Disarli v TEFAF N.Y., LLC
2022 NY Slip Op 30029(U)
January 5, 2022
Supreme Court, Kings County
Docket Number: Index No. 503910/18
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of Janaury, 2022.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

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THOMAS DISARLI,

Plaintiff,

-against- Index No.: 503910/18

TEFAF NEW YORK, LLC, SEVENTH REGIMENT ARMORY CONSERVANCY, INC., STABILO USA, STABILO INTERNATIONAL, BV, SELECT CONTRACTING, INC.,

Defendants.

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SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Third-Party Plaintiff,

-against-

ARMORY FAIRS LLC,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	164-165, 177-178, 194, 196, 217-218
Opposing Affidavits (Affirmations)	235, 238, 241, 244
Affidavits/ Affirmations in Reply	248, 253, 255
Other Papers:	

Upon the foregoing papers, defendant/third-party plaintiff Seventh Regiment Armory Conservancy, Inc. (SR Armory), moves for an order (1) pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims against it, or (2) alternatively, pursuant to CPLR 3212, granting it summary judgment in its favor on its cross claims against defendant Select Contracting, Inc. (motion sequence number 11). Defendant Stabilo USA LLC s/h/a Stabilo USA (Stabilo) moves for an order (1) pursuant to CPLR 3211 and 3212, granting it summary judgment dismissing the complaint and all cross claims against it, or (2) alternatively, pursuant to CPLR 3212, granting it summary judgment in its favor on its cross claims against defendant Select Contracting, Inc. (motion sequence number 12). Defendant TEFAF New York, LLC and third-party defendant Armory Fairs LLC (collectively referred to as TEFAF),[1] move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint, cross claims and the third-party action as asserted against them (motion sequence number 13). Defendant Select Contracting, Inc. (Select), moves for an order, pursuant to CPLR 3212, granting it partial summary judgment dismissing plaintiff's complaint to the extent that it is premised on the Labor Law (motion sequence number 14).

Background

Plaintiff Thomas DiSarli alleges that he was injured as the result of an accident that occurred on October 26, 2016, when he tripped and fell over Masonite panels placed over the floor near the exit of the Seventh Regiment Armory (Armory). The accident occurred while plaintiff was working as a security guard at an art sale that was

[1] TEFAF New York, LLC and Armory Fairs LLC are one and the same entity. Armory Fairs LLC is the former name of TEFAF New York, LLC. Armory Fairs LLC changed its name to TEFAF New York, LLC on or around February 26, 2016.

held at the Armory. The State of New York, a non-party, owns the Armory and SR Armory holds a 99-year lease on the premises. TEFAF is the entity that held the art sale, pursuant to a lease or license with SR Armory. TEFAF hired defendant Stabilo to set up and break down the event, including the building and removal of the booths used by the art sellers. Stabilo subcontracted all of the physical work relating to the set-up, building and removal to Select. Plaintiff was employed by non-party T&H Security, which was hired by TEFAF to provide security for the art sale.

According to plaintiff's deposition testimony, at around 5:00 p.m. on October 26, 2016 when the art sale was over, T&H Security posted plaintiff near the freight exit onto Lexington Avenue in order to monitor the artwork as it was taken out of the Armory. While standing in this exit area, plaintiff observed workers who were wearing Select t-shirts place Masonite panels over the floor near the exit.[2] At around 8:00 p.m., one of plaintiff's supervisors directed plaintiff to take a rolling bag or suitcase filled with the radios used by T&H Security's guards out to a car belonging to another T&H Security employee. While plaintiff was walking towards the exit pulling the rolling bag, he tripped over one of the Masonite panels.

