SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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MITCHELL ELSNER,

DECISION, ORDER, JUDGMENT
Index No. 153527/2014

Plaintiff,

Seq. Nos. 002, 003

-against-

BOSTON PROPERTIES, INC., PRITCHARD INDUSTRIES, INC., and THE 601 LEXINGTON AVENUE CONDOMINIUM, BOSTON PROPERTIES LIMITED PARTNERSHIP, CG CENTER 1 LLC and CG CENTER II, LLC,

Defendant(s),

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JENNIFER G. SCHECTER, J.:

In motion sequence number 002 (002), pursuant to CPLR 3212, defendants Boston Properties, Inc. (Boston Properties), The 601 Lexington Avenue Condominium, Boston Properties Limited Partnership, CG Center 1 LLC and CG Center II, LLC (collectively the Boston Defendants) move for summary judgment dismissing the complaint and for summary judgment on their cross-claims against co-defendant Pritchard Industries, Inc. (Pritchard). Plaintiff Mitchell Elsner cross-moves for sanctions and for summary judgment on liability.

In motion sequence number 003 (003), Pritchard moves for summary judgment dismissing the complaint and the cross-claims.

The motions are consolidated for disposition.

Background

This is an action to recover for personal injuries sustained by plaintiff on August 1, 2013 at a food court

located on the atrium level of 601 Lexington Avenue in Manhattan (Affidavit in Support [Supp] 002, Ex I, Elsner Transcript [Elsner Tr] at 51). Boston Properties owns 601 Lexington Avenue and contracted with Pritchard for maintenance services.

The material facts are undisputed. On the day of the accident, it rained and nearly .16 of an inch of water had accumulated by noon. Plaintiff entered the building with his wet umbrella at approximately 12:30 pm (Elsner Tr at 63, 65). After walking down steps to a food-court area, plaintiff purchased lunch from the Market Deli on the atrium level and then walked across the food court towards the steps that lead back to the exit (Elsner Tr at 64-73). Plaintiff estimated that he walked 15-20 steps from the Market Deli before he slipped, fell and injured his knee on the "apoxy terrazzo" floor (Elsner Tr at 71-72, 93, 165). Mr. Elsner clearly recalls that there were no mats where he fell (Elsner Tr at 72-73, 140, 143, 148, 165). After he fell, he noticed water on the floor--more than drops but less than a puddle--a foot or two behind him (Elsner Tr at 74, 87, 163, 173-174, 177, 179). He did not see the water before he fell and the floor was neither broken nor cracked (Elsner Tr at 87-88, 179).

Mr. William Venturella, a Fire Safety Director and supervisor of security officers for Boston Properties, testified that Pritchard was responsible for maintenance at

601 Lexington, including placing mats in the lobby and atrium (Supp 002, Ex J, Venturella Transcript [Venturella Tr] at 9-10, 48; Elsner Tr at 79). He testified that he did not recall any complaints about the floor at the atrium prior to plaintiff's accident (Venturella Tr at 115-16). Not long following Mr. Elsner's accident, Mr. Venturella filled out an incident report indicating that plaintiff fell at 12:45 on "drops" of water on the terrazzo floor and that he injured his knee (Venturella Tr at 23-35, 75-76, 91).

Mr. Enis Ahmemulic, a utility porter employed by Pritchard who was not present on the day of the incident, testified that Boston Properties purchased mats and that it was Pritchard's responsibility to put them out in the atrium on rainy days (Supp 002, Ex K, Ahmemulic Transcript [Ahmemulic Tr] at 29, 97, 119). He explained that he was orally directed to ask the building manager if mats should be placed on the floors if there was a 40% chance of rain and if there was over a 90% chance then, even before it rained, Pritchard porters would place mats down by the entrances and the handicap elevator in a "T" formation (Ahmemulic Tr at 42, 45-46, 50-51, 130, 152, 154). Generally, orders came from the building's manager.

