SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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CHARLES VARGAS, Index No. 160997/2013

Plaintiff

- against - DECISION AND ORDER

SAN FRANCISCO ASSOCIATES LIMITED PARTNERSHIP, WAVECREST MANAGEMENT TEAM LTD., and CENTRAL DEVELOPMENT CORP.,

Defendants

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APPEARANCES:

For Plaintiff
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For Defendants San Francisco Associates Limited Partnership and Wavecrest Management Team Ltd.
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LUCY BILLINGS, J.S.C.:

I. BACKGORUND

Plaintiff, a tenant in defendant San Francisco Associates Limited Partnership's residential apartment building at 29 East 104th Street, New York County, suffered personal injuries August 29, 2013, when a marble slab step on the staircase in the building collapsed underneath him as he descended the staircase. Defendant Wavecrest Management Team Ltd. managed the building for

San Francisco Associates.

On June 25, 2013, San Francisco Associates hired defendant Central Development Corp. (CDC) to renovate the premises, including replacement of the staircase. As of August 20, 2013, however, nine days before plaintiff's injury, CDC had not completed any replacement of the staircase, but had performed work in the stairwell pursuant to CDC's contract with San Francisco Associates. The extent of that work is the crux of CDC's current motion for summary judgment dismissing plaintiff's claim that CDC's negligent work contributed to the stairs' collapse and co-defendants' claims for contribution, non-contractual and contractual indemnification, and breach of a contract to procure insurance. C.P.L.R. § 3212(b).

II. CDC'S MOTION FOR SUMMARY JUDGMENT

A. Applicable Standards

To obtain summary judgment, CDC must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. Id.; Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). If CDC satisfies this standard, the burden shifts to plaintiff and co-defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De

Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of CDC's motion, the court construes the evidence in the light most favorable to the opponents. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503. If the moving party fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005).

B. CDC's *Prima Facie* Defense

CDC's contract with San Francisco Associates, which the parties stipulate the court may consider authenticated and admissible for purposes of CDC's motion, required CDC to abate the lead point on the metal frame of the staircase that held its marble treads and to remove and replace defective components of the stairs, including providing marble for the treads. Sam Wu, CDC's Construction Director in August 2013, testified at his deposition that CDC's work included scraping the old paint off the stairwell walls, where there was no lead paint, and

repainting them, but this work was not specified in the contract. Sam Wu further testified that CDC did not perform any lead paint abatement on the stairs on or before August 29, 2013, because the New York City Department of Housing Preservation and Development (HPD) had not authorized such work. While his explanation why CDC did not perform that work is hearsay, Sam Wu was at the work site to observe whether any such work occurred. He admits that in mid-August 2013 CDC workers did scrape old paint from the stairwell walls surrounding the staircase and stood on the stairs' marble treads to reach the walls and perform that work. The deposition testimony by Zeng Jian Zhong, another CDC employee at the worksite, corroborated Sam Wu's observations.

Rebecca Wu, CDC's administrator and bookkeeper, testified at her deposition that she was instructed to and did request payment for 50% of the lead paint abatement on the stairs in August 2013, as substantiated by CDC's business records requisitioning payment that she maintained. CDC did not request payment for scraping paint off the stairwell walls. Sam Wu testified that the request was a typographical error, but even if such a substantive discrepancy could be simply a typographical or an otherwise inadvertent error, Rebecca Wu's conflicting testimony and her requisition for payment raise a factual issue. Rawls v. Simon, 157 A.D.3d 418, 418-19 (1st Dep't 2018); Prevost v. One City Block LLC, 155 A.D.3d 531, 535 (1st Dep't 2017); Smigielski v. Teachers Ins. & Annuity Assn. of Am., 137 A.D.3d 676, 676 (1st Dep't 2016). See Medrano v. Port Auth. of N.Y. & N.J., 154

A.D.3d 521, 521-22 (1st Dep't 2017); Barba v. Stewart, 137 A.D.3d 704, 705 (1st Dep't 2016); Ellerbe v. Port Auth. of N.Y. & N.J., 91 A.D.3d 441, 442 (1st Dep't 2012). Although CDC also presents a memorandum from HPD refusing the payment because no lead paint abatement was performed, the memorandum is uncertified, and no witness lays a business record foundation for this document, which is HPD's record, rather than CDC's record. C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015). Finally, CDC presents a second payment requisition indicating no lead paint abatement during the first or second payment periods, but the timing of this revision shortly after the stair's collapse and plaintiff's severe injury, as well as the conflict with the requisition before plaintiff's injury, still pose a factual issue.

Moreover, in direct contradiction to the deposition testimony by Sam Wu and Zeng Jian Zhong, plaintiff testified at his deposition that he observed Asian Americans scraping paint off the stairs themselves, not simply standing on the stairs to work on the stairwell walls, using hammers and chisels, every day for two months leading up to his injury. Evans v. Acosta, 169 A.D.3d 438, 439 (1st Dep't 2019); Rawls v. Simon, 157 A.D.3d at 418-19; Prevost v. One City Block LLC, 155 A.D.3d at 535; Smigielski v. Teachers Ins. & Annuity Assn. of Am., 137 A.D.3d at

676. See Medrano v. Port Auth. of N.Y. & N.J., 154 A.D.3d at 521-22; Barba v. Stewart, 137 A.D.3d at 705; Ellerbe v. Port Auth. of N.Y. & N.J., 91 A.D.3d at 442. CDC does not deny that its workers were Asian American. Nor does any evidence indicate any other contractors were performing work in the building during that period. Sam Wu insists that a photograph of the stair that collapsed under plaintiff, which Wu authenticates, shows the absence of any scraping on the staircase, but does not specify whether he refers to the structural components that hold up the stairs or whether scraping includes hammering or even chiseling, which plaintiff observed.

