SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALA OHADI and FARANEH DOEAI,

Index No. 161586/2014

Plaintiff,

against

DECISION & ORDER

MAGNETIC CONSTRUCTION GROUP CORP., SYDELL GROUP, LLC, 1170 BROADWAY ASSOCIATES, LLC, 1170 BROADWAY TENANT, LLC, 1170 BROADWAY MANAGER, LLC, NOMAD HOTELS, LLC, STONEHILL & TAYLOR ARCHITECTS, P.C., HAREN & KELLER PAINTING CORP., CASSWAY CONTRACTING CORP. and A & GV STUCCO CONSTRUCTION CORP.,

Defendants.

MAGNETIC CONTRUCTION GROUP CORP.,

Third-Party Plaintiff,

against

HAREN & KELLER PAINTING CORP., CASSWAY CONTRACTING CORP. and A & G.V. STUCCO CONTRUCTION CORP.,

Third-Party Defendants.

Anthony Cannataro, J.:

In this action, plaintiff Ala Ohadi seeks to recover damages for personal injuries allegedly sustained when he slipped and fell in the building located at 1170 Broadway, New York, New York while he was employed as a project manager for Audio Video &

Controls ("AV&C") to manage the implementation of low voltage electrical infrastructure in the building as part of a project to convert the building into a hotel.

Factual and Procedural History

On February 6, 2012, as he was leaving work for lunch, plaintiff fell down stairs which led from the second floor to the first floor and sustained several serious injuries. Plaintiff commenced this action against several defendants, including 1170 Broadway Associates, LLC, 1170 Broadway Tenant LLC, 1170 Broadway Manager, LLC (collectively "1170 Broadway"), the master lease holder of the building, Sydell Group, LLC (Sydell), the overseer of the project, Stonehill and Taylor Architects, P.C. (STA), the architect of the project, Magnetic Construction Group Corp. (Magnetic), the general contractor, and the various subcontractors retained and managed by Magnetic, including Cassway Contracting Corp. (Cassway), which performed 'drywall & ceilings' work for the project, Haren & Keller Painting Corp. (H&KP), the painters for the project, and A & GV Stucco Corp. (A&GV), which performed cleaning services. Magnetic commenced a third-party action seeking to be indemnified by the subcontractors.

Plaintiff filed a note of issue on September 7, 2016, which was subsequently stricken by a so-ordered stipulation on June 1, 2017. Defendants now move pursuant to CPLR 3212 for summary judgment dismissing so much of the complaint as was asserted against them, and plaintiff cross-moves for partial summary judgment on the issue of liability. Those motions, sequence numbers 003, 004, 005, 006, 007 and 008, are consolidated for decision herein.

Legal Analysis

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be

drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NYSlipOp 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

STA's Motion for Summary Judgment

The Court first addresses STA's motion for summary judgment dismissing so much of the complaint as was asserted against it. An architect cannot be held liable for common law negligence or liability under Labor Law § 200 where it did not supervise the plaintiff's work, and the plaintiff presents no evidence of active negligence on the part of the architect (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Lopez v Dagan*, 98 AD3d 436 [1st Dept 2012]; *Davis v Lenox School*, 151 AD2d 230 [1st Dept 1989]). Further, as a matter of law, an architect cannot be held liable for negligence under Labor Law §§ 240 and 241 to a subcontractor's injured worker where (1) the architect's contractual duties were limited to supervision of construction and compliance with plans and specifications, and (2) the architect lacked authority to halt work for unsafe conditions or to determine or control on-site working conditions, which were a specific contractual responsibility of another subcontractor (*Davis v Lenox School*, 151 AD2d 230).

In the instant case, STA served exclusively as a design professional on the project. Its contractual duties were limited to supervision of construction and compliance with plans and specifications. It did not have authority to direct or control the work performed by the various independent contractors, including plaintiff's employer. The deposition testimony indicates that the extent of STA's supervision at the site was merely to ensure compliance with the architectural plans, but it was Sydell that made the final decisions regarding how to implement the suggestions made by STA. Further, there is no evidence to suggest that STA engaged in any active malfeasance which caused or contributed to the accident (*see Jaroszewicz v Facilities Dev. Corp.*, 115 AD2d 159 [3d Dept 1985]). Accordingly, STA's motion for summary judgment dismissing so much of the complaint as was asserted against it is granted.