Ahmemulic explained that the various sized mats had been placed in the same way for 20 years (Ahmemulic Tr 76, 124).

He testified that mats would be placed pursuant to a "building rule" (Ahmemulic Tr at 54, 56, 151). One of the porters would also be assigned to the atrium level daily and would be responsible to check, clean and mop the floors (Ahmemulic Tr 109-111).

Pritchard supervisor, Adrian Hoxha, swore that on wet days a porter would be assigned to dry mop the floor on the food-court level (Pritchard Supp 003, Ex H Hoxha Aff] at ¶ 2). He explained that on "the day of the accident, the porter dry mopped [the area where plaintiff fell] every 20 to 30 minutes" (Hoxha Aff at ¶ 2). He further swore that Pritchard never "received complaints that there was water on the floor of the food court level" (Hoxha Aff at ¶ 6).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed

material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Liability

The parties all move for a judgment on liability. Defendants move for dismissal of the action and plaintiff moves for a judgment against them based on their alleged negligence. Because defendants made a prima facie showing of entitlement to judgment and, in response, plaintiff failed to establish the existence of a triable issue of fact, defendants' motions are granted and plaintiff's cross-motion is denied.

A landowner must maintain property in a reasonably safe condition. Its duty, however "is not limitless" (*Di Ponzio v Riordan*, 89 NY2d 578, 582-83 [1997]) and liability is predicated on evidence that the landowner either "created a dangerous condition or had actual or constructive notice of a hazard that could have been prevented by the exercise of reasonable care" (*Rouse v Lex Real Assocs.*, 16 AD3d 273, 274 [1st Dept 2005]).

Viewing the evidence in a light most favorable to plaintiff, defendants have established that they did not create the wet condition in the atrium nor did they have any "notice of a hazard that could have been prevented by the exercise of reasonable care" (*Garcia v Delgado Travel Agency Inc.*, 4 AD3d 204 [1st Dept 2004]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1st Dept 1995]). Defendants "were under no obligation to cover the entire floor with mats and to continuously mop up all the tracked-in water. There was neither active notice, in the form of complaints received, nor constructive notice of a hazard sufficiently visible as to permit discovery and remedy by defendants. In the absence of proof as to how long a condition existed, no inference can be drawn that defendants had constructive notice of a dangerously wet floor" where Mr. Elsner slipped and fell (*Garcia*, 4 AD3d 204[citations omitted]; *see also Gunzburg v Quality Building Servs. Corp.*, 137 AD3d 424, 424 [1st Dept 2016][defendants under no obligation to continuously mop up all tracked-in rainwater; plaintiff's testimony established water was not visible and apparent as it was not until after she fell that she discerned wet spots on the floor]; *Richardson v S.I.K. Associates, LP*, 102 AD3d 554 [1st Dept 2013]; *Orlov v BFP 245 Park Co., LLC*, 84 AD3d 764, 765 [2d Dept 2011] [defendants neither created nor had notice of condition and were not

required to cover all of the floors with mats "nor to continuously mop up all moisture resulting from tracked-in rain"]; *Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747, 750 [2d Dept 2007] [plaintiff's claim that landowner and Pritchard were negligent in failing to place mats in the area where plaintiff fell was unavailing]; *Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 [1st Dept 2005][error to deny summary judgment where there was no question raised as to constructive notice]; *Edwards v 727 Throgs Neck Expressway, Inc.*, 24 AD3d 290 [1st Dept 2005][affirming dismissal where plaintiff testified there were no mats placed and building had a custom of laying down mats in wet weather based on lack of notice], *lv denied* 7 NY3d 707 [2006]; *Rouse*, 16 AD3d at 274; *Verde-Stefani Melohn Props., Inc.*, 13 AD3d 255 [1st Dept 2004][absent "constructive notice, defendants cannot be found negligent for failing to take safety measures, such as putting down mats"]; *Shernicoff v 1700 Broadway Co.*, 304 AD2d 409, 410 [1st Dept 2003]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106 [1st Dept 2000][reversing denial of summary judgment where plaintiff testified that there were no mats placed on the day he fell despite mats usually being put down when it rained]).

