[* 1] SCANNED ON 1/28/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE DORIS LING-COHAN Justice PART 36

Index Number : 106706/2010
JOHNSON, ROBERT C.
vs.
OUTDOOR INSTALLATIONS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 42

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is for summary judgment by defendants October Installation LLC d/b/a Spring Scaffolding is denied in accordance with the attached memorandum decision.

(consolidated for disposition with motion sequence number 002)

FILED
JAN 25 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/23/13

_____, J.S.C.
JUSTICE DORIS LING-COHAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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ROBERT C. JOHNSON and JEANNINE M. JOHNSON,

Plaintiffs,

Index No.: 106706/10
DECISION/ORDER

-against-

Motion Seq. No.: 001 & 002

OUTDOOR INSTALLATIONS, LLC and THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendants.

----------X

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury action, the defendant Outdoor Installations, LLC, d/b/a Spring Scaffolding (Spring) moves for summary judgment to dismiss the complaint (motion sequence number 001), and the defendant Trustees of Columbia University in the City of New York (Columbia) moves separately for the same relief (motion sequence number 002). The motions are consolidated for disposition and, for the following reasons, are denied.

BACKGROUND

On October 19, 2007, Johnson, an officer employed by the New York City Police Department (NYPD), was injured while chasing a suspect around the corner of Riverside Drive and West 109th Street in the County, City and State of New York. *See* Notice of Motion (Spring), Zawisny Affirmation, ¶ 12. At his deposition on June 8, 2011, Johnson testified that, at approximately 5:30 - 6:00 p.m. on the day of his accident, he and several other officers of the NYPD, the Federal Bureau of Investigation (FBI) and the Drug Enforcement Agency (DEA) were engaged in chasing a suspect in an ongoing narcotics investigation after that suspect had

abandoned his car and fled south down Riverside Drive . *Id.*; Exhibit E, at 12, 18-19, 27-31. Johnson also testified that it was raining heavily at the time, and that he had not previously surveyed the area of Riverside Drive and West 109th Street, or noticed any scaffolding there. *Id.* at 26, 35. Johnson also stated that he "did not recall seeing lights in the vicinity of the scaffold pole," and that "I never saw the pole, so the lighting was - it was black, dark." *Id.* at 37-38. Johnson asserts that his injuries are the result of a hazardous condition, namely, defendants' failure to provide adequate lighting under the sidewalk shed.

Non-party and former NYPD officer Thomas Grimes (Grimes), who was present at the time of Johnson's accident, was deposed on August 26, 2011. *See* Carlton Affirmation in Opposition, Exhibit A. Grimes also stated that he "didn't recall seeing lights under the scaffold." *Id.* at 34. Grimes further described the area where Johnson was injured as "dimly lit." *Id.* at 47.

Spring was deposed on June 15, 2011 via one of its operations managers, William Knight (Knight), who testified that Spring had been hired in 2007 by Columbia to install a type of scaffolding known as a "sidewalk bridge" or "sidewalk shed" in front of a building located at 362 Riverside Drive that is owned by Columbia and is situated at the corner of Riverside Drive and West 109th Street (the building). *See* Notice of Motion (Spring), Exhibit F, at 8-10. Knight further testified that the "sidewalk shed" that Spring installed in front of the building extended eastward on West 109th Street from Riverside Drive, was 90 feet long, by 10 feet high by 13 feet wide and was equipped with 24-hour fluorescent, electrical lighting. *Id.* at 11. Knight specifically confirmed that these light fixtures had been installed at 15-foot intervals by a non party electrical subcontractor called Mari Electric (Mari), that the lights were kept permanently on, that Columbia had replaced all light bulbs as needed, and that Columbia had never received

any complaints about the lighting or the fixtures that would have caused Columbia to recall its subcontractors to service them. *Id.* at 16-20, 26-30.

