SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND: PART 23

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JOSEPH BARRETTA and ROBERT CARRAO,

Plaintiffs,

-against-

CASA BELVEDERE, THE ITALIAN CULTURAL FOUNDATION, INC., FRIENDS OF CASA BELVEDERE, INC., M&C MASONRY, LLC, AND JP STONEMART, INC.

Defendants.

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Index No. 150548/2019

Decision & Order

Ozzi, J.

By motion dated July 21, 2021 Plaintiffs Joseph Barretta and Robert Carrao move this court for an Order granting summary judgment on the issue of liability against defendants Casa Belvedere, the Italian Cultural Foundation, Inc., Friends of Casa Belvedere, Inc. (collectively, "Casa Belvedere") Salvatore Calcagno Construction Inc., M&C Masonry LLC ("M&C"), and JP Stonemart, Inc. ("Stonemart") (collectively, "Defendants"). Defendants oppose the motion.

Statement of Facts

This action arises from a February 3, 2018 accident which took place at the Casa Belvedere in Staten Island. Plaintiff Joseph Barretta ("Barretta") was allegedly injured when the limestone patio railing he was leaning against suddenly broke away, causing Barretta to fall approximately ten feet onto the concrete below. Barretta sustained multiple injuries, including, inter alia, fractures, as well as neck, shoulder, back, ankle, face and head injuries. Plaintiff

Robert Carrao ("Carrao") was injured while trying to prevent Barretta's fall. At the time of the accident, Plaintiffs were attending a Super Bowl party at a social club called the Italian Cultural Foundation at Casa Belvedere.

Construction of the railing system was completed approximately two weeks prior to the incident. James Paone ("Paone") the Director of Operations for Casa Belvedere, hired M&C to remove an existing patio railing and install a new railing at Casa Belevedere. Paone selected the limestone, purchased from Stonemart, to recreate the look that existed at the property almost a century earlier, based on old photos. Paone personally selected the material to be used from JP Stonemart which consisted of approximately eighty two limestone balustrades with supporting railings that were picked up by Joseph Molfino of M&C Construction in January 2019. The balustrades selected by Paone were at least ten to fifteen years old and had been stored outdoors by JP Stonemart during that time. Pietrangelo Deposition pp. 17-19. Some of the balustrades had algae on them due to their having been stored outside and Paone directed M&C to power wash them prior to their installation. Molfino Deposition pp. 14-15; Pietrangelo Deposition pp. 21-22.

Joseph Molfino ("Molfino") is the former owner of M&C along with Dominic Caprario.[1] He testified at his deposition that he recommended that the limestone balustrades be placed every eight feet along the perimeter of the balcony but that Paone rebuffed his suggestions, wanting the balcony to have the same aesthetic as the balcony in the century old photographs he showed to Molfino. Molfino Deposition pp. 25; 36-38. Molfino informed Paone that the integrity of the railing system would be negatively impacted and "may be weaker" if the posts were not installed in the manner in which he recommended, but Paone insisted that M&C install the

[1] Molfino testified at his deposition that M&C is no longer in business. Molfino Deposition p. 9.

balcony railing to look "exactly as it was in the early 1900s in the black and white pictures..." Molfino Deposition pp. 78-80.

Rebar was used on the bottom of every other rail. Molfino Deposition p. 81. M&C's work was inspected by Molfino and Caprario. Capario Deposition pp, 24-25; 42-43. Caprario said upon his inspection of the completed railing, he applied pressure to same and found it to be structurally secure. Caprario Deposition pp. 43-44.

Legal Analysis

On a motion for summary judgment, the primary function of the Court is issue finding as opposed to issue determination. Weiner v. Ga-Ro Die Cutting, 104 A.D.2d 331 (2nd Dep't 1983). A motion for summary judgment must be denied if there are facts sufficient to require a trial of any issue of fact. CPLR 3212(b). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issue of fact. Moreover, "the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion." Marine Midland Bank N.A. v. Dino et. al., 168 A.D.2d 1610 (2d Dep't 1990); see also Glennon v. Mayo, 148 A.D.2d 580 (2d Dep't 1989). Summary Judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where he existence of an issue of fact is arguable. American Home Assurance Co. v. Amerford International Corp., 200 A.D.2d 472 (1st Dep't 1994).

