Murphy v JRM Constr. Mgt., LLC
2017 NY Slip Op 30399(U)
February 27, 2017
Supreme Court, New York County
Docket Number: 157682/2013
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12
--x
JOHN MURPHY,

Plaintiff,

-against-

JRM CONSTRUCTION MANAGEMENT, LLC, BROADWAY 340 MADISON FEE LLC, SUNGARD SYSTEMS INTERNATIONAL, INC., and INTERCEPT INTERACTIVE, INC., d/b/a UNDERTONE,

Defendants.
--x

Index No. 157682/13

Motion seq. no. 005

DECISION AND ORDER

BARBARA JAFFE, J.

For plaintiff:
David Resnick, Esq.
Philip Monier, III, Esq.
David Resnick & Assocs., PC
450 Seventh Ave.
New York, NY 10123
212-279-2000

For Broadway, Intercept, Sungard, & RXR:
Loretta A. Redmond, Esq.
Quirk & Bakalor, PC
1325 Franklin Ave. Plaza
Garden City, NY 11530
212-319-1000

For JRM:
Nikolaos E. Diamantis, Esq.
Law Office of Charles J. Siegel
125 Broad St., 7th fl.
New York, NY 10004
212-440-2350

This action arises from a fall at a construction site in Manhattan. It is undisputed that JRM was the general contractor on the project, that Broadway, Sungard, and Intercept own, lease, and sublease the subject premises, respectively, and that RXR is the managing agent of Broadway.

By notice of motion, defendants Broadway, Intercept, Sungard, and RXR (movants) move pursuant to CPLR 3212 for an order granting them summary dismissal of the complaint as against them and for an order granting them summary judgment on the second cross claim for contractual indemnification in favor of Intercept as against JRM, or a conditional grant of summary judgment on the second cross claim. Plaintiff opposes.

By notice of cross motion, JRM moves pursuant to CPLR 3211(a)(1) and 3212 for an

order granting it summary dismissal of plaintiff's claim based on Labor Law § 241(6), and opposes the motion filed by movants. Plaintiff partially opposes JRM's motion to the extent of asserting that there exist issues of fact as to the identity of the party to be held liable. The cross motion was resolved during oral argument and is moot.

I. BACKGROUND

A. Applicable contractual provisions

In February 2013, Intercept hired JRM as general contractor for the project. Pursuant to their contract, § 3.18.1 of "AIA Document A201 - 2007, General Conditions of the Contract for Construction," which is incorporated by reference in § 9.1.2 of "AIA Document A101 - 2007, Standard Form of Agreement Between Owner and Contractor," JRM agreed to

> indemnify and hold harmless [Intercept], . . . and agents and employees of any of them from and against all claims, damages, losses, and expenses including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expenses is attributable to bodily injury, . . . , but only to the extent caused by the negligent acts or omissions of [JRM], a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose act they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified hereunder.

(NYSCEF 128). The contract also provides, in § 3.18.2, that

> [i]n claims against any person or entity indemnified under this Section 3.18 by an employee of [JRM], a Subcontractor, anyone directly or indirectly employee by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for [JRM] or [Intercept] under workers' compensation acts, disability benefits acts or other employee benefit acts.

(*Id.*). In § 3.18.3, it is provided that JRM's contractual indemnity obligations, "specifically include without limitation, all fines, penalties, damages, liability, costs, expenses (including, without limitation, reasonable attorneys' fees) . . . ," and in § 3.18.4, JRM agreed to indemnify

and hold harmless Intercept from, against and for any costs and expenses, including reasonable attorney fees, incurred by Intercept in enforcing any of JRM's obligations to defend, indemnify, and hold Intercept harmless under the contract, and arising from the performance of work under the contract. (*Id.*).

The accident in issue occurred on April 3, 2013, at 6:45 am, when plaintiff, a carpenter who had been employed by a subcontractor of JRM, fell in the freight elevator lobby of the subject premises, injuring his knee.

