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

----------X

STEVEN ROSARIO,

Plaintiff,

-against-

CAPITAL 155 EAST 55TH, LLC, SHUN LEE PALACE, INC., and T&W RESTAURANT, INC.,

Defendants.

----------X

DECISION AND ORDER
Index №.: 158808/15
Motion Seq. No. 002, 003, and 004

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

In this trip and fall action, defendant Capital 155 East 55th, LLC (Capital) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 002). Defendants T&W Restaurant, Inc. (T&W) and Shun Lee Palace, Inc. (Shun Lee) move, separately, for the same relief (motion seq. Nos. 003 and 004, respectively). The motions are consolidated for disposition.

BACKGROUND

Plaintiff Steven Rosario alleges that he was injured on the afternoon of February 15, 2014, when he was caused to trip and fall on debris while walking through a service door at a building located at 155 East 55th in Manhattan. Specifically, plaintiff alleges that he tripped on a box with wire sticking out of it. Capital owns the property, while Shun Lee is a lessee that operates a restaurant from the subject building. T&W operates a restaurant at a different location.

Plaintiff filed his complaint on August 25, 2015, alleging that defendants were liable in negligence for his injuries. Plaintiff, in his bill of particulars, alleges that, while delivering

linens to Shun Lee's restaurant, "he was caused to trip and fall over . . . as a result of the debris and boxes accumulated on the hallway floor of the service entrance" (plaintiff's bill of particulars at 2-3). More specifically, plaintiff alleges that one of the boxes "had a packing wire sticking out of it" and the wire "caught the pants" of plaintiff and caused him to trip and fall (*id.* at 3).

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The

opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

To establish negligence, of course, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, among others, *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]).

I. Capital

Capital argues that, as an out-of-possession landlord, it has no contractual obligation to plaintiff. It submits an affidavit from Michael Fremder (Fremder), it's controller, who states:

> "On or about July 31, 1990, Capital entered into a Lease Agreement with [Shun Lee], allowing Shun Lee to operate a restaurant in a portion of the Premises . . . . Pursuant to the Lease Agreement, Capital, as owner and landlord of the Premises, agreed to transfer possession and control of the Demised Premises to Shun Lee, as tenant, for a term of years. On [the date of plaintiff's accident], Shun Lee was the tenant of the Demised Premises, pursuant to the Lease Agreement and its subsequent Amendments. The Lease Agreement provides that the '[t]enant shall maintain and repair the public portions of the demised premises both exterior and interior' (. . . Article 4). The Lease Agreement also provides that Capital 'shall not be held liable for . . . any injury or damage to persons or property resulting from any cause of whatsoever nature,' in connection with the Lease or Demised Premises"

(Fremder aff, ¶¶ 5-9).

Capital cites to *Kittay v Moskowitz* (95 AD3d 451 [1st Dept 2012]) for the proposition that an out-of-possession landlord with no contractual obligation to maintain the premises has no duty to a plaintiff injured on the property. *Kittay* held that, even though the landlord had a limited right to reenter the building, he was not liable for an accident at the subject premises "because the record does not establish that the basis of liability is a significant structural or design defect that is contrary to a specific statutory safety provision" (*id.* at 452 [internal quotation marks and citation omitted]).

Here, plaintiff does not claim that his accident stems from a structural or design defect. Indeed, plaintiff does not oppose Capital's motion. Thus, as Capital has no duty to plaintiff as an out-of-possession landlord, Capital's motion for summary judgment dismissing all claims and cross claims as against it must be granted.

II. T&W

T&W makes what amounts to a "wrong restaurant" defense. That is, T&W, citing plaintiff's own testimony (plaintiff's tr at 49-51), argues that plaintiff's accident took place at Shun Lee's restaurant, rather than its own. Plaintiff does contest this fact or T&W's motion. As T&W had no duty to plaintiff, all claims and cross claims as against it must be dismissed.