Plaintiff's argument that defendants had actual and years of constructive notice that the terrazzo-marble atrium floor

was slippery when it was raining (Affirmation in Opposition to Motion Sequence 003 [Opp 003] at 6-7 ¶¶ 1-2, 5]) does not establish a question of fact as to notice that would support denial of summary judgment (*Solazzo v New York City Tr* Auth, 21 AD3d 735, 736 [1st Dept 2005] [defendants awarded summary judgment because general awareness that there may be a dangerous condition caused by inclement weather is insufficient to charge them with constructive notice of the specific condition that resulted in plaintiff's injuries and there was no evidence of a recurring dangerous condition in the particular area where plaintiff fell], *affd* 6 NY3d 734 [2005]; *Piacquadio v Recine Realty Corp*, 84 NY2d 967 [1994][nothing in the record established that the terrazzo was otherwise dangerous or negligently maintained]; *Madrid v City of New York*, 53 AD2d 517 [1st Dept 1976], *affd* 42 NY2d 1039 [1977][defendants not liable for injuries absent showing that terrazzo floor was inherently dangerous or that hospital had actual or constructive notice of its slippery condition]; *contrast Nevoso v Putter-Fine Building Corp.*, 18 AD2d 317 [1st Dept 1963][dismissal denied when allegations of slippery floor were coupled with evidence of defects]).

Nor is plaintiff's reliance on an affidavit from an experienced property manager--who swears that proper maintenance of the building required placement of mats or

runners to cover "ALL AREAS where rain water can be tracked into the building or [where] rain water can fall from umbrellas being carried, or where people can fall from wet shoes" (which would amount to coverage wherever people could possibly walk)--availing as it is unclear what renders him a safety expert with qualifications to set the standard of care here (*see Lei Chen Fan v New York SMSA L.P.*, 94 AD3d 620, 621 [1st Dept 2012]; *see also Richardson*, 102 AD3d 554; *Solazzo*, 21 AD3d 735).

Defendants' motions for summary judgment on liability are therefore granted and plaintiff's cross-motion for summary judgment and sanctions is denied.

Contractual Indemnification

The Boston Defendants' motion for summary judgment on their cross-claim against Pritchard is granted.

The parties' agreement provides:

> "**Indemnity**. [Pritchard] shall indemnify, defend and hold harmless the Owner Entities from any claims, demands, debts, suits, losses, damages, fines, penalties, liabilities, costs and expenses, including attorneys fees, expenses, court costs, or causes of action whatsoever of every name and nature, both in law and equity (i) arising from or **claimed to have arisen from, the omission, fault, act, negligence or misconduct of [Pritchard]** . . ." (Affirmation in Support Motion Sequence

Number 002, Ex M, at § 8.4 [emphasis added]).

The indemnification provision is broad and requires a defense based on a claim arising from Pritchard's actions. Because the duty to defend is triggered by the allegations in plaintiff's complaint, the Boston Defendants' motion is granted (*see BP AC Corp v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *see also Gunzburg*, 137 AD3d at 425).

Accordingly, it is

ORDERED that the Boston Defendants' motion for summary judgment on plaintiff's claim and on their cross-claim for contractual indemnification against Pritchard (sequence number 002) is granted and the clerk is directed to enter judgment against plaintiff accordingly without costs, it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that Pritchard's motion for summary judgment (sequence number 003) is granted only as against plaintiff and the clerk is directed to enter judgment accordingly without costs; it if further

ORDERED that in all other respects Pritchard's motion is denied; it is further

ORDERED that if the Boston Defendants and Pritchard cannot resolve the issue, a trial shall be held on the indemnification amount.

This constitutes the decision and order of the court.

Dated: April 21, 2017

HON. JENNIFER G. SCHECTER