B. Procedural history

On August 21, 2013, plaintiff commenced this action, asserting claims of negligence against Broadway and JRM. (NYSCEF 1). On or about October 29, 2014, Broadway served and filed a third-party summons and third-party complaint against Sungard and Intercept, and by order dated January 28, 2015, plaintiff amended his complaint to add Sungard and Intercept as defendants. (NYSCEF 40).

By decision and order dated December 16, 2015, plaintiff was granted leave to amend his complaint solely to the extent of adding as a party-defendant RXR. (NYSCEF 116).

In their verified answer, movants advance against JRM a first cross claim for contribution and common law indemnity and a second cross claim for contractual indemnification. (NYSCEF 94).

In his bill of particulars, plaintiff alleges that defendants were negligent, reckless, and careless in their operation, maintenance, control, possession, and supervision of the premises and their failure to provide a passage free of a tripping condition, and that they caused and created the condition and had constructive notice of it. (NYSCEF 33).

C. Parties' depositions

On April 30, 2015, plaintiff testified at his examination before trial (EBT) that the evening before his accident, the marble floor of the freight elevator lobby was not covered by any planking, whereas the following morning, it was covered with approximately ten pieces of masonite, none of which was taped to the floor. Plaintiff described the accident as follows: "I walked into the building and someone opened the door and the Masonite had lifted up from the wind and caught me in my shins and I went right down." (NYSCEF 131). According to plaintiff, he did not see who placed the masonite on the day of his accident, but had previously observed masonite flooring being installed in the area. He also asserted that a JRM laborer usually taped the boards with duct tape, and that when he arrived at the premises on April 3, 2012, the masonite was not taped. (*Id.*).

A JRM partner who oversees the management of construction projects for JRM, testified that in the event of a delivery to the job site, masonite may have been placed in the freight lobby by the "moving company," the landlord, or JRM, and that if JRM had placed it, the company had procedures for working with masonite for both long-term and temporary applications, and that in the latter case, the masonite would not be taped down. While he admitted that Cassidy was responsible for installing masonite, he did not know if he had placed it in the freight lobby on the morning of the accident, which would depend on whether deliveries were anticipated that day. He admitted having reviewed portions of the agreements between JRM and Intercept. (NYSCEF 132).

At his deposition, Cassidy testified that his job duties included ensuring the safety of the job site, including the installation of masonite, which he had done over 50 times in the freight

lobby during the course of the project. According to him, the correct method of installing masonite was to tape it down flat to the floor. He was also not sure that he had installed the masonite that morning, as there were other contractors working in the building and whoever arrived first would install it for the others. Cassidy explained that ordinarily, masonite was installed in the freight lobby in advance of morning deliveries, that he would arrive at approximately 6 am on mornings when deliveries were expected, that he arrived at 6:06 am on the morning of the accident and thus must have expected a delivery, and that it was his responsibility to install the masonite on such occasions. He admitted however that he and a security guard employed by nonparty Classic Security were present in the freight lobby when plaintiff fell, but denied having witnessed it, and that immediately following the accident, he observed that the masonite boards had been taped down. (NYSCEF 133, 136).

Cassidy represented that he understood OSHA standards to define a "tripping hazard" as anything over a quarter-inch thick, and that the masonite with which he worked was one-eighth-inch thick. (NYSCEF 133).

At his deposition, RXR's building manager testified that he saw masonite laid down in the freight lobby "hours" after the accident occurred but could not recall if it was taped down. He denied that the building or its employees installed the masonite or inspected it, as the job was overseen by JRM, who bore the responsibility of installing it, but acknowledged that RXR kept its own masonite in the building's basement. Based on the sign-in log kept on the day of the accident, the building manager concluded that it must have been JRM who installed the masonite. (NYSCEF 134).

A supervisor employed by Classic Security identified an incident report prepared that day

and testified that it was a record generated in the ordinary course of Classic Security's business. He did not, however, author it, nor did he witness the accident. (NYSCEF 148). The report reflects a statement by another employee that plaintiff "fell down and spill[ed] some coffee at loading dock entrance due to Masonite tiling placed by Thomas Cassidy from JRM" and that "[p]rotection boards were laid down prior to the incident occurring." (NYSCEF 73).

