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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 600404/2010
ISTAFANOS, PHILIP
vs.
HINES GS PROPERTIES INC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

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

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

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 6/26/12

_____ **J.S.C.**

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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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PHILIP ISTAFANOS,

Plaintiff,

Index No. 600404/10

-against-

DECISION/ORDER

HINES GS PROPERTIES, INC. and TEMCO SERVICE INDUSTRICES, INC.,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	
Cross-Motion and Affidavits Annexed.....	2
Answering Affidavits to Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff Philip Istafanos commenced the instant action to recover damages for personal injuries he allegedly sustained when he slipped on a waxed floor on the third floor of the United States Food and Drug Administration ("FDA") premises, located at 158-15 Liberty Avenue, Jamaica, New York (the "building") on February 25, 2007. Defendants Hines GS Properties, Inc. ("Hines") and Temco Service Industries, Inc. ("Temco") now move for an order pursuant to CPLR § 3212 granting them summary judgment on the grounds that Hines is not liable for the acts of Temco and it did not cause the condition or have actual or constructive notice of the condition and that Temco discharged its duty owed to plaintiff by repeatedly warning him that it

was performing stripping and waxing work in the area where plaintiff slipped. For the reasons set forth below, Hines' and Temco's motion for summary judgment is denied.

The relevant facts are as follows. Plaintiff is employed by the FDA as a microbiologist. In 2007, the building was opened on weekends and some FDA employees were permitted to work on Saturdays and Sundays due to the needs of the FDA. Hines was the property manager of the building and Temco was a cleaning services contractor hired by Hines. Temco was responsible for stripping and waxing the floors of the building approximately six times a year on weekends and on the date of the accident, it was scheduled to perform such services.

On the date of the accident, plaintiff arrived at the building at approximately 10:00 a.m. Between 10:30 and 11:00 a.m., Temco's foreman, Cliff Moore, approached plaintiff in his Lab ("Lab L"), located in the building's east corridor, to tell him that they were going to be stripping and waxing the floors that day and asked plaintiff if he would be working in Lab L all day. Plaintiff indicated to Mr. Moore that he had not been notified by FDA management that there was going to be any stripping or waxing of the floors that day but he advised Mr. Moore that he was going to be in Lab L the entire day. He also stated that he would be using the Microscope room at some point during the day. When Mr. Moore asked for permission to clean Lab L, plaintiff refused. Plaintiff also advised Mr. Moore that he should not clean the Microscope room, as he would be working in there. Mr. Moore responded that he would finish the stripping and waxing quickly and that the floor in the Microscope room would be dry by 12:00 p.m.

At approximately 11:00 a.m., plaintiff observed the Temco employees preparing to wax the Microscope room. He observed them open the Microscope room door and place a machine outside the door. At this time, plaintiff had a telephone conversation with FDA Director Alice

Cohen complaining about the cleaning work being performed by Temco on a day when he was working in the building. At approximately 3:00 p.m., plaintiff left Lab L and walked down the east corridor and through the Microscope room, intending to walk to the Incubator room, located in the west corridor. The Microscope room had entrance doors leading to both the east and west corridors. Plaintiff entered the Microscope room on the east side and walked through the room. He alleges that at this time, he did not know that the floor in the west corridor was wet with wax and that there were no "Wet Floor" barricades or caution tape in front of the door leading to the west corridor. While exiting the Microscope room on the west side, plaintiff alleges he took one or two steps and began sliding on the waxed floor but he did not fall. After the accident, plaintiff walked back through the Microscope room to the east corridor and back to Lab L where he continued to work. He then went to complain to Mr. Moore about the situation. Plaintiff then left the building at approximately 8:00 p.m. that evening. Plaintiff alleges that he did not complain about the condition on which he slipped to anyone prior to the accident and was not aware of anyone else complaining about the condition.

The court first turns to Temco's motion for summary judgment. A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not cause the condition and that it did not have actual or constructive notice of the condition. *See Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). However, a "general awareness" is insufficient to constitute constructive notice. *See Gordon*, 67

N.Y.2d at 837-838. Plaintiff is "required to show by specific factual references that the defendant had knowledge of the allegedly recurring condition." *Stone v Long Is. Jewish Med. Ctr.*, 302 A.D.2d 376, 377 (2d Dept 2003). Moreover, "a prima facie case of negligence must be based on something more than conjecture; mere speculation regarding causation is inadequate to sustain the cause of action. Conclusory allegations unsupported by evidence are insufficient to establish the requisite notice for imposition of liability." *See Mandel v 370 Lