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

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JUDITH MILIKOFSKY and MARK MILIKOFSKY,

Plaintiffs,

-against-

Index No.: 150250/2013

FALCON CONSTRUCTION MANAGEMENT, LLC, METROPOLITAN REALTY ASSOCIATES, LLC and ANGELO GORDON & CO., L.P.,

DECISION/ORDER

Mot. Seq. 004

Defendants.

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FALCON CONSTRUCTION MANAGEMENT, LLC,

Third-Party Plaintiff,

-against-

FINDLAY INSTALLATION SERVICES, LLC and FLOORING TECHNOLOGIES, INC.,

Third-Party Defendants.

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FALCON CONSTRUCTION MANAGEMENT, LLC,

Fourth-Party Plaintiff,

-against-

METRO INDUSTRIAL WRECKING & ENVIRONMENTAL CONTRACTORS, INC.,

Fourth-Party Defendant.

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FALCON CONSTRUCTION MANAGEMENT, LLC,

Fifth-Party Plaintiff,

-against-

A.S.A.P. PLUMBING LLC,

Fifth-Party Defendant.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, third-party defendant, Findlay Installation Services, LLC ("Findlay"), moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint of the primary plaintiffs, Judith Milikofsky ("Milikofsky") and Mark Milikofsky's (collectively "Plaintiffs") ("Complaint"), the third-party complaint ("Third-Party Complaint") of primary defendant/third-party plaintiff, Falcon Construction Management, LLC ("Falcon"), and all claims, third-party claims, cross-claims and counter claims against Findlay.

Factual Background

According to the Complaint, Milikofsky was employed at Nassau Radiologic ("NRad") where she performed clerical tasks. NRad experienced two flooding incidents while Milikofsky was employed there. The precise dates of the first and second floods are uncertain, but according to Milikofsky, the second flooding incident occurred approximately two to three months before her accident and flooded the entire office. Milikofsky alleges that Falcon negligently performed repairs and installation of molding adjacent to the carpeting throughout NRad.

Plaintiff claims that on November 9, 2011, while walking to the machine room at NRad, her foot became caught on the molding at the bottom of the wall, causing her to trip and become injured. Consequently, Milikofsky filed the Complaint alleging, *inter alia*, that defendants, including Falcon (first cause of action) was negligent in the installation of the molding.

As relevant herein, Falcon thereafter filed the Third-Party Complaint for indemnification and/or contribution alleging that Findlay's negligence caused Milikofsky's injury.

Findlay's instant motion for summary dismissal of all claims asserted against it ensued.

Findlay's Motion

In support of summary judgment, Findlay argues that the depositions of Milikofsky, Michael Rodriguez ("Rodriguez"), a project manager at Falcon at the time of Milikofsky's injury, and Scott Findlay ("Scott Findlay"), owner of Findlay, fail to demonstrate that: first, Findlay created the defective condition that caused Milikofsky's injury; second, the molding in question was gapped, broken or separated prior to Milikofsky's fall; third, the molding in question was part of Findlay's scope of work; and fourth, Findlay installed the defective molding or had knowledge that the molding was a tripping hazard. Further, the parties' depositions do not establish that Findlay had a duty to repair the defect, and that Findlay had actual or constructive notice of the alleged defective molding.

Next, Plaintiffs fail to state a triable issue of fact because Milikofsky speculates as to what caused her injury. Plaintiffs' and Falcon's claims that Findlay's negligent workmanship caused the molding to separate from the wall is speculative, since Milikofsky never observed that the molding was defective prior to her accident. Further, Milikofsky conceded that she may have caused the molding to come apart from the wall. Moreover, Milikofsky admits that she did not know what caused the molding to become detached from the wall.

Further, as Falcon's claim that Findlay negligently installed the molding is likewise speculative, Falcon's common-law indemnification fails. Moreover, the common-law indemnification fails since Falcon's negligence contributed to Milikofsky's injury. Falcon inspected the carpet and molding for quality, but never raised an issue as to its condition.