II. DIRECT CLAIMS

A. Contentions

Movants contend that the deposition and documentary evidence establish that JRM, not them, installed the masonite, thereby creating the dangerous condition that resulted in plaintiff's injury, and that they were not responsible for supervising, controlling, or directing JRM's work. They deny possessing constructive notice of the condition, as Cassidy arrived at 6:06 am and the accident occurred at 6:45 am, and thus, the dangerous condition was present for no more than 25 minutes, which they assert is an insufficient period of time for them to discover and remedy it. In any event, they argue that the dangerous condition was occasioned by an unanticipated gust of wind. Moreover, they assert, the security guard's presence in the freight lobby provides no basis for imputing to them constructive notice, as Classic Security was an independent contractor. They also maintain that Sungard and Intercept are not proper parties, as tenants have no duty to maintain the common areas of the premises. (NYSCEF 110).

In opposition, plaintiff contends that all movants have a nondelegable duty to keep the common areas of the building in a safe condition and are responsible for the actions of their agent, JRM, to the extent that it created the dangerous condition. He also maintains that the alleged duration of the dangerous condition, based on counsel's estimation only, raises an issue

of fact as to whether movants had sufficient time to discover and remedy it. (NYSCEF 140).

In reply, movants contend that masonite boards, less than a quarter of an inch thick, laid flat and flush with one another without tape, do not constitute a "tripping hazard," nor was the alleged dangerous condition "readily apparent or observable." Moreover, because the gust of wind caused the masonite board to rise only seconds before plaintiff fell, there was no visible hazard, and thus no actual or constructive notice. They argue that Cassidy's testimony establishes that, given the timing of his arrival at the site and JRM's protocol for prepping the freight lobby with masonite, he must have installed it, and that plaintiff's speculation that another entity may have installed it raises no triable issue. They reiterate that neither Sungard nor Intercept had a duty to maintain the freight lobby, as it was an area over which they had no control or responsibility. (NYSCEF 153).

B. Analysis

1. Applicable law

To prevail on a motion for summary judgment dismissing a cause of action, the defendant "bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action." (*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

It is well-established that "a landowner owes a duty of care to maintain his or her property in a reasonably safe condition." (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]; *Burke*

v Yankee Stadium, LLC, 146 AD3d 720, 2017 NY Slip Op 00597, *1 [1st Dept 2017]). Such a duty is premised on ownership, occupation, control, or special use of the premises. (*Branch v County of Sullivan*, 25 NY3d 1079, 1081 [2015]; *Sewesky v City of New York*, 140 AD3d 666, 666-667 [1st Dept 2016]). Thus, one in possession of real property, whether an owner or tenant, owes a duty to exercise reasonable care in safely maintaining the property. (*Rodriguez v New York City Hous. Auth.*, 211 AD2d 328, 331 [1st Dept 1995], *revd on other grounds* 87 NY2d 887). However, a tenant has no duty to maintain common areas of the premises absent evidence it created the dangerous condition therein, or "it owned or retained . . . control over [it], or had the authority to correct the condition" (*Masterson v Knox*, 233 AD2d 549, 550 [3d Dept 1996]; *Shire v Ferdinando*, 161 AD2d 573, 574 [2d Dept 1990], *lv denied* 76 NY2d 713), and where the tenant is contractually obligated to maintain common areas under the lease, such obligation must "entirely displace" the landowner's duty (*Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2d Dept 2016]; *Abramson v Eden Farm, Inc.*, 70 AD3d 514, 514 [1st Dept 2010]).

Although one who hires an independent contractor is generally not liable for the latter's negligent acts, it may nonetheless have a nondelegable duty if, as pertinent here, it "has assumed a specific duty by contract," or "is under a duty to keep the premises safe." (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]; *Luksik v 27 Prospect Park W. Tenants Corp.*, 19 AD3d 557, 557 [2d Dept 2005]).

