SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** PART 3-5

Index Number : 119724/2000

CONNORS, MICHAEL

vs

SK 55WALL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 119724/00

MOTION DATE 8/4/06

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED

SEP 13 2006

COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

It is hereby

ORDERED that the motion is decided in accordance with the annexed Memorandum Decision. It is further

ORDERED that the cross motion has been withdrawn. It is further

ORDERED that counsel for third-party defendant F & G Mechanical Corporation shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/11/06

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

MICHAEL CONNORS, Index No.: 119724/00

Plaintiff,

-against-

SK 55 WALL LLC and B & R CONSULTANTS, LTD.,

Defendants.

----------x

B & R REBAR CONSULTANTS, INC., Third-Party Index No.: 590595/05

Third-Party Plaintiff,

-against-

F & G MECHANICAL CORPORATION,

Third-Party Defendant.

----------x

Edmead, J.:

This is an action to recover damages for personal injuries sustained by a worker when he slipped and fell on oil while working at a construction site. Third-party defendant F & G Mechanical Corporation (F & G) moves, pursuant to CPLR 3212, for summary judgment dismissing third-party plaintiff B & R Rebar Consultants, Inc.'s (B & R) third-party complaint, sounding in contribution and common-law indemnification, on the ground that no triable issues of fact exist with regard to the liability of F & G for plaintiff's alleged injuries.

Defendant SK 55 Wall LLC (SK Wall) cross-moves, pursuant to CPLR 3212, for summary judgment on its cross claims against defendant B & R Consultants, Ltd. for common-law and contractual indemnification. In a facsimile, dated August 22, 2006, this court was advised by the attorney for B & R Consultants, Ltd. that defendant SK Wall's cross motion for

summary judgment seeking indemnification from defendant B & R Consultants, Ltd. has been withdrawn, as his firm has recently taken over SK Wall's defense, as well.

BACKGROUND

On Saturday, October 23, 1999, plaintiff, who was employed as a foreman by Prolight Electric, was allegedly injured when he slipped and fell on a puddle of oil, which had leaked from a pipe threading machine, at a construction site located at 55 Wall Street, New York, New York. Defendant SK Wall, who owned the premises at issue, hired third-party plaintiff B & R to serve as general contractor on the construction project. B & R hired third-party defendant and subcontractor F & G to supply steamfitters to install the cooling and heating systems on the project.

Plaintiff testified that his alleged accident occurred in the fourth floor corridor, just outside the elevator lobby in the northwest corner of the building. Plaintiff also testified that, in the days prior to his alleged accident, he had observed steamfitters using pipe threading machines, or oilers, in other areas of the building, though not in the area where he fell. In addition, plaintiff stated that he had never observed any steamfitters in the area of the pipe threading machine at issue. Plaintiff also stated that he did not know who owned the pipe threading machine, although he believed it was owned by the steamfitters, because "[t]hey had their pipe threading equipment in that area, and they were the only ones on the job who [were] doing that type of work" (Notice of Motion, Exhibit H, Connors EBT, at 61).

Michael Cahill (Cahill), vice president of B & R, testified that he was in charge of the construction project. Cahill noted that, in addition to B & R hiring F & G as the sole steamfitter contractor on the project, and plaintiff's employer, Prolight Electric, B & R had hired other

mechanical contractors for the project. Although Cahill could not recall if those mechanical contractors did steamfitting, he did note that "they certainly did pipe work" (Notice of Motion, Exhibit I, Cahill EBT, at 32).

Cahill explained that, at the time of plaintiff's alleged accident, F & G utilized a shanty for the storage of its materials and equipment, which was located within a fitness center on the fourth floor of the building. Cahill asserted that the shanty would remain locked all day, unless F & G needed to access its contents. In addition, only F & G employees had keys to this area, and if no F & G personnel were working on a particular day, the area would remain locked.

Cahill further stated that he could not recall ever seeing a specific pipe threading machine in the shanty, nor could he recall anyone from F & G ever using pipe threading machines on the construction site. In fact, Cahill stated that he had no knowledge as to whether F & G had ever used pipe threading machines on the fourth floor prior to and including the date of plaintiff's alleged accident.

Cahill also testified that he had never made any complaints to F & G concerning its use of pipe threading machines. In addition, Cahill had never observed any oil leaking from any pipe threading machine, nor was he aware of any complaints of oil spillage prior to the time of plaintiff's alleged accident. Cahill also noted that he believed that the fire protection contractor on the project, who would have also been working on the fourth floor, would have used pipe threading machines, though he could not remember whether or not he had actually observed that contractor using the machines.