The Summary Judgment Motions by the Remaining Defendants and Plaintiff

The Court next turns to the remaining defendants' motions for summary judgment and the plaintiff's cross motion for summary judgment. First, all the remaining defendants seek to have the complaint dismissed in its entirety, alleging that plaintiff is unable to identify what caused him to fall and is merely "speculating" as to the cause of his fall, and as to any negligence on the part of the defendants.

The Court rejects this contention. In his deposition, plaintiff testified regarding the dirty and possibly hazardous conditions of the stairwell he fell in. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party, although there were some conflicting statements in plaintiff's testimony, plaintiff nevertheless testified that he observed that the stairs upon which he fell had an accumulation of water, dust and possibly paint, and that when he got up from the fall his jacket had residue of the same. He further observed that the stairs themselves were worn out, warped, broken in some places, and lacked nosing. Plaintiff also stated that there was no hand-rail in the stairwell at the time of the incident and that the lighting was inadequate. This testimony, taken with other statements made by plaintiff during his deposition, if believed, would provide a sufficient nexus between the condition of the stairs and the circumstances of his fall to establish both negligence and causation as to one or more of the remaining defendants (*see Cherry v Daytop Vil., Inc.*, 41 AD3d 130 [1st Dept 2007]; *see also Jackson v Fenton*, 38 AD3d 495 [2d Dept 2007]; *Cuevas v City of New York*, 32 AD3d 372 [1st Dept 2006]). As such, summary judgment dismissing so much of the complaint as was asserted against these defendants is unwarranted.

As to plaintiff's cross motion for partial summary judgment, although plaintiff has set forth sufficient proof to survive defendants' motions, at this juncture it is impossible for the Court to determine the issue of liability as a matter of law. There remain unresolved issues of fact necessitating a trial regarding the possible negligence of the remaining defendants and whether that negligence proximately caused plaintiff to fall. Accordingly, the plaintiff's cross motion must be denied.

For the same reasons, the branches of the motions by 1170 Broadway, Magnetic, Cassway, H&KP and A&GV for summary judgment dismissing so much of the complaint as was asserted against them individually must be denied. 1170 Broadway had an obligation to properly maintain the stairs on which plaintiff fell, and Magnetic had several Labor Law responsibilities as the general contractor for the project. Neither 1170 Broadway nor Magnetic can rely on the indemnity provisions in their contracts with each other and with the subcontractors to be absolved of liability because neither of them can establish that plaintiff's injuries resulted from actions for which they were to be indemnified, and not the result of their own negligence. Similarly, the claims against Cassway, H&KP and A&GV cannot be dismissed because there is evidence to suggest possible liability on the part of each of them. A jury could find that the alleged dirty condition of the stairwell, which included allegations of accumulated dust and paint, resulted from the actions and negligence of Cassway, which had been sheetrocking on the second floor on the day of the incident, from the actions of H&KP, which had been hired to, among other things, paint in the stairwell and which was undisputedly in the building performing work on the day of the accident, and/or from the actions of A&GV, which may have failed to properly clean areas of construction as it were required to do.

As to the various defendants' claims that they did not have notice of the alleged conditions, it remains a question of fact whether they had actual notice or in the alternative, constructive notice, in the event that the condition or defect was visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Accordingly, the remaining defendants' motions for summary judgment and plaintiff's motion for partial summary judgment are all denied.

Statute of Limitations

The court next turns to the portion of AGV's motion which seeks summary judgment dismissing the plaintiff's claims against it as barred by the statute of limitations. Pursuant to CPLR 214 (5), an action to recover for personal injuries must be commenced within three years of the injury. The complaint naming AGV was not filed until May 30, 2016, over four years after the accident at issue, and is thus well beyond the statute of limitations for such claims.

Acknowledging this issue, plaintiff seeks to have his claim against AGV "relate back" to the date he filed his claims against the other named defendants. In cases of impleader and third-party defendants, a claim against an unnamed party will relate back to the date of the plaintiff's claim against the original named defendant "only if (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship he can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Brock v Bua*, 83 AD2d 61, 69 [2d Dept 1981]). The third prong of the test has been modified so that "only mistake on the part of the litigant seeking the benefit of the doctrine, rather than excusable mistake, need be shown" (*Vanderburg v Brodman*, 231 AD2d 146, 147 [1st Dept 1997]). Parties are united in interest "[i]f the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." (*Prudential Ins. Co. of Am. v Stone*, 270 NY 154, 159 [1936]). This prong is met "where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*Vanderburg v Brodman*, 231 AD2d 146, 147).