A defendant has constructive notice of a dangerous condition where it is "visible and apparent and . . . exist[s] for a sufficient length of time before the accident to permit the defendant to discover and remedy it." (*Arcabascio v We're Assoc., Inc.*, 125 AD3d 904, 904 [2d Dept 2015]). To prevail on a motion for summary judgment here, movants must establish, *prima facie*, that they neither created the condition that caused plaintiff's fall, nor did they have actual

or constructive notice of the condition. (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 [2d Dept 2012], *lv dismissed* 20 NY3d 965; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]). To satisfy their initial burden, movants must offer evidence showing when the subject area "was last inspected or cleaned." (*Pineda v 1741 Hone Realty Corp.*, 135 AD3d 567, 567 [1st Dept 2016]; *Kravets v New York City Hous. Auth.*, 134 AD3d 678, 679 [2d Dept 2015]). However, movants may be entitled to summary judgment if the condition in issue was "both open and obvious and, as a matter of law, . . . not inherently dangerous." (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014]).

2. Broadway and RXR

a. Actionable condition

To the extent that movants contend that the condition at issue is not actionable, Cassidy's testimony as to what he believed constitutes a tripping hazard is factually and legally unsupported. (*See Pellescki v City of Rochester*, 198 AD2d 762, 762 [4th Dept 1993], *lv denied* 83 NY2d 752 [1994] [OSHA regulations bear on relationship between employer and employee; imposes no duty on owner or general contractor]). In any event, Cassidy later testified that he was instructed by JRM to tape down all masonite and observed, following the accident, that it was properly taped down, while plaintiff testified that it was not. Thus, Cassidy's and plaintiff's conflicting versions raise a triable issue as to whether the manner in which the masonite was installed is actionable. (*See Monaghan v Lake Park 135 Crossways Park Dr., LLC*, 80 AD3d 679, 680 [2d Dept 2011] [defendant failed to establish, *prima facie*, that manner in which unsecured masonite boards placed not hazardous]).

b. Notice

Although the evidence relied on by movants does not conclusively establish that JRM

installed the masonite, Cassidy's testimony that he was responsible for installing it at the site, that he normally arrived at 6 am only in advance of deliveries, that he arrived at 6:06 am on the day of the accident, and that he would always install masonite in the freight lobby when deliveries were made, along with the incident report identifying Cassidy as the one who installed it, all support an inference that a person or entity other than Broadway or RXR installed the masonite and thus, created the hazardous condition, and that neither Broadway nor RXR had actual notice of it. However, counsel's speculation that the condition existed no longer than 25 minutes has no evidentiary basis, and as movants have not offered any evidence as to when the area was last inspected, they fail to establish that they had no constructive notice. (*See Arslan v Richmond N. Bellmore Realty, LLC*, 79 AD3d 950, 951 [2d Dept 2010] [plaintiff's contention that substance on floor must have been present 20 to 30 minutes was speculative and thus insufficient to raise triable issue]).

In any event, given the narrow temporal range within which a defendant may be relieved of constructive notice (*compare Grossman v TCR*, 142 AD3d 854, 856 [1st Dept 2016], *lv dismissed* 28 NY3d 1110 [although defendants' witness testified floors were mopped every 15 to 20 minutes, no evidence floors actually mopped, and as plaintiff was gone from locker room "40 minutes before returning . . . , the water could have accumulated at that spot and remained there for long enough to justify inference of constructive notice"], *and Faniel v Marriott Corp.*, 204 AD2d 191, 191 [1st Dept 1994] [jury verdict affirmed as it could have reasonably concluded that defendant had constructive notice of condition present for at least 35 minutes], *with Brothers v 574 9th Ave. Rest. Corp.*, 140 AD3d 512, 512-513 [1st Dept 2016] [proof that area where accident occurred last inspected 20 to 30 minutes before accident sufficient to demonstrate lack of constructive notice], *and Perry v Cumberland Farms, Inc.*, 68 AD3d 1409, 1410 [3d Dept 2009],

lv denied 14 NY3d 706 [30 minutes]), triable issues exist as to the length of time the condition persisted, and whether it was sufficient to permit Broadway and RXR to discover and remedy it.