It is undisputed that the Masonite panels were, at most, one quarter to one half inch thick. Plaintiff, however, testified that the lighting in the area was poor, that the panel on which he tripped was raised or bent and was not lying flat. In addition, plaintiff testified that the area by the door was busy with a lot of people walking in and out, that he was walking approximately two feet behind another person, and that he was distracted by a forklift that was coming in the door as he was walking out. Plaintiff

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[2] Although Select's witness, John Hamilton, who was Select's president, testified that, based on past experience, someone from RS Armory could have put down the Masonite near the exit, he had no personal knowledge regarding who put the Masonite down on the date of the accident and essentially conceded that Select could have put it down.

thereafter commenced this action, alleging causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

Discussion

Initially, plaintiff asserts that the motions by TEFAF and SR Armory should be denied because they have failed to provide the statement of material facts and word count certification required by Uniform Rules for Trial Courts (22 NYCRR) §§ 202.8-b and 202.8-g. Under the facts of this case, this court finds, contrary to the holding of the court in *Amos Financial LLC v Crapanzano* (73 Misc 3d 448, 453 [Sup Ct, Rockland County 2021]), that the failure to provide statements of material facts and word count certifications may be excused under CPLR 2001 (*see Priority 1 Security v Childrens Community Servs. Inc.*, 2021 WL 4523600, *7 [U] [Sup Ct, New York County 2021]; *but see Amos Financial LLC*, 73 Misc 3d at 453; *De Leon v Kagansky*, 2021 WL 4537869, *1 [U] [Sup Ct, Kings County 2021]; *Jimenez-Couret v Linzo*, 2021 WL 5044291, *1-2 [U] [Sup Ct, Bronx County 2021]). In this regard, the court notes that various Departments of the Appellate Division have held that failures to comply with or delays in complying with similar court rules and or provisions of the CPLR are not necessarily fatal to consideration of the motions at issue under CPLR 2001. These circumstances include but are not limited to the failure to provide a counter-statement of facts as required by rule 19-a of the Rules of Practice for the Commercial Division of the Supreme Court (Uniform Rules for Trial Cts [22 NYCRR] § 205.70) (*see Matter of Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1338 [4th Dept 2015]; *Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]); the separate brief and statement of facts requirements of Uniform Rules for Trial Courts (22 NYCRR) § 202.8 (c) (*see Lagattuta-Spataro v Sciarrino*, 191 AD3d 1355, 1356 [4th Dept 2021]); the requirement of a separate affirmation of good faith for discovery motions contained in Uniform Rules

for Trial Courts (22 NYCRR) § 202.7 (c) (*see Encalada v Riverside Retail, LLC*, 175 AD3d 467, 468-469 [2d Dept 2019]; the requirement that the pleadings be attached to a summary judgment motion (*see Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1359 [2d Dept 2019]); and the requirement of CPLR 2309 (c) that an affidavit notarized out of state be accompanied by a certificate of conformity (*see Williams v Light*, 196 AD3d 668, 669-670 [2d Dept 2021]).

Here, the motions were made very shortly after the rules requiring the statement of material facts and word count certifications became effective. TEFAF, in moving, provided a clear, numbered factual statement in its original attorney's affirmation, and, in any event, has provided a statement of material facts and word count certifications with its reply papers (*see Cushman & Wakefield, Inc. v Kadmaon Corp., LLC*, 175 AD3d 1141, 1142 [1st Dept 2019]). Although SR Armory did not address the issue in its reply, the court notes that SR Armory adopted Stabilo's papers and Stabilo's papers included a statement of material facts and word count certifications. Ultimately, given that plaintiff, in opposition, was able to provide his own counter statement of material facts and address the merits of the motions by SR Armory and TEFAF, the court fails to see how plaintiff was prejudiced by Stabilo and TEFAF's failures. As such, the court will consider the motions by SR Armory and TEFAF on the merits (*see Priority 1 Security*, 2021 WL 4523600, *7).

Defendants, through the deposition testimony of plaintiff and the defense witnesses, have demonstrated, prima facie, that plaintiff's work as a security guard was unrelated to the construction work that Stabile and Select were hired to perform and plaintiff has failed to demonstrate an issue of fact in this respect. Accordingly, defendants are entitled to dismissal of plaintiff's causes of action premised on Labor Law §§ 200, 240 (1) and 241 (6) (*see Kuffour v Whitestone Constr. Corp.*, 94 AD3d 706,

707 [2d Dept 2012]; *Spaulding v S.H.S. Bay Ridge*, 305 AD2d 400, 400-401 [2d Dept 2003]; *see also Bosconi v Thomas R. Stachecki Gen. Contr., LLC*, 186 AD3d 1600, 1601 [2d Dept 2020]).