Finally, the defective condition that caused Milikofsky's injury is *de minimis.* The "gap or raised projection in the baseboard molding" that caused plaintiff "to stub her foot and trip," was not a "trap or nuisance," in that it was "not difficult to pass over safely" (Stein Aff., at ¶78).

Plaintiffs' Opposition

First, Plaintiffs argue that there is sufficient evidence that the defective molding was the cause of Milikofsky's accident and issues of fact exist as to whether Findlay caused the molding to become defective (Platz Aff., at ¶¶112, 116), which must be resolved by a jury. Further, nothing presented by Findlay impacts on the prime defendants' potential liability as the owners and construction manager and demolition company that caused the flood.

Next, Findlay failed to show that it lacked actual notice of the alleged defective condition, or that the condition existed for a sufficient length of time to permit it, in the exercise of reasonable care, to remedy the defect. (¶¶118-119). Findlay's absolute duty to inspect its work renders the issue of actual and constructive notice irrelevant. In any event, Findlay had a duty to inspect its work and actual knowledge may be inferred from the fact that Findlay was present and thus should have seen the condition, irregardless of the length of time the condition existed. And, as to constructive notice, Findlay knew there had been a flood and did work to remediate the damage (¶¶127-133) and the photographs of the area indicate that Findley had both actual and constructive notice of the condition of the molding. Moreover, given the nature of the occurrence, *i.e.*, that Findley caused or created the condition, there is no need for plaintiff to prove notice in order to recover. And, Falcon cannot escape liability if its subcontractor Findley caused or created the dangerous condition of improperly affixed molding. Nor must Milikofsky exclude every other cause of her accident to prevail on her negligence claim.

Further, Findlay's conclusory denial of responsibility, identification of gaps in Milikofsky's proof, and reliance on inadmissible hearsay are insufficient to support its motion (¶¶134-136, 140). And, Milikofsky and Rodriguez's deposition testimony, and the "evasive, contrived denials by [Scott] Findlay at [his] deposition raise questions of fact as to whether her accident was caused by the defective nature of the condition in question" (¶142).

And, the protruding molding in narrow section of the entrance is not *de minimis*.

Finally, Findlay's contention that it cannot be liable because it is an independent contractor and had no duty to plaintiff is misplaced because plaintiff did not sue Findlay, and thus, the only issue is whether Findlay was negligent for breaching its duty to Falcon which hired it. If Findlay was negligent in its performance of its duties to Falcon and the owners, and Falcon and the owners are held liable to plaintiff for such negligence, then Findley would be liable to Defendants directly and not to plaintiffs. Nevertheless, Findlay, could be found directly liable to plaintiff under the circumstances here where Findlay created the hazardous condition.

Falcon's Opposition

Falcon also argues that questions of fact exist as to how Milikofsky's accident occurred and which party is culpable for creating the subject conditions. Findlay installed carpet and molding at NRad a month prior to Milikofsky's accident, and admits that it installed the black molding shown in a photograph depicting the accident location. Further, Scott Findlay does not have sufficient knowledge of the work Findlay performed at NRad, since he was not on-site or supervising the work during the construction. Scott Findlay's testimony included "selective memory concerning the work," and therefore a jury should be allowed to evaluate his credibility

(p.4). And, Findlay's notice of the defective condition would not be required if it caused the condition.

Moreover, Findlay's refusal to produce documents testified about at Scott Findlay's deposition alone warrants denial of the motion. And, there "may be eyewitnesses identified by Scott Findlay who are still employed and may have actually installed the molding" (Liferiedge Aff., at p.3).

Findlay's Reply

Findlay argues that Plaintiffs fails to demonstrate the existence of a question of triable fact. Milikofsky's explanation of the proximate cause of her accident is speculative. Milikofsky never observed or was aware of the alleged "gaps" in the molding where her accident occurred. Milikofsky also did not know whether the "[m]olding as seen in the photographs became damaged or 'gapped' before, or as a result of her accident" (Reply, at ¶3).

Moreover, assuming Milikofsky's accident was caused by the protruding molding, Plaintiff failed to establish how and when the defective condition was caused. Plaintiffs' exhibits depicting the accident location fail to show the cause the alleged damaged molding. Additionally, since Findlay's work involved carpet replacement, the only molding it would have installed would have been molding adjacent to the carpet, which in photographs is black, not grey, made from different material than that of the molding that caused Plaintiff to fall, and appears new. Further, the "[a]rguments proffered by Findlay do not hinge on the credibility of Scott Findlay," and therefore credibility of his deposition testimony is not at issue (¶18).

Finally, Scott Findlay's did not affirmatively testify that Findlay had additional documents concerning the work it performed in 2011, or that certain employees witnessed the

work performed by Findlay (¶20).

Discussion

CPLR § 3212: Summary Judgment

"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 [demonstrate the absence of] any material issues of fact [internal quotation marks omitted]" (*Melendez v Parkchester Med. Servs., P.C.*, 76 A.D.3d 927 [1st Dept 2010], quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent of the motion makes a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228 [1st Dept 2006], *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). "[I]ssue-finding, rather than issue-determination is the key to [reviewing a motion for summary judgment]" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008] [internal quotation marks and citation omitted]). Moreover, the evidence should be viewed in the light most favorable to the party opposing the motion (*People v. Grasso*, 50 A.D.3d 535, 544 [1st Dept 2008]).

Findlay's Duty to Milikofsky

As to Findlay's motion to dismiss Plaintiff's complaint on the ground that Plaintiff's claims are speculative, dismissal is unwarranted.

Findlay's argument that Milikofsky only speculates as to the cause of her injury and that there is no evidence that the cause of her injuries was the defective molding installed by Findlay, lacks merit. Milikofsky adequately describes the condition that caused her accident (*see infra*, p.

10). Specifically, she testified that her right sneaker became wedged between the molding and the wall, causing her to trip, and that she observed the defect, the molding separated from the wall immediately after she was tripped (*see Schneider v Kings Hwy. Hosp. Ctr., Inc.*, 67 N.Y.2d 743, 744-45 [1986]; *see also Nakasato v 331 W. 51st Corp.*, 124 A.D.3d 522, 523-24 [1st Dept 2015]; *Slowinski v Port Auth. of N.Y and N.J.*, 2013 N.Y. Slip Op. 30030(U), *6-7 [Sup. Ct. N.Y. County 2013]).

Additionally, Findlay's argument that the molding which separating from the wall caused her accident is *de minimis* fails. Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (*see Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 688 N.E.2d 489 [1997]; *Platkin v. Cty. of Nassau*, 121 A.D.3d 879, 879, 994 N.Y.S.2d 636, 637 [2d Dept 2014]). Physically small defects are actionable "when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot" (*Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 41 N.E.3d 766 [2015]). There is no "minimal dimension test or per se rule" that the condition must be of a certain height or depth to be actionable (*Trincere,* 90 N.Y.2d at 977; *see Green v. N.Y. City Hous. Auth.*, 137 A.D.3d 748, 748, 26 N.Y.S.3d 560, 561 [2d Dept 2016]). In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere,* 90 N.Y.2d at 978, quoting *Caldwell v. Village of Is. Park,* 304 N.Y. 268, 274, 107 N.E.2d 441 [1952]).