Finally, absent any contention that the unanticipated gust of wind constitutes an intervening or superseding cause of plaintiff's injuries, the fact that the gust may have occurred seconds before plaintiff tripped is irrelevant to the issue of whether untaped masonite constitutes a dangerous condition.

2. Sungard and Intercept

Movants' conclusory assertion that Sungard and Intercept were tenants of the building does not preclude the possibility that they nonetheless occupied, made special use of, or exercised control over the freight lobby so as to impose on them a duty to reasonably maintain it, and notwithstanding that Intercept's contractor, JRM, may have created the dangerous condition. (*See generally Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845, 846-847 [2d Dept 2010] ["independent contractor rule" and exceptions thereto applied to commercial lessee, though plaintiff failed to demonstrate application of any exception to facts of case]). Additionally, while movants provide the pertinent sublease, they do not reference any provision or provisions therein setting forth the parties' respective duties to maintain the common areas of the building. Thus, movants' fail to establish, *prima facie*, that Sungard and Intercept had no duty, and thus I need not reach the sufficiency of plaintiff's opposition.

III. SECOND CROSS CLAIM

A. Contentions

In seeking contractual indemnification from JRM, Intercept argues that, for the reasons previously stated, JRM or one of its subcontractors was responsible for installing the masonite boards, thereby triggering its indemnity obligation under their agreement. Alternatively, it argues

that absent a finding that JRM is negligent, I should grant a conditional order of summary judgment. (NYSCEF 110).

In opposition, JRM contends that the record reflects uncertainty as to whether it installed the masonite on the morning of the accident, and thus movants do not prove that it was negligent so as to trigger the indemnity clause. It also asserts that the contract on which Intercept relies is unsigned and inadmissible, nor was it identified or authenticated by any witness, and that the incident report is inadmissible absent authentication. (NYSCEF 144). Plaintiff responds to JRM's opposition insofar as claiming that questions of fact exist as to JRM's negligence which must be resolved by a jury, and maintains that the incident report was properly authenticated by Classic Security's supervisor. (NYSCEF 147).

In reply, Intercept alleges that the contract in issue was properly identified and authenticated by JRM's partner. (NYSCEF 153).

B. Analysis

As JRM's partner identified the contract, it is admissible, and the unsigned portion of the contract is incorporated by reference in section 9.1.2 of the standard form portion of the agreement, which is signed by both parties. Additionally, absent any indication that the incident report is not based on the security guard's own observations, and as it was demonstrated to have been generated in the ordinary course of business, it is admissible. (*See* CPLR 4518[a] [so long as made in regular course of business, issue of author's personal knowledge "may be proved to affect its weight, but they shall not affect its admissibility"]; *Matter of McKanic*, 50 AD3d 1145, 1146 [2d Dept 2008] [to extent accident report contained notations based on officer's own observations, it was admissible]; *cf. Zuluaga v PPC Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007] [absent foundation that accident report was prepared in ordinary course of business,

properly rejected as inadmissible]).

Here, the contract obligates JRM to indemnify Intercept solely for its own acts of negligence. Although the evidence relied on by Broadway and RXR is sufficient to establish that they did not create the dangerous condition (*supra*, II.B.3.), it does not establish that JRM created it, particularly as issues remain as to whether the masonite was taped, and thus is not dispositive on the issue of JRM's negligence. Thus, an award of summary judgment is appropriate to the extent conditioned on a future finding of JRM's negligence. (*See eg Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543 [1st Dept 2015] [conditional summary judgment warranted where there had not yet been determination as to indemnitor's negligence, and where indemnification provision did not violate General Obligations Law]).

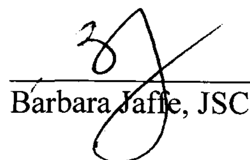
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that movants' motion for (1) an order summarily dismissing the complaint is denied, and for (2) an order granting defendant Intercept Interactive Inc. conditional summary judgment on its second cross claim for contractual indemnification as against defendant JRM Construction Management, LLC is granted; and it is further

ORDERED, that JRM Construction Management, LLC's cross motion is denied as moot.

ENTER:



Barbara Jaffe, JSC

DATED: February 27, 2017
New York, New York