This court, however, rejects Stabilo's assertion that it is entitled to summary judgment dismissing the complaint against it, because it did not owe plaintiff a duty of care, based on the fact that its only relationship with the art show was its contractual relationship with TEFAF (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-142 [2002]; *see also Bernal v ACS Sys. Assoc., Inc.*, 197 AD3d 603, 604-605 [2d Dept 2021]). Stabilo's liability here is governed by a line of cases involving the non-delegable duty general contractors owe to pedestrians in certain circumstances where they have actual or constructive notice of dangerous conditions caused by acts or omissions of their subcontractors (*see Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 151-152 [1943]; *see also Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept 2011]; *Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010]).

Although these cases address this non-delegable duty in the context of sidewalk accidents, the same non-delegable duty undoubtedly applies with respect to the duty to provide pedestrians with a reasonably safe means of ingress or egress (*see Blatt v L'Pogee, Inc.*, 112 AD3d 869, 869-870 [2d Dept 2013]; *Edwards v BP/CG Ctr. 1*, 102 AD3d 413, 413-414 [1st Dept 2013]; *Backiel v Citibank*, 299 AD2d 504, 505-508 [2d Dept 2002]; *Thomassen v J & K Diner*, 152 AD2d 421, 424 [2d Dept 1989], *lv dismissed* 76 NY2d 771 [1990]). This rule applies because of a general contractor's authority over the work and/or area at issue and does not depend on whether the contractor actually supervised or controlled the work of the subcontractor (*see Bessa v An Flo Indus., Inc.*, 148 AD3d 974, 978 [2d Dept 2017]; *Anastasio*, 82 AD3d at 809; *Harsch v City of New York*, 78 AD3d 781, 783 [2d Dept 2010]; *see also Schwartz*, 290 NY at 151-152). Since

TEFAF hired Stabilo to perform the set up and take down of the art show, and Stabilo subcontracted with Select to physically perform the actual work, there are at least factual issues as to whether Stabilo would be deemed a general contractor or agent thereof with respect to Select's work and the worksite (*see White v 31-01 Steinway, LLC*, 165 AD3d 449, 452 [1st Dept 2018]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018]; *Gallagher v Resnick*, 107 AD3d 942, 945 [2d Dept 2013]).[3]

In view of the deposition testimony of the witnesses for TEFAF and SR Armory showing that TEFAF assumed certain maintenance obligations during the course of the art show, there are at least factual issues as to whether TEFAF, as the lessee or licensee of SR Armory for the art show, assumed a duty of care to maintain the area of the accident (*see Stevenson v Saratoga Performing Arts Ctr., Inc.*, 115 AD3d 1086, 1087-1088 [3d Dept 2014]; *Torres v Washington Hgts. Bus. Improvement Dist. Mgt. Assn., Inc.*, 57 AD3d 214, 214 [1st Dept 2008]; *see also Gatto v Coinmach Corp.*, 172 AD3d 1176, 1177-1178 [2d Dept 2019]). Similarly, SR Armory, which has not submitted its agreement with TEFAF, has failed to demonstrate, prima facie, that it may be shielded from liability as an out of possession landlord during the course of the art show (*see Tardif v Hauppauge Off. Park Assoc., LLC*, 184 AD3d 887, 889 [2d Dept 2020]; *Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 800 [2d Dept 2019]; *Agbosasa v City of New York*, 168 AD3d 794, 796 [2d Dept 2019]).

Stabilo, TEFAF and SR Armory also assert that they are each entitled to summary judgment on the ground that the Masonite covering the floor only presented a trivial defect given that it was, at most, one quarter to one half inch thick. However, the

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[3] Contrary to Stabilo's assertion, the complaint's allegations regarding Stabilo's status as the general contractor for the project and whether it had actual or constructive notice of the defective condition are sufficient to provide Stabilo with sufficient notice of the duty at issue (*cf. Szulinska v Elrob Realty, LLC*, 190 AD3d 777, 779 [2d Dept 2021]).