In the instant case, although the claims against Magnetic and AGV arise out of the same occurrence, the two of them are clearly not united in interest. They had very different responsibilities at the building, for which they are independently liable, and they would not necessarily desire the same result. As the criteria for relation back has not been met, plaintiff's claims against AGV are barred by the statute of limitations and

must be dismissed. However, Magnetic's third-party claims against AGV remain, as they were timely filed.

Labor Law Claims

Several of the defendants have argued that they are entitled to summary judgment on the portion of plaintiff's complaint which seeks to recover for injuries pursuant to Labor Law § 240 (1). The statute does not mention "stairs" as an enumerated safety device, and it is only where a staircase is the sole means of access to and from the work area in question that a staircase may be deemed a safety device for which contractors and owners and their agents would be liable within the meaning of Labor Law § 240 (1) (*see Ramirez v Shoats*, 76 AD3d 851 [1st Dept 2010]; *McGarry v CVP 1 LLC*, 55 AD3d 441 [1st Dept 2008]; *Griffin v New York Tr. Auth.*, 16 AD3d 202 [1st Dept 2005]).

In the instant case, it is undisputed that the staircase on which plaintiff fell was not the sole means of access to the work site. There were multiple ways plaintiff could have exited the building on his way to lunch, including two staircases, a regular elevator, and freight elevator. As such, Labor Law § 240 is inapplicable as a matter of law.

Several defendants have also moved for summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim. To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete provision of the New York State Industrial Code containing "specific, positive commands," rather than a provision reiterating common-law safety standards (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 503 [1993]). In support of his Labor Law § 241 (6) claim, plaintiff's "further amended complaint" alleges that defendants violated Industrial Code §§ 23-1.7 (d) and 23-1.7 (e). Industrial Code § 23-1.7 (d) does not apply to the stairwell in this case for the same reasons discussed above regarding Labor Law § 240. Industrial Code § 23-1.7 (e), titled "Tripping and other hazards,"provides:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp

> projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Despite defendants' arguments to the contrary, as an employee of AV&C who managed staff and consulted with Magnetic at the building for the project, plaintiff has at the very least raised an issue of fact as to whether he is protected under Labor Law § 241 (6), which is meant to ensure safety to the persons employed at or "lawfully frequenting" construction sites such as the one in the instant case. The fact that plaintiff was not engaged in construction and that he was on his way to lunch at the time of the accident is immaterial (*see Aguilar v Henry Marine Service, Inc.*, 12 AD3d 542 [2d Dept 2004]; *O'Connor v. Serge Elevator Co.*, 58 NY2d 655, 657 [1982]). Further, despite defendants' arguments, there is a question of fact as to whether construction work was taking place in or near the stairwell and whether the accumulated dust was the result of that work, such that dismissal of plaintiff's cause of action as a matter of law would be inappropriate at this time.

Accordingly, it is

ORDERED that the motion of defendant Stonehill and Taylor Architects, P.C. for summary judgment dismissing so much of the complaint as was asserted against it is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendant A & GV Stucco Construction Corp. P.C. for summary judgment dismissing so much of the plaintiff's complaint as was asserted against it is granted and plaintiff's complaint is dismissed in its entirety as

against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Stonehill and Taylor Architects, P.C. and A & GV Stucco Construction Corp. P.C. shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the branches of the motions by 1170 Broadway Associates, LLC, Magnetic Construction Group Corp., Cassway Contracting Corp., and Haren & Keller Painting Corp., for partial summary judgment dismissing plaintiff's Labor Law § 240 cause of action are granted and plaintiff's Labor Law § 240 cause of action is dismissed; and it is further

ORDERED that the remainder of the motions by 1170 Broadway Associates, LLC, Magnetic Construction Group Corp., Cassway Contracting Corp., and Haren & Keller Painting Corp. for summary judgment dismissing the complaint and plaintiff's motion for partial summary judgment are denied and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on August 1, 2018 at 2:15PM.

Dated: 7/3/18

ENTER:

Anthony Cannataro, JSC