Paul Bertolini (Bertolini), a long-time employee and general superintendent and safety director for F & G, testified that, if F & G's pipe threading machine was used at the construction

site, it would have been locked up in the F & G shanty when it was no longer in use. Bertolini also stressed that it was "absolutely" F & G's policy to lock the shanty at the end of the day, and at times when there were no F & G employees present (Notice of Motion, Exhibit K, Bertolini EBT, at 57). Bertolini also reiterated that only F & G employees had keys to the shanty. F & G's strict policy regarding the security of the shanty was put into effect in order to prevent theft, as well as the unauthorized use of its tools and equipment.

Bertolini also noted that, upon review of his payroll records, no F & G workers were working on the project on Saturday, October 23, 1999, the date of plaintiff's alleged accident. Thus, the shanty would have been locked on Friday night and would have remained locked on the day of the alleged accident. Bertolini asserted that, as only F & G employees possessed keys to the shanty, and no F & G employees were working on that day, no F & G equipment could have been removed from the shanty and in use at the time of plaintiff's alleged accident.

In addition, Bertolini stated that he periodically inspected F & G's equipment at the site, including the pipe threading machines, although it was the job of the workers actually using the pipe threading machines to check them for possible oil leaks. Bertolini further stated that he had no knowledge of any oil spill having been present at any time prior to and including the day of plaintiff's alleged accident, and that he had not been aware of the occurrence of plaintiff's accident.

Further, Bertolini stated that there were other trade entities on the project, such as plumbers, electricians and sprinkler fitters, which would have also used pipe threading machines. He further identified plaintiff's employer, Prolight Electric, as a trade entity that would have possibly used a pipe threading machine.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact'" (Wolff v New York City Transit Authority, 21 AD3d 956, 956 [2d Dept 2005], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corp., 298 AD2d 224, 226 [1st Dept 2002]).

"In a slip and fall case, the plaintiff must show the existence of a hazardous condition and that the defendant created the condition or had actual or constructive notice of it" (King v JNV Limited, 275 AD2d 733, 734 [2d Dept 2000]; see Prisco v Long Island University, 258 AD2d 451, 451-452 [2d Dept 1999]). In the absence of evidence that a defendant created a defect or received actual notice of a defect relevant to its facilities, the defendant is entitled to summary judgment (Schiano v TGI Friday's, Inc., 205 AD2d 407, 408 [1st Dept 1994]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

Here, B & R claims that it is entitled to indemnification and contribution from F & G for plaintiff's injuries, simply because F & G may have used the same type of machinery that

allegedly caused plaintiff to fall. However, B & R's own vice president, Cahill, testified that, although F & G was the only steamfitter contractor on the project, he had hired other mechanical contractors that also performed pipe work. In addition, Bertolini, the safety director for F & G, stated that there were other trades on the project which would have also used pipe threading machines. Moreover, plaintiff testified that he had never actually observed steamfitters at the location of the particular pipe threading machine at issue.

In addition, Cahill and Bertolini both asserted that F & G's storage shanty would remain locked all day, unless F & G needed to access its materials, and that only F & G employees possessed keys to the shanty. Further, Bertolini's review of the payroll records revealed that there were no F & G workers working at the project site on the day of plaintiff's alleged accident. Thus, there is no evidence showing that the shanty was not locked at the time of the alleged accident.

While there may be a question of fact as to whether F & G owned the pipe threading machine at issue, F & G has made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence demonstrating that they did not create the hazardous oil spill and did not have actual or constructive notice of the condition (see Madrid v City of New York, 42 NY2d 1039, 1039 [1977]).

Here, plaintiff testified that he did not see the condition until after he allegedly slipped and fell. In addition, Cahill stated that he had never observed any oil leaking from a pipe threading machine, nor was he aware of any spillage of oil prior to plaintiff's alleged accident. Further, Bertolini stated that he had no knowledge of any oil spill having been present on the job site.

Moreover, in opposition to the motion, B & R has failed to come forward with any evidence to raise a triable issue of fact as to whether F & G created or had notice of the alleged slippery condition. In Zuckerman v City of New York, (49 NY2d at 562), the Court held that "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Thus, as F & G has established that it had no fault in the accident, and as no questions of fact exist, F & G is entitled to summary judgment dismissing B & R's complaint seeking indemnification and contribution for plaintiff's alleged injuries.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that third-party defendant F & G Mechanical Corporation's motion for summary judgment dismissing the third-party complaint is granted, and the third-party complaint is severed and dismissed with costs and disbursements, as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

DATED: September 11, 2006

ENTER:

J.S.C.

CAROL EDMEAD
J.S.C.