Findlay failed to establish the object that caused Milikofsky to trip was trivial. Although

Findlay points out that Milikofsky did not have trouble seeing, had no complaints about the office lighting, and that the alleged hazard she identified was not difficult to pass over safely, Findlay fails to address the dimensions of the alleged molding that caused Milikofsky's accident. Findley's conclusory claim, that: "[i]t cannot be said in this instance that 'intrinsic characteristics or surrounding circumstances' of the medical office somehow magnified the dangers posed by the molding . . . ." is insufficient (Stein Aff., at ¶78). In any event, Milikofsky sufficiently raised an issue of fact in that she testified that the subject molding was protruding from the wall far enough that another NRad employee had to tape the molding to hold it in place so that it would not harm other employees. Moreover, the entrance to the machine room as "very narrow" (42:10). And, the first time Milikofsky walked past the area where her accident occurred-on the day of her accident-was when her accident occurred (Milikofsky Trans., at 36:10-13). Thus, it cannot be said, as a matter of law, that the alleged dangerous condition of the molding constitutes a nonactionable defect.

Furthermore, inasmuch as it is undisputed that Findlay was not an owner of managing agent of the premises, but a contractor hired to perform certain repair work at the premises, and that Plaintiff did not sue Findlay directly, Findlay's liability in this action for Plaintiff's injuries in its role as "contractor" allegedly arises from its breach of its contractual obligation to third party plaintiff Falcon. In this regard, "A duty of care to non-contracting third parties . . . may arise out of a contractual obligation or the performance thereof in three sets of excepted circumstances, in which case the promisor is subject to tort liability for failing to exercise due care in the execution of the contract," and as relevant herein, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to

others, or increases that risk" (*Timmins v. Tishman Const. Corp.*, 9 A.D.3d 62, 66, 777 N.Y.S.2d 458 [1st Dept 2004]). In other words, a contractor is liable to an injured third-party when said contractor undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury(*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 142, 773 N.E.2d 485, 488 [2002]; *Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 111, 782 N.E.2d 50 [2002]).[1]

Findlay failed to establish that it did not cause Milikofsky's injury as a matter of law.[2] Nor can it be said that the record establishes, as a matter of law, that that the molding in question was not part of Findlay's scope of work.

Milikofsky testified that on November 9, 2011, the date of her accident, she was walking

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[1] "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138, 773 N.E.2d 485, 488 [2002]; *Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 111 782 N.E.2d 50 [2002] ("[O])rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor"); *Espinal*, 98 N.Y.2d at 139, 746 N.Y.S.2d 120, 773 N.E.2d 485). The Court in *Espinal* articulated three exceptions where "a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons" (*id.* at 140).

First, a contractor is liable for injury to a third-party if:

> the putative [contractor] has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good (id. at 139, 746 N.Y.S.2d 120, 773 N.E.2d 485, quoting *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168 159 N.E. 896 [1928]).

Second, a contractor is responsible for a non-contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury (*Church*, 99 N.Y.2d at 111; *Espinal*, 98 N.Y.2d at 136). Lastly, the service contract is so comprehensive and exclusive that the contractor "entirely displaced the [contracting party] in carrying out [its] duties and became the sole privatized provider for [such duties]" (*Espinal*, 746 N.Y.S.2d 120, citing *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817, 634 N.E.2d 189, 194-95 [1994] [holding third-party liable where third-party's all-inclusive maintenance contract rendered it the only guarantor of "a safe and clean . . . premises"]).

[2] The latter two *Espinal* exceptions are inapplicable in the present case. There is no evidence that Milikofsky detrimentally relied on Findlay's continued performance of carpet and molding installation. Nor can it be said that a comprehensive contract between Findlay and Falcon caused Findlay to entirely displace Falcon's duties to NRad.

through the carpeted hallway and tripped on the molding at the bottom of the wall as she turned into the "very narrow" entrance of the machine room (42:10-14). She testified that the front of her right sneaker became caught in the molding, causing her to lose her balance and fall (42:19). Immediately after she fell she noticed that the molding was "completely away from the wall," and that it was "far enough [from the wall] so that the doctor had to tape it back" (45:12-13). She identified that the carpeting in the area where her accident occurred was the new carpeting installed after the second flood (32:11-14), and the grey molding at the bottom of the wall where her accident occurred was not modified after the second flood, and was in place until the date of her accident (32:25-33:3).