III. Shun Lee

Shun Lee argues that plaintiff's allegations are pure speculation and that it did not have notice of any dangerous condition. As to speculation, Shun Lee contends that plaintiff appears to be invoking the evidentiary doctrine of res ipsa loquitur, without doing so explicitly. Such an invocation, Shun Lee argues, would be inappropriate, as Shun Lee did not have exclusive control over the service entrance hallway because various delivery people use the hallway.

Shun Lee also argues that it did not have notice, actual or constructive, of the alleged

dangerous condition. In support, Shun Lee submits the deposition testimony of Patrick Lau (Lau), the manager of Shun Lee's restaurant. Lau testified that he did not know of the plaintiff's accident until plaintiff filed this action, and that there has never been another accident in the subject hallway in his 23 years at the restaurant (Lau tr at 10, 14-15). Lau testified that he typically walks through the hallway leading to the service entrance a few times a day:

> "Q: How often do you walk in that hallway? Is it on a daily basis?
> A: A daily basis, yes.
> Q: Two times, three times a day."

(*id.* at 24).

As to the day of plaintiff's accident, specifically, Lau testified that he entered the restaurant through the customer entrance, rather than the service entrance, but he could not remember if he visited the subject hallway leading to the service entrance:

> "Q: On the day that you arrived at the restaurant at about 4:00, how did you enter the restaurant? Through the customer entrance or the service entrance that day?
> A: I entered through on the customer entrance.
> B: Did there come a time that you went into the hallway of that service entrance that day while you were on duty for the restaurant.
> A: I don't recall that I go to that hallway that day."

(*id.* at 24-25).

Lau additionally stated that he didn't know if there were boxes in the subject hallway on the day of plaintiff's accident (*id.* at 33). Further, he stated that the restaurant customarily stores empty boxes in the subject hallway (*id.*). Elaborating on this practice, Lau stated: "We clean the food. All those empty boxes we break it down and it's all sliced into one box and we stack it on the side and on the nighttime we're allowed to put it outside before thirty minutes of the closing hour and that's it" (*id.* at 34). Lau also testified that some of the boxes that were typically broken down and stored in the subject hallway had wire components (*id.* at 37).

In opposition, plaintiff argues that Shun Lee fails to make a prima facie showing as to notice and, even if it had, there is a question of fact as to whether it created the dangerous condition through its practice of stacking boxes in the hallway adjoining the service entrance. Plaintiff is correct on both points.

Shun Lee's duty to plaintiff arises from its occupancy of the subject property. In a general sense, Shun Lee is correct that a negligence claim cannot be supported by speculation alone. In *Kane v Estia Greek Rest.*, the First Department held that the defendants were entitled to summary judgment, as the plaintiff could not recall the details of his slip and fall, including whether he fell on stairs or on the landing below the stairs (4 AD3d 189, 190 [1st Dept 2004]). The First Department reasoned:

> "As we have repeatedly stated, [r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment. Even if the plaintiff suffers memory loss as a consequence of the slip and fall, he still must present a theory of liability and facts in support thereof on which the jury can base a verdict. Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment"

(*id.* [internal quotation marks and citation omitted]).

In contrast to the plaintiff in *Kane*, Rosario gave a detailed account of his accident, which the court reproduces at length here, as Shun Lee argues that plaintiff's allegations are pure speculation:

> Q: …You walked in. Were the lights on? You could see fine?
> A: Yeah, the lights were on.
> Q: You saw the boxes stacked on the side?
> A: I didn't recall (sic). No, I didn't see no boxes. I just saw the path, where I could walk…
>
> …
>
> Q: Alright, so how many steps did you take before you felt I think you said a wire or something?