Assuming CDC hammered and chiseled the staircase frame as plaintiff recounts, neither he nor co-defendants present any expert opinion that hammering and chiseling the staircase frame weakened it, causing the cracked marble tread held by the frame all to collapse to the extent that plaintiff's leg fell through both the tread and the frame. Upon CDC's motion for summary judgment, however, the burden rests on CDC to show that, when it presents plaintiff's observations of such work, that work did not weaken the stairs and contribute to the collapse. CDC's expert simply concludes that no work CDC performed contributed to the collapse. He does not specify that he considers CDC's work to have included scraping paint off the stairs, using hammers and chisels every day for two months. Absent a showing that the expert has considered all the relevant evidence in the record, at least to the extent of explaining why he is disregarding specific

evidence, the court may not in turn consider an opinion that is not based on all the relevant evidence in the record. Reif v. Nagy, 175 A.D.3d 107, 126-27 (1st Dep't 2019); Halloran v. Kiri, 173 A.D.3d 509, 510-11 (1st Dep't 2019); Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d 404, 407 (1st Dep't 2017); Santoni v. Bertelsmann Prop., Inc., 21 A.D.3d 712, 714-15 (1st Dep't 2005).

CDC thus fails to establish that CDC's work, including scraping paint off the stairs using hammers and chisels every day for two months before plaintiff's injury, to which plaintiff testified, and which reasonably may be inferred to have been by CDC employees, did not contribute to the staircase's collapse. Ray v. Apple Sq. LLC, 174 A.D.3d 416, 417 (1st Dep't 2019); DelGuidice v. City of New York, 103 A.D.3d 443, 444 (1st Dep't 2013). See Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); Oldham v. City of New York, 155 A.D.3d 477, 477 (1st Dep't 2017). Therefore the court denies CDC's motion for summary judgment dismissing plaintiff's claims against CDC.

C. Co-Defendants' Cross-Claims

Since CDC has failed to establish that its work did not negligently contribute to the staircase's collapse and plaintiff's injury, CDC is not entitled to dismissal of co-defendants' cross-claims for contribution and Wavecrest Management Team's cross-claim for non-contractual, implied indemnification. Essex St. Corp. v. Tower Ins. Co. of N.Y., 153 A.D.3d 1190, 1197 (1st Dep't 2017); McCulloch v. One Bryant Park,

132 A.D.3d 491, 493 (1st Dep't 2015); Miano v. Battery Place Green LLC, 117 A.D.3d 488, 489 (1st Dep't 2014); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014). Because the court previously determined that San Francisco Associates' negligence caused the staircase's collapse, San Francisco Associates concedes that it may not sustain a claim for non-contractual, implied indemnification and therefore discontinues that cross-claim. See McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 377-78 (2011); Gardner v. Tishman Constr. Corp., 138 A.D.3d 415, 417 (1st Dep't 2016); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2013).

Wavecrest Management Team concedes the absence of any contract with CDC and therefore discontinues Wavecrest Management Team's cross-claims for contractual indemnification and breach of contract. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549-50 (1st Dep't 2018); Nicholson v. Sabey Data Ctr. Props., LLC, 160 A.D.3d 587, 587 (1st Dep't 2018); Galue v. Independence 270 Madison LLC, 119 A.D.3d 403, 403 (1st Dep't 2014); Echevarria v. 158th St. Riverside Dr. Hous. Co., Inc., 113 A.D.3d 500, 502 (1st Dep't 2014). The indemnification provision in favor of San Francisco Associates in its contract with CDC requires CDC's negligence, but again, until CDC establishes that its work did not negligently contribute to the staircase's collapse and plaintiff's injury, CDC is not entitled to dismissal of San Francisco Associates' cross-claim for contractual

indemnification. Finally, CDC fails to show either that the contract does not require CDC to procure insurance covering San Francisco Associates or that CDC in fact procured the required insurance, to entitle CDC to dismissal of San Francisco Associates' cross-claim for breach of a contract to procure insurance. Prevost v. One City Block LLC, 155 A.D.3d at 536. See Aramburu v. Midtown W. B, LLC, 126 A.D.3d 498, 501 (1st Dep't 2015); Arner v. RREEF Am., L.L.C., 121 A.D.3d 450, 451 (1st Dep't 2014); Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013).

III. CONCLUSION

Consequently, for all the reasons explained above, the court denies defendant Central Development Corporation's motion for summary judgment dismissing plaintiff's claims against Central Development Corp. C.P.L.R. § 3212(b). The court also denies Central Development Corporation's motion for summary judgment dismissing co-defendants' cross-claims for contribution, defendant Wavecrest Management Team Ltd.'s cross-claim for non-contractual indemnification, and defendant San Francisco Associates Limited Partnership's cross-claims for contractual indemnification and breach of contract. Id. The court grants Central Development Corporation's motion for summary judgment to the extent of discontinuing San Francisco Associates Limited Partnership's cross-claim for non-contractual indemnification and Wavecrest Managment Team Ltd.'s cross-claims for contractual

indemnification and breach of contract based on these defendants' stipulation. C.P.L.R. § 3217(a)(2) and (b).

DATED: December 24, 2019

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.