Spring has also presented an affidavit from one of its foremen, Ionnica Lupulescu (Lupulescu), who averred that Spring's only responsibility is for the erecting and removal of "sidewalk shed" scaffolding, that Spring is not responsible for maintenance or safety with respect to such scaffolding, and that Spring never received any complaints regarding the "sidewalk shed", at the building in question. *See* Notice of Motion (Spring), Exhibit A, ¶¶ 8-16. Lupulescu also specifically stated that:

> Fluorescent lights were installed under the entire structure of the sidewalk bridge and the lights were operational and on 24 hours a day, 7 days a week. There was no on/off switch controlling the lighting. Pursuant to the contract between [Spring] and [Columbia], [Columbia] was responsible for maintenance of the sidewalk bridge lighting including bulb replacement.

Id., ¶ 11.

Columbia was deposed on July 5, 2011 via one of its resident managers, Ronald Pelissier (Pelissier), who testified that the building is a dormitory residence owned by Columbia University, and that porters from the building were charged with sweeping under the "sidewalk shed" scaffold while renovation work at the building was ongoing. *See* Notice of Motion (Spring), Exhibit G, at 11, 13, 17-19. Pelissier also stated that Columbia had never received any complaints about the scaffold. *Id.* at 33.

Johnson commenced this action on July 16, 2010 by filing a summons and complaint that sets forth one cause of action for negligence (on behalf of himself), and one cause of action for loss of consortium (on behalf of his wife, co-plaintiff Jeannine M. Johnson). *See* Notice of Motion (Spring), Exhibit B. On October 1, 2010, Columbia filed an answer with affirmative

defenses and a cross claim against Spring for indemnification. *See* Notice of Motion (Columbia), Exhibit G. On October 27, 2010, Spring also filed an answer with affirmative defenses and a cross claim against Columbia for indemnification. *See* Notice of Motion (Spring), Exhibit C. Now before the court are Spring's and Columbia's respective motions for summary judgment to dismiss the complaint and cross claims.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material or triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64 (1st Dept 2002). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of opposing papers". *Winegrad*, 64 NY2d at 853. Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). On a summary judgment motion, the court must view the evidence in a light most favorable to the non-moving party and accord the non-moving party the benefit of every reasonable inference. See *Negri v. Stop and Shop, Inc.*, 65 NY2d 625 (1985); *Rennie v. Barbarosa Transport, Ltd*, 151 AD2d 379, 380 (1st Dept 1989).

Applying such principles herein, for the reasons set forth below, Spring and Columbia's motions for summary judgment are denied, as movants have failed to satisfy their burden of demonstrating an entitlement to judgment as a matter of law. Moreover, in opposition, plaintiff

has raised genuine issues of material fact which warrants a denial of the motions.

The Appellate Division, First Department, recently reiterated the established legal principle that:

> The owner of a premises may be held liable for an accident caused by a dangerous condition on the property if the plaintiff can demonstrate that the owner created the condition or had actual or constructive notice of it. An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the accident to permit the owner's employees to discover and remedy the problem [internal citations omitted].

Pintor v 122 Water Realty, LLC, 90 AD3d 449 (1st Dept 2011); *see also Alexander v. New York City Transit*, 34 AD3d 312, 313 (1st Dept 2006). Notably, a showing of notice is *not* required when defendant created the condition by installing the structure that gave rise to plaintiff's injury. *Salvador v. New York Botanical Garden*, 74 A.D.3d 540, 541 (1st Dept 2010) (showing of notice was not required when owner created the condition by installing the telephone enclosure in a darkened hallway that plaintiff ran into while chasing a child).

Here, plaintiff's theory of liability stems from the creation and negligent maintenance of the sidewalk shed. Neither defendant refutes the fact that Columbia contracted with Spring for the creation and maintenance of the sidewalk shed. As detailed below, defendants, who have the burden of proof on their motions for summary judgment, failed to establish, as a matter of law, that they did not create the allegedly dangerous condition. *See Rachlin v. 34 Street Partnership* , 96 AD3d 690 (1st Dept 2012)(finding factual issues as to whether defendant created the allegedly hazardous condition precluded the granting of summary judgment in favor of defendants).