A: Yeah, I'll say it's like five feet from where the door is at.
Q: One, two, three, four, five, and you felt what?
A: Nothing, that I got on, I guess, something and I went with my back down and hit the floor.
Q: You took five steps and you felt what?
A: I didn't feel nothing. I just saw I pulled something. Something pulled and I just hit the floor. That's all I saw. I tripped into something like I tripped into a wire or something and went into the floor.
Q: Are you saying you felt a wire or something pull on your leg?
A: Yes.
Q: What leg?
A: On my right-hand leg.
Q: On your right leg?
A: Yes.
Q: Did you see a wire or are you just assuming that's what it was?
A: No, I saw a wire. After I fell, I saw there was a box there, a box with a cap on it, you know, the cover like and it had the wire like these boxes come with wire, I guess. If you have seen them, they come with wire and they're wired together, so I guess somebody clipped the wire and the wire was like out of the box and that's how I got caught into the wire.
Q: So are you saying that a wire caught your pants leg?
A: Yes.
Q: Whereabouts on your pants leg?
A: I'll say under my knee, somewhere under my knee.
Q: Just how far under your knee?
A: I wouldn't know at this point. I don't know. I just know it was somewhere around there to cause me to trip.

(Plaintiff's tr at 146-149).

Even though there are some points that plaintiff is vague on, such as where below his knee the wire made contact with him, he clearly explicates facts on which a jury could base a verdict: in short, that a wire protruding from a box caused him to trip. Accordingly, the court rejects Shun Lee's argument that plaintiff's allegations should be dismissed because they are pure speculation.[1]

As to notice, plaintiff is correct that Shun Lee has failed to make a prima facie showing

[1] Also, the court does not address Shun Lee's argument regarding res ipsa loquitur because there is nothing in the record to suggest that plaintiff is seeking application of this doctrine.

of entitlement to judgment with respect to this issue. "To hold a party with a duty of care liable for a defective condition, it must have notice, actual or constructive, of the hazardous condition that caused the injury" (*Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 62 [1st Dept 2006]). "Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*id.* [internal quotation marks and citation omitted]). "Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). When moving for summary judgment, it is a defendant's burden to show that it did not have constructive notice of the alleged dangerous condition (*Jahn v SH Entertainment, LLC* (117 AD3d 473, 473-474 [1st Dept 2014]).

The plaintiff in *Jahn* allegedly slipped on water at an event held in large open space (*id.* at 473-474). The First Department held that summary judgment "was properly denied," as the defendant "failed to establish that it lacked constructive notice of the alleged condition" (*id.* at 473). While the defendant provided an affidavit from one of its owners, it "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident" (*id.* at 473). Instead, the First Department held that the owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident" (*id.*).

Here, similarly, Lau's testimony is insufficient to show that Shun Lee inspected the

subject hallway prior to plaintiff's accident. Lau plainly testified that he could not remember if he saw the subject hallway on the day of plaintiff's accident. Shun Lee, thus, fails to make a prima facie showing as to constructive notice and its motion for summary judgment must be denied.

Plaintiff is also correct that there is an alternative basis requiring this disposition. That is, there remains a question of fact as to whether Shun Lee created the alleged defect through its practice of breaking down and storing boxes in the subject hallway (*see Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637 [1st Dept 2013] [holding that "(t)he record presents triable issues as to whether (the defendant) created the greasy condition on the sidewalk by disposing of waste from its restaurant on the sidewalk," as "(t)here is evidence that (the defendant) placed garbage bags on the sidewalk near the area where plaintiff fell"] *id.* at 637-638).

CONCLUSION

Accordingly, it is

ORDERED that defendant Shun Lee Palace, Inc.'s motion (motion seq. No. 004) for summary judgment is denied; and it is further

ORDERED that defendants Capital 155 East 55th Street, LLC and T&W Restaurant, Inc.'s motions (motion seq. Nos. 002 and 003) for summary judgment dismissing all claims and cross claims as against them are granted and the complaint is hereby severed and dismissed as against said defendants with costs and disbursements to these defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that the remainder of the action shall continue as against defendant Shun Lee Palace, Inc.

This constitutes the decision and order of the court.

Dated: July 25, 2017

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

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