Here, Plaintiffs have not met their initial burden in demonstrating the absence of any triable issue of fact. As both Defendants Casa Belvedere and M&C point out, this summary judgment motion was filed prior to the filing of the Note of Issue and discovery remains outstanding, With respect to Casa Belvedere, Plaintiff has not demonstrated that the defendant

had any notice, either actual or constructive of the deficiencies in the railing system. Casa Belvedere did not create the condition that caused Plaintiffs' injuries or have actual notice of the condition. See e.g., Koutsiaftis v. Alliance Parking Services, LLC, 175 A.D.3d 1519 (2d Dep't 2019). Casa Belvedere simply hired contractors to perform the work on the patio to and provide the materials necessary to complete same- M&C and Stonemart. Generally, constructive notice is found when the alleged dangerous condition is visible, apparent, and exists on defendant's premises for a sufficient period to afford the defendant an opportunity to discovery and remedy it. Velocci v. Stop and Shop, 188 A.D.3d 436 (2d Dep't 2020), citing Ross v. Betty G. Reader Revocable Trust, 86 A.D.3d 419, 421 (1st Dep't 2011). Here, there is nothing in the record to suggest that any alleged defect in the railing system was visible or apparent to Casa Belvedere, nor have Plaintiffs established that any alleged defect existed for a sufficient period of time so as to afford Casa Belvedere an opportunity to discover the defect and remedy same. The work had been inspected by M&C within two weeks of the incident and had been found to be structurally sound. Caprario Deposition pp. 43-44.

Furthermore, as M&C and Stonemart point out, liability with respect to specific defendants is difficult to assess at this juncture, when discovery has not yet been completed and, consequently, Plaintiff's motion is premature. The Court concurs that expert testimony may be required to establish which Defendant, if any, was the proximate cause of Plaintiff's injuries. The mere conclusory assertions that either M&C's installation of the patio or the limestone supplied by Stonemart, or both, are the proximate causes of Plaintiffs' injuries is insufficient to warrant summary judgment in this instance. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993); Oxford Health Plans (N.Y.), Inc. v. Biomed Pharmaceuticals, Inc., 181 A.D.3d 808 (2d Dep't

2020)(conclusory assertions insufficient to demonstrate existence of material issues of fact or lack thereof).

Finally, Plaintiffs have not met their burden in establishing the absence of an issue of fact with respect to whether the defendants owed a duty to Plaintiffs. Any contracts entered into were between Casa Belvedere and either Stonemart or M&C. Plaintiffs were not in contractual privity with either Stonemart or M&C but were rather noncontracting third parties. The Court of Appeals has consistently held that "breach of a contractual obligations will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor" (Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002), unless one of three exceptions exist: (1) where the promisor, while engaged affirmatively in discharging a contractual obligation, relates an unreasonable risk of harm to others, or increases that risk (the "force of harm" exception); (2) where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation; and (3) where contracting party has entirely displaced the other parties duty to maintain the premises safely. Espinal v. Melville Snow Contractors, 98 N.Y.2d 136 (2002). The only potentially applicable exception in this instance is the "force of harm exception." However, in order for this exception to be applicable, Plaintiffs must show that either M&C or Stonemart, or both, caused the accident to occur due to a deficiency in the performance of their work, which caused the accident to occur. Here, in the absence of testimony or other evidence specifically demonstrating that anything done by either M&C or Stonemart caused the railing system to fail and collapse, summary judgment is not warranted. Plaintiffs have failed in their moving papers to proffer sufficient evidence as to why this exception is applicable to the instant action and thus, summary

judgment is unwarranted at this juncture. See Killeen v. State of New York, 66 N.Y.2d 850 (1988) (negligence cannot be inferred solely from the happening of an accident).

Consequently, for the reasons set forth above, Plaintiffs' motion for summary judgment is denied. The foregoing constitutes the decision and Order of the Court.

Dated: December 9, 2021

HON. WAYNE M. OZZI, J.S.C.