Milikofsky testified that she believed that Falcon performed the repair work after the second flood (Stein Aff., Ex. F, Milikofsky Trans., at p.29:4-7).

Rodriguez testified that Findlay was hired to install the new carpeting and molding after the second flood at NRad (Stein Aff., Ex. G, Rodriguez Trans.). Specifically, Findlay was hired to install temporary carpeting, and then once NRad made its choice as to the final carpeting, Findlay was to remove the temporary carpeting and install the permanent carpeting (32:2-9). Initially, a demolition company removed the carpet damaged as a result of the second flood (32:18-23). Findlay removed the temporary carpet (39:9), and in the "middle to end of October" (39:4), it installed the permanent carpet and "some base molding" (36:5-6). Rodriguez testified that it is "typical procedure" for the molding to be removed prior to installing the carpet, then install the molding once the carpet is installed (39:16-40:3). Moreover, it was Findlay's responsibility to ensure that the base molding it installed had "no gaps" and was "flush" (64:19-24).

Further, the Daily Construction Report from October 8, 2011 (Pla. Ex. 6, Falcon's Daily Construction Report, October 8, 2011) ("October 8 Report") and October 9, 2011 (Pla. Ex. 7, Falcon's Daily Construction Report, October 9, 2011) ("October 9 Report") indicate that Findlay installed base molding at NRad (98:21-99:18). Further, the October 9 Report indicates that Findlay installed carpet where Milikofsky's accident occurred (62:16-21).

Next, Rodriguez testified about the cause of Milikofsky's accident. He testified that he viewed a photograph depicting the area where Milikofsky's accident occurred after her injury ("Plaintiffs' Exhibit 1") (Stein Aff., Ex. B), which shows that "[s]omeone taped the edge and there's also scuff marks along this, as if it got hit" (45:12-19). Further, Rodriguez agreed that the "incident investigation report" (Pla. Ex. 8, Incident Investigation Report, undated), which was completed after the incident, indicates that the molding was ajar from the wall (79:12-15).

Scott Findlay also indicated that Findlay performed work at NRad on October 8, 2011 (Stein Aff., Ex. J-1, Scott Findlay Trans., at pp. 29:23-30:11). Moreover, Scott Findlay admits that the October 9 Report indicates that Findlay performed work at NRad on that day (33:4-7).

Next, Scott Findlay admitted that black molding depicted in the photograph (Plaintiffs' Exhibit 1) is the product of Findlay's work since, "[Findlay] was contracted to do corridor carpeting and base and it's a new base" (38:1-12). Scott Findlay further admits that the beige[3] molding, which is adjacent to the black molding, depicted in Plaintiffs' Exhibit 1 is situated on the carpet (37:17). While Falcon's project manager would manage the project, Scott would direct the work Findlay actually performed at NRad (39:17-23), including the selection of adhesive used to attach the molding to the wall (39:24-40:15).

[3] Findlay's Affidavit in support of its motion for summary judgment acknowledges that the descriptions of "beige" and "grey" molding refers to the same molding.

Scott Findlay also testified that he did not know or did not recall the answers to several questions at his deposition.[4] However, in light of the above testimony and documents, Scott Findlay's inability to recall the answers to and/or ignorance of the answers to questions at his deposition merely raise issues of fact as to whether caused or created or exacerbated the alleged dangerous condition of the subject molding (*see Prenderville v. Int'l Serv. Sys., Inc.*, 10 A.D.3d 334, 338, 781 N.Y.S.2d 110, 113 [1st Dept 2004]).

Since Findlay failed to make a *prima facie* showing that it did not cause or create the condition that caused Milikofsky's injury, whether Findlay lacked actual or constructive notice is inconsequential to its motion (*see Allen v. Turyali Fast Food, Inc.*, 25 Misc. 3d 1210(A), *8, 901 N.Y.S.2d 897 [Sup. Ct. Bronx County 2007], *affd*, 51 A.D.3d 468, 857 N.Y.S.2d 123 [1st Dept 2008] ["[i]ssues of notice do not generally apply to [third party defendant], since it has no obligation to maintain the premises herein."]).

