| **Norton v Empire Off. Inc.** |
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| 2018 NY Slip Op 32170(U) |
| September 6, 2018 |
| Supreme Court, New York County |
| Docket Number: 151724/16 |
| Judge: Lynn R. Kotler |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

DONNA NORTON INDEX NO. 151724/16

MOT. DATE

- v -

MOT. SEQ. NO. 002

EMPIRE OFFICE INC. et al.

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).
Replying Affidavits NYSCEF DOC No(s).

This is a personal injury action. Defendants Envirochrome Interiors Inc ("EI Inc.") and Envirochrome Interiors and Design, Inc. ("EID Inc." and collectively "Envirochrome") now move for summary judgment dismissing plaintiff's claim and all crossclaims against them. Plaintiff opposes the motion. Empire Office Inc. ("Empire") has not taken a position with respect to the motion. Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

On July 15, 2015, the date of her accident, plaintiff was employed by the International Alliance of Theatrical Stage Employees ("IATSE"). Plaintiff was at IATSE's office located at 417 Fifth Avenue in Manhattan, when she tripped and fell over a countertop/board and/or stack of boards (the "board") in the conference room (the "accident"). Previously, IATSE had entered into a written contract dated May 12, 2015 with EI Inc. to perform renovations at the office (the "contract"). The scope of the renovation included drywall, plumbing, sprinklers, HVAC, carpet, painting, flooring, and electric. The contract provides in pertinent part:

> The Contractor [Envirochrome] will coordinate the Work with the Project Manager, any consultants retained in connection with the Project, any subcontractors and any separate contractors retained by or on behalf of the Owner.

Article 2 §2.6 of the ENVIROCHROME contract states:

> The Contractor acknowledges and agrees that a critical requirement of this Project is the Owner's ability to continue operations at the Project premises throughout the performance of the Work. It is the responsibility of the Contractor to coordinate and execute the Work so that the Owner can maintain continuous operations.

Dated: 9/6/18

HON. LYNN R. KOTLER, 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

Article 8.6.2 of the ENVIROCHROME contract states:

> The Contractor shall supervise and direct the Work and shall have control over the work and shall do so using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the contract. ...the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures.

Envirochrome produced Colin McErlean, its superintendent for a deposition. McErlean testified in pertinent part as follows:

Q. Back in July of 2015, what frequency were you at the IATSE job site?

A. Every day.

Q. What were your hours of employment back in July of 2015?

A. They varied, typically from 7:00 to 4:00.

...

Q. You mentioned new furniture. What was Envirochrome's involvement with the new furniture at the IATSE space?

A. Just coordinating.

...

Q. The filing cabinets that you're describing that Empire brought into this room, did they contain any sort of countertop on them?

A. They did.

...

Q. Do you have an understanding as to whether these countertops were for cabinets located in that conference room or cabinets located somewhere else in the IATSE space?

A. In the conference room.

...

Q. Did Envirochrome supervise or direct Empire to place these countertops in a different area?

A. We did not.

Meanwhile, IATSE entered into a contract with Empire to also perform work at the premises. Empire produced Tori Alexander, who is Empire's Vice President of business administration. Alexander testified at a deposition that Empire typically contracts to sell and install furniture that this is what the contract between IATSE and Empire entailed.

The night before the accident, Empire's foreman Richard Lenihan was working on site after hours performing furniture installation in the subject conference room. He was working with a countertop board to be placed over the filing cabinets but did not finish installing it that night

Alexander further explained that Empire used a staging area where materials Empire used would be stored. For the subject renovation, Empire stored its materials in the conference room where plaintiff's accident occurred. Alexander further stated that "[t]ypically, it's the general contractor who would lay out the plan for the floor in terms of what's going to be a staging area, where the installations are happening and the phasing of it and then based on that, Empire will come up with their installation plan."

Envirochrome now moves for summary judgment, arguing that: [1] EID Inc. cannot be liable because it did not have a contractual relationship or duty with regard to the underlying renovation; and [2] defendant Empire Office Inc. ("Empire") left the board out and EI Inc. did not have control or exercise supervision over Empire or the premises. Plaintiff opposes the motion and contends that triable issues of fact preclude summary judgment.

**DISCUSSION**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]). Liability for a dangerous condition may only be predicated upon occupancy, ownership, control or a special use of the property (*Gibbs v. Port Authority of New York*, 17 AD3d 252 [1st Dept 2005]).

On this record, Envirochrome has demonstrated entitlement to summary judgment. Specifically, it has established that its employees did not place the boards in the conference room. Therefore it did not cause or create the condition. Further, Envirochrome did not owe plaintiff a duty. It contracted with IATSE to perform renovations at the property. Absent that work causing the subject dangerous condition, Envirochrome cannot be held liable to plaintiff.

The court rejects plaintiff's arguments that there is a triable issue of fact as to whether Envirochrome controlled Empire's work. There was no agreement between Envirochrome and Empire. Plaintiff calls Envirochrome a general contractor, but there is no testimony that Envirochrome managed, supervised or directed Empire's work. While Empire's witness testified that Empire would generally work under a general contractor, he did not testify that this was the case here. Rather, Envirochrome has come forward with proof that it merely coordinated with Empire which provided furniture at the job site. Such activity does not give plaintiff the "authority to maintain or control the area in question, or to correct any unsafe condition" (*Gibbs, supra*).

Finally, plaintiff's reliance on Envirochrome's contract with IATSE is unavailing. Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Further, the court does not find, nor does plaintiff argue, that any exception to that general rule applies here.

Accordingly, Envirochrome's motion for summary judgment is granted and plaintiff's claims and all crossclaims against it are severed and dismissed.

**CONCLUSION**

In accordance herewith, it is hereby:

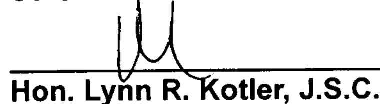
**ORDERED** Envirochrome's motion for summary judgment is granted and plaintiff's claims and all crossclaims against it are severed and dismissed; and it is further

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

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9/6/18
New York, New York

So Ordered:



**Hon. Lynn R. Kotler, J.S.C.**