SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Frank Vaccaro

INDEX NO. 154556-2019

MOT. DATE

- v -

MOT. SEQ. NO. 004

ESRT Empire State Building LLC et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is a personal injury action arising from a construction site accident. Now, defendant Development Ventures Group, Inc. ("Development") moves for summary judgment in its favor: (1) dismissing plaintiff's causes of action for common-law negligence and breach of Labor Law §§ 200, 240(1) and 241(6); and (2) dismissing ESRT Empire State Building LLC and Empire State Realty Trust, Inc.'s (the "Owners") cross claims against Development. In turn, the Owners cross-move for summary judgment against Development and an order striking Developments answer and crossclaims due to spoliation of evidence. Third-party defendant Unity Construction Group, Inc. ("Unity") partially opposes Development's motion to the extent that the latter seeks dismissal of all claims against it. Plaintiff also opposes Development's motion and cross-moves for sanctions against it. Development opposes both cross-motions. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available.

The facts relevant to this motion sequence are as follows. On the date of plaintiff's accident, January 25, 2018, plaintiff was employed by Unity as a superintendent. That day, plaintiff was on the 53rd floor of the Empire State Building (the "building"), Suite 5340 (the "suite"), when a ladder he was using moved and he fell. Plaintiff was in the suite to check on punch list items. Plaintiff testified that before his accident, the ladder looked like it was in good condition. Plaintiff fell after "the ladder felt like it was moving sideways; in other words it was collapsing to the side".

Owners owned the building and Development leased the suite. Development owned the subject ladder, which was more than seventeen years old, and lent it to plaintiff upon plaintiff's request. Pictures of the ladder were taken by Development's insurance representative, which have been provided to the court, and the ladder was disposed of more than a year after plaintiff's accident. Development has provided an expert's affidavit, who opines based upon photographs of the ladder and deposition testimony that:

Dated: 4/28/23

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**

> The ladder showed typical signs of use but no visible cracks, defects, damage, or degradation that would affect its function. The step surfaces were in good condition with slip resistant features and without any noteworthy contamination. The "feet" of the ladder were in good condition without any apparent damage, and the ladder could be placed with all four feet on the ground. I did not see any feature or condition of the ladder that would restrict or limit its safe use at the time of the subject accident.
>
> ...
>
> Because the ladder was in good condition, and based on my prior background, training, and experience in the engineering and physics of ladders and ladder accidents, I conclude to a reasonable degree of engineering certainty that the subject ladder, as an inanimate object, could not have tipped over on its own. Only the Plaintiff's own actions could have caused the ladder to tip over

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]). 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]).

The court will first consider Development's motion. Development argues it is not a proper Labor Law defendant and plaintiff is silent as to this point. While Unity argues that Development can be held liable under the Labor Law, plaintiff has conceded this point and thus Development's motion for summary judgment dismissing plaintiff's Labor Law § 200, 240[1] and 241[6] claims is granted.

Plaintiff only opposes Development's motion as to his common law negligence claim. On this point, Development has failed to demonstrate that it did not have notice of any defect with regard to the ladder. While plaintiff testified that the ladder looked like it was in good condition, Development's own witness could not recall seeing anyone ever use the ladder before plaintiff's accident and further testified that it was not used again thereafter. Development's witness further testified that she didn't know if anyone ever inspected the ladder prior to plaintiff's accident. On this record, Development has failed to demonstrate that it did not have notice of a defective condition with respect to the ladder.

Development relies upon photographs of the ladder taken after plaintiff's accident and its expert affidavit claiming the ladder was in good condition. The court must now address the parties' arguments regarding Development's alleged spoliation of evidence. Spoliation is the destruction of evidence (*Kirkland v. New York City Hous. Auth*, 236 AD2d 170 [1st Dept 1997]). The court has broad discretion in providing relief to the party deprived of lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action (*Ortega v. City of New York*, 9 NY3d 69 [2007]). In determining the sanction to be imposed on a spoliator, the court must examine the extent that the non-spoliating party is prejudiced by the destruction of the evidence and whether dismissal is warranted as "a matter of elementary fairness" (*Kirkland, supra*).

Spoliation of a key piece of evidence, whether negligent or intentional, may warrant dismissal of an action or the striking of responsive pleadings (*Standard Fire Ins. Co. v. Federal Pac. Elec. Co., 14 AD3d 213* [1st Dept 2004]). Dismissal or striking a responsive pleading is warranted only where the spoliated evidence is the sole means by which a party can establish a claim or defense, where a claim or defense is otherwise "fatally compromised" or a party is "left 'prejudicially bereft' of its ability to defend as a result of the spoliation (*Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 AD3d 607 [1st Dept 2016]).

In *Strong v City of New York* (112 AD3d 15 [2015]), the First Department thoroughly explained when spoliation sanctions are appropriate and in what form with regards to the negligent destruction of audiotapes: "the negligent erasure of audiotapes can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was "on notice [that] the [audiotapes] might be needed for future litigation". Here, Development disposed of the ladder despite knowledge of plaintiff's injuries and subsequent investigations that were performed into plaintiff's accident. Indeed, Development filed an insurance claim thus demonstrating that it anticipated a claim by plaintiff against it and thus had a duty to preserve the ladder. Development's witness explained that the ladder was disposed after a year because she "couldn't stand looking at it in the closet, so since no one was using it, we decided a bad omen (sic) and get rid of it."