Therefore, dismissal of Plaintiff's Complaint is unwarranted.

Contribution

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 61, 754

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[4] Scott Findlay did not recall the process that Findlay used to install the black molding (47:25); did not recall whether Findlay removed the carpet destroyed by the flood (30:25); or whether Findlay performed work at NRad on October 9, 2011 (48:8). When asked whether Findlay "finish[ed] flooring and base in NRAD and install[ed] corridor carpet," as recorded in the October 9 Report, Scott Findlay testified that he did not recall (33:9-11). Scott Findlay did not know who decided that the transition strip in the area where Milikofsky's accident occurred should not be replaced (52:9). Further, he did not recall what date Findlay finished the job at NRad (41:4-7) Moreover, Scott Findlay did not know whether Findlay performed more than one carpet installation at NRad (42:14), or whether the carpet Findlay did install was permanent or temporary (43:17-19). Further, he did not know whether a Findlay employee inspected the work it performed at NRad after its completion (48:21-24). Finally, he admits he has never visited NRad (39:5).

N.Y.S.2d 301, 306 [2d Dept 2003]; *see AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 594 [2005]; *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 764 N.Y.S.2d 17 [1st Dept 2003]). It is well established that to maintain a claim for contribution, the claimant must show that the party against whom contribution is sought contributed to plaintiff's alleged injuries by breaching a duty either to plaintiff or to [defendant]" (*see Jehle v. Adams Hotel Associates*, 264 A.D.2d 354, 695 N.Y.S.2d 22 [1st Dept 1999]). "A contribution claim can be made even when the contributor has no duty to the injured plaintiff (citations omitted)" (*Trump Village Section 3, Inc. v. New York State Housing Finance Agency*, 307 A.D.2d 891764 N.Y.S.2d 17 [1st Dept 2003]). "In such situations, a claim of contribution may be asserted if there has been a breach of duty that runs from the contributor to the defendant who has been held liable (citations omitted)(id.)

Since a question of fact exists as to whether Findlay was negligent in installing the carpeting and molding at NRad, Findlay failed to establish its entitlement to dismissal of Falcon's contribution claim (*see Hannigan v. Staples, Inc.*, 137 A.D.3d 1546, 29 N.Y.S.3d 575 [3d Dept 2016]; *Martin v. Huang*, 85 A.D.3d 1132, 926 N.Y.S.2d 622 [2d Dept 2011]; *Tamhane v. Citibank, N.A.*, 61 A.D.3d 571, 877 N.Y.S.2d 78 [1st Dept 2009]). Accordingly, Findlay's motion for summary judgment of Falcon's claim for contribution is denied.

Indemnification

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v. City of N.Y.*, 94 A.D.3d 1, 10, 940 N.Y.S.2d 21, 28 [1st

Dept 2012], citing *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d at 377–378, 929 N.Y.S.2d 556, 953 N.E.2d 794 [2011]; *see Reilly v. DiGiacomo & Son,* 261 A.D.2d 318, 690 N.Y.S.2d 424 [1st Dept 1999]).

Findlay has failed to establish its *prima facie* burden entitling it to dismissal of Falcon's common-law indemnification claim. As set forth above, Findlay failed to eliminate all questions of fact as to its alleged negligence. Accordingly, Findlay's motion for summary judgment of Falcon's claim for common-law indemnification is denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Third-Party Defendant Findlay Installation Services, LLC's motion for summary judgment dismissing the plaintiff's complaint, Falcon Construction Management, LLC third-party complaint, and all claims, third-party claims, cross-claims and counter claims against Findlay, is denied. It is further

ORDERED that Third-Party Defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 8, 2017

Hon. Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.