Significantly, defendants failed to establish that there was compliance with New York City Building Code § 3307.6.5, in the installation of the sidewalk shed lighting, which a jury

could determine is some evidence of negligence.

New York City Building Code provides that "[t]he underside of sidewalk sheds shall be lighted at all times either by natural or artificial light. The level of illumination shall be the equivalent of that produced by 200 watt, 3400 lumen minimum." New York City Building Code § 3307.6.5, item 2. As evidence of their alleged compliance, Spring produced an invoice illustrating that the contract included "fluorescent lights." *See* Zawinsky Affirmation, Exhibit A, Proposal/Contract. However, the invoice does not indicate the quality or wattage of the lights, nor does it definitively establish that there was compliance with the New York City Building Code.

Moreover, the deposition testimony of Columbia's Resident Manager, Ronald Pelissier, indicates that Spring may have violated New York City Building Code § 3307.6.5, by installing non-compliant light bulbs. Based on his personal observations of the sidewalk shed lighting, Pelissier estimated the wattage of the light fixtures to be "100 watts." *See* Schwartz Affirmation, Exhibit L, Pelissier EBT at page 20, lines 15-16. This stands in direct contrast to the 200-watt requirement under NYC Building Code § 3307.6.5. Based on this testimony, a trier of fact could infer that Spring violated the New York City Building Code, which is some evidence that the lighting was inadequate at the time of Johnson's accident and that defendants created the allegedly dangerous condition, which caused him to sustain injuries.

Additionally, the deposition testimony of Spring's Manager, William Knight[1], fails to definitively establish that compliant light bulbs were installed at the site. Knight, whose duties appeared to be strictly clerical in nature, testified that he did not know what the New York City

[1] At the time of the accident, Mr. Knight was Spring's Manager.

Building Code required for sidewalk sheds. *See* Schwartz Affirmation, Exhibit K, Knight EBT at page 17, lines 7-12. Knight also indicated that he had no formal training in construction, was not licensed in construction, and had never been to the site where the sidewalk shed was installed. *Id.* at pages 8-9. From this testimony, it appears that Knight lacked the relevant knowledge and expertise needed in order to definitively state whether the lighting in the shed complied with New York City Building Codes, and as to whether defendants created an allegedly dangerous condition which caused Johnson to sustain injuries.

Spring also relies upon an affidavit from a foreman, Ionnica Lupulescu, who was not deposed during the discovery phase of this case, to support its assertion that the shed lighting was properly installed. *See* Zawinsky Affirmation, Exhibit A, Lupulescu Affidavit. However, in his affidavit, Lupulescu, only vaguely describes his basis of knowledge by stating that, "I have supervised the installation of the sidewalk bridge [in question]." Lupulescu Affadavit, ¶ 5. Notably, he does not say that he actually went to the site, or that he oversaw the lighting installation done by the subcontractor; nor did he provide any specific information as to the nature of his "supervision" over the Columbia job. In addition, he did not specifically indicate that Spring, or the subcontractor, Mari, complied with New York City Building Codes § 3307.6.5, with respect to the Columbia job. Rather, Lupulescu only speaks in general terms about the firm's adherence to all New York City Building Codes. *Id.* Lupulescu also admits to having no responsibility with regard to the maintenance of the shed lighting after its installation. *Id* at ¶ 12.