Without the ladder, plaintiff and Development's codefendants are bereft of the ability to rebut Development's assertions that the ladder was in good condition based upon the photographs its insurance company took of the ladder. Thus, the court finds that spoliation sanctions are warranted. The appropriate form of the sanction shall be preclusion with regards to the photographs since plaintiff and Development's codefendants were deprived of an opportunity to inspect the ladder and take their own photographs and the photographs would otherwise give Development an unfair advantage at trial in light of their destruction of this key piece of evidence. Accordingly, Development is precluded from offering into evidence the photos taken by its insurance company at the time of trial or permitting its expert to rely on said photographs to form an opinion about the condition of the ladder at the time of plaintiff's accident. Further, plaintiff and Development's codefendants may make an application at the time of trial for an adverse inference.

The court now turns to the balance of the motion and the Owner's cross-motion with regards to ESRT's crossclaims against Development. The Owners have asserted crossclaims against Development for contractual indemnification, contribution, breach of contract for failure to obtain insurance, and for common law indemnification.

Article 21 of the lease requires Development to indemnity the Owners under the following circumstance:

> To the fullest extent of the law, Tenant (Development) shall indemnify, defend and hold the Landlord Parties (the Owners) harmless from and against any and all claims, demands, liability, losses, damages, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) arising from or in connection with: (a) any breach or default by Tenant in the full and prompt payment and performance of Tenant's obligations hereunder; (b) the use or occupancy or manner of use or occupancy of the Premises by Tenant or any person claiming under or through Tenant; (c) any act, omission or negligence of Tenant or any of its subtenants, assignees or licensees or its or their partners, principals, directors, officers, agents, invitees, employees, guests, customers or contractors (of any tier); (d) any accident, injury or damage occurring in or about the Premises; (e) the performance by Tenant (or any Person on behalf of Tenant, or any Person claiming by, through, or under, Tenant, including, without limitation, any Person engaged by or on behalf of Tenant) of any Alteration in, to or about the Premises, including, without limitation, the failure of Tenant or any such Person to

> obtain any permit, authorization or license or failure to pay in full any contractor, subcontractor or materialmen performing such Alteration; (f) a misrepresentation made by Tenant hereunder (including, without limitation, a misrepresentation of Tenant under Article 40 hereof);and (g) any mechanics lien filed, claimed or asserted in connection with any Alteration or any other work, labor, services or materials done for or supplied to, or claimed to have been done for or supplied to Tenant, or any Person claiming through or under Tenant. Tenant shall not be required to indemnify the Landlord Parties, and hold the Landlord Parties harmless, in either case as aforesaid to the extent that it is finally determined that the negligence or willful misconduct of a Landlord party contributed to the loss or damage sustained by the Person making the claim against the Landlord.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

In this action the plaintiff claims that he was injured within Development's suite when he fell from an allegedly defective ladder owned by Development and lent to plaintiff by Development. Furthermore, there is no evidence of any negligence on the part of the Owners. These allegations and claims fall within at least the category of "any accident, injury or damage occurring in or about the Premises". Therefore, the Owners are entitled to contractual indemnification from Development, including all attorneys' fees, costs, and disbursements incurred in defense of the underlying action brought by the injured party. Therefore, the Owners motions is granted in its entirety on the crossclaim for contractual indemnification and Development's motion for summary judgment dismissing this claim is denied.

Article 42 of the lease requires Development to maintain a commercial general liability insurance policy with minimum limits of $5 million per occurrence and shall name the Owners as additional insureds on a primary basis. Development claims that it did not breach this provision of the lease because it "was insured under a commercial general liability policy issued to its parent company, Kajima USA Inc. ... The policy affords coverage as required by the Lease." Contrary to Development's contention, the policy annexed to its motion papers does not list the Owners as an additional insured. Therefore, the Owners are also entitled to summary judgment on their crossclaim for breach of contract for failure to procure insurance and Development's motion as to this claim is denied.

Finally, Development's motion as to the Owners' crossclaim for contribution is also denied, since there is an issue of fact as to whether Development was negligence with respect to plaintiff's accident.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Development's motion for summary judgment is granted to the extent that plaintiff's Labor Law claims against it are severed and dismissed; and it is further

ORDERED that Development's motion is otherwise denied; and it is further

ORDERED that the Owners' and plaintiffs' cross-motions for sanctions are granted to the extent that Development is precluded from offering into evidence the photos taken by its insurance company at the time of trial or permitting its expert to rely on said photographs to form an opinion about the con-

dition of the ladder at the time of plaintiff's accident. Further, plaintiff and Development's codefendants may make an application at the time of trial for an adverse inference; and it is further

ORDERED that the balance of the Owners' cross-motion for summary judgment on its crossclaims against Development is granted as follows:

[1] the Owners are granted summary judgment on their crossclaim for contractual indemnification and for breach of contract for failure to procure insurance against Development;

[2] the Owners are entitled to reimbursement for their defense costs incurred to date, with statutory interest and the issues of [1] what amount Development should reimburse the Owners for defense costs incurred to date, with statutory interest is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and determine; and it is further

ORDERED that counsel for the Owners shall, within 90 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

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: 4/28/23
New York, New York

So Ordered:

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