. Title attests that the lease for the subject premises was in effect at the time of the accident. Movants allege that Bronx Bananas was still in possession of the premises at the time of the accident. However, Mr. Title also testified that in November 2013, Bronx Bananas downsized and surrendered possession of 727

Drake Avenue, the subject premises. Additionally, plaintiff testified that at the time of the accident; Bronx Bananas was not operating out of the subject premises. It is unclear whether, movant exercised control over the subject premises. Moreover, the record is devoid of proof that the alleged defect was not a significant structural or design defect and that movants were not contractually obligated to make such repairs.

Further, movants failed to establish that they did not have actual or constructive notice of a dangerous condition. "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities [], and specifically that the dangerous condition did not exist when the area was last inspected []" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]; *see Dylan P. v Webster Place Assoc., L.P.*, 132 AD3d 537 [1st Dept 2015]; *Gautier v 941 Intervale Realty LLC*, 108 AD3d 481, 481-82 [1st Dept 2013]). Although Mr. Title testified that he and his son would inspect the premises about once a month, movants failed to establish the condition of the premises the last time the area was inspected prior to the accident (*see Dylan*, 132 AD3d 537). It is noted that the lack of evidence of the length of time the dangerous condition existed, does not vitiate movants' burden on a motion for summary judgment (*see Green v New York City Hous. Auth*, 7 Ad3d 287 [1st Dept 2004]).

Based upon the foregoing, movants failed to establish that they had no duty to maintain the alleged defective condition.

As movants failed to meet their initial burden, this court need not consider plaintiff's opposition.

The branch of the motion pursuant to CPLR 3215, for a default judgment in favor of defendants third-party plaintiff against third-party defendant Bronx Bananas Corp, is denied as premature.

Generally, to establish entitlement to a default judgment, movants must demonstrate: 1) proof of service of the summons and complaint; 2) proof of the default; and 3) proof of the facts constituting the claim (see CPLR 3215; *Whittemore v Yeo*, 117 AD3d 544 [1st Dept 2014]; *Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227 [1st Dept 1997]).

In the instant matter, movants seek a default judgment on their indemnification claims against Bronx Bananas Corporation. However, an indemnification claim does not accrue until liability has been established in the main action (*see Slovik v Wang*, 110 AD2d 630 [2d Dept 1985]; *IMP Plumbing and Heating Corp. v 317 E. 34th St., LLC*, 89 AD3d 593, 594 [1st Dept 2011]). As there are issues of fact as to movants liability, the motion for a default judgment on the indemnification claims must be denied as premature.

The foregoing shall constitute the decision and order of this court.

Dated: MAR 23 2018

A.J.S.C.

Elizabeth A. Taylor