Further, there is testimony in the record indicating that Lupulescu was not the foreman assigned to the Columbia job. According to Spring's witness, William Knight, the foreman

assigned to the Columbia job was former employee Juan Gallardo. *See* Schwartz Affirmation, Exhibit K, Knight EBT, at pages 19-20. As the foreman for the Columbia job, Gallardo was responsible for overseeing the installation of the lighting, which was done by the subcontractor, Mari. *Id.* Read in conjunction with the other relevant testimony, Lupulescu's statements in his affidavit, provide little or no information, regarding the installation of the subject sidewalk shed. Thus, it cannot be said that Lupulescu's affidavit serves to eliminate the possibility that the lighting was inadequate on the day of Johnson's accident, and that defendants created the allegedly dangerous condition which caused Johnson to sustain injuries.

The deposition testimony of defense witnesses Knight and Pelissier also raises a question of whether the shed lighting was properly maintained after it was installed by Spring. New York City Building Code § 3307.6.5, item 2, also states that "[a]rtificial lighting units shall be inspected nightly." Under the terms of the contract between Columbia and Spring, Columbia was responsible for the maintenance of the sidewalk shed lights.[2] *See* Zawinsky Affirmation, Exhibit A, Proposal/Contract, Terms and Conditions #10. Knight also testified to this fact, stating that Columbia University was solely responsible for checking to see whether or not the lights were operational during the time the shed was present.[3] *See* Schwartz Affirmation, Exhibit K, Knight EBT at page 20, lines 11-18. The record indicates that Columbia University's Resident Manager for that building, Ronald Pelissier[4], was the person in charge of the

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[2] Clause #10 of the Terms and Conditions reads: "Maintenance of sidewalk bridge lights (including bulb replacement) to be the responsibility of Customer." *See* Schwatz Affirmation, Exhibit A.

[3] Columbia does not dispute being responsible for maintaining and monitoring the lighting. *See* Schwartz Affirmation, ¶ 7.

[4] Pelissier testified that "[his] building duties are to check the building . . . fill out monthly reports . . . [and] checking staff." *See* Pelissier EBT at page 7, line 17.

maintenance and daily inspections of the lighting in the sidewalk shed. However, Pelissier's testimony indicates that no such inspection or maintenance ever occurred.

In his deposition, Pelissier indicated that no person from Outdoor or Columbia University communicated any instructions or responsibilities to him with respect to the sidewalk shed. *See* Schwartz Affirmation, Exhibit L, Pelissier EBT at pages 17-18. Pelissier also acknowledged that the porters for the building, who were under his supervision, were not given any special instructions with respect to checking or maintaining the lighting in the sidewalk shed. *Id.* at page 19, lines 19-21. Based on this testimony, a trier of fact could determine that neither of defendants' witnesses had actual knowledge of the lighting conditions on the day in question, and that the lighting was not adequately maintained after it was installed. Significantly, defendants, failed to submit evidence of the lighting conditions at the time of the accident. Thus, Johnson's allegations and that of his witness, that it was dark and assertion that the lighting was not adequate, have not been sufficiently rebutted to grant summary judgment. *See Rachlin, supra* at 691.

Moreover, Johnson has raised a question of fact as to whether their was adequate lighting a non-party witness, Thomas Grimes[5], provided deposition testimony that supports Smith's assertion that the area was unreasonably dark at the time of the accident. Grimes testified that the area was "dimly lit" and that the fleeing suspect ran directly into Grimes who had his gun drawn. *See* Carlton Affirmation, Exhibit "A" – Grimes EBT at page 47, lines 4-19. From this testimony, a trier of fact could infer that the area was dark enough that a suspect who was attempting to evade police capture would unintentionally run directly at (and into the arms of) an officer who

[5] Thomas Grimes was one of the police officers working with Johnson on the day of the accident.

had a gun drawn. Grimes's testimony is sufficient to raise a triable issue of fact with regard to the adequacy of the lighting.

Based upon the above, defendants motions for summary judgment are denied.

DECISION

Accordingly, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of the defendant Outdoor Installations, LLC, d/b/a Spring Scaffolding is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the defendant Trustees of Columbia University in the City of New York is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendants, with notice of entry.

Dated: New York, New York
January 23, 2013

Hon. Doris Ling-Cohan, J.S.C.