photographs submitted by Stabilo, TEFAF and SR Armory are inconclusive. Further, plaintiff testified that the Masonite panel on which he tripped was bent or raised, that the lighting was poor, that there were a lot of people going in and out of the exit, and that he was distracted by a forklift that was coming into the Armory as he was walking out. In view of this record, Stabilo, TEFAF and SR Armory have failed to demonstrate their prima facie entitlement to summary judgment on the ground that the defect was trivial (*see e.g. Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 83 [2015]; *Trinidad v Catsimatidis*, 190 AD3d 444, 445 [1st Dept 2021]; *Karpel v National Grid Generation*, LLC, 174 AD3d 695, 696 [2d Dept 2019]; *Nagin v K.E.M. Enters., Inc.*, 111 AD3d 901, 902-903 [2d Dept 2013]). For essentially the same reasons, Stabilo, TEFAF and SR Armory have failed to demonstrate, prima facie, that the alleged defect was open and obvious and not inherently dangerous (*see Kuznick-DeFranco v Cushman & Wakefield, Inc.*, 195 AD3d 1405, 1406 [4th Dept 2021]; *Stanger v City of New York*, 190 AD3d 776, 777 [2d Dept 2021]; *Karpel*, 174 AD3d at 696-697).

TEFAF further argues that it did not have actual or constructive notice of the condition presented by the Masonite placed on the floor because it only arose shortly before the accident.[4] The deposition testimony in the record demonstrates that TEFAF had personnel on site on the evening of the accident, and since the Masonite was put down around 5:00 p.m. and the accident did not happen until around 8:00 p.m., there is at least a factual issue as to whether there

[4] Neither Stabilo nor SR Armory argue that they did not have actual or constructive notice of the issue with the Masonite.

was sufficient time for the defect to have been noticed and corrected (*see Singh v Manhattan Ford Lincoln, Inc.*, 188 AD3d 506, 507 [1st Dept 2020]; *Coelho v S&A Neocronon, Inc.*, 178 AD3d 662, 663-664 [2d Dept 2019]; *Stevenson*, 115 AD3d at 1088). In the absence of any testimony or evidence regarding when TEFAF last inspected the Lexington Avenue exit of the Armory, it has failed to demonstrate, prima facie, the absence of constructive notice in this respect (*see Pinto v Walt Whitman Mall, LLC*, 175 AD3d 541, 545 [2d Dept 2019]; *Francis v Super Clean Laundromat, Inc.*, 117 AD3d 898, 899 [2d Dept 2014]; *see also Ellis v Sirico's Catering, Inc.*, 194 AD3d 692, 693-694 [2d Dept 2021]).

In sum, Stabilo, TEFAF, and SR Armory have failed to demonstrate, prima facie, that they are entitled to summary judgment dismissing the common-law negligence cause of action as against them. As such, this portion of their respective motions must be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

As Stabilo, TEFAF, and SR Armory have failed to demonstrate, prima facie, that the accident was not the result of their own negligence, they are not entitled to dismissal of the contribution and common-law indemnification cross claims asserted against them (*see Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 981 [2d Dept 2021]; *Nugra v Aramalla*, 191 AD3d 683, 686 [2d Dept 2021]; *Carter v Nouveau Indus., Inc.*, 187 AD3d 702, 704 [2d Dept 2020]). In view of their failure to demonstrate their prima facie entitlement to summary judgment in this respect, this aspect of the respective motions by Stabilo, TEFAF, and SR Armory

must be denied regardless of the sufficiency of the opposition papers (*see Winegrad*, 64 NY2d at 853).

Having failed to demonstrate their own freedom from negligence in the happening of the accident, Stabilo and SR Armory have also failed to demonstrate their prima facie entitlement to summary judgment on their common-law indemnification claims as against Select (*see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448-1449 [2d Dept 2019]; *Morris v Home Depot USA*, 152 AD3d 669, 673 [2d Dept 2017]; *Mikelatos v Theofilaktidis*, 105 AD3d 822, 824-825 [2d Dept 2013]). Their motions in this respect must thus be denied despite Select's failure to submit opposition papers (*see Caliber Home Loans, Inc. v Squaw*, 190 AD3d 926, 927-928 [2d Dept 2021]; *Exit Empire Realty v Zilelian*, 137 AD3d 742, 743 [2d Dept 2016]).

Accordingly, it is

ORDERED that defendants' respective motions (motion sequence numbers 11-14) are granted, only to the extent that plaintiff's causes of action premised on Labor Law §§ 200, 240(1), and 241 (6) are dismissed; and it is further

ORDERED that the defendants' motions are otherwise denied.

This constitutes the decision and order of the court.

ENTER

J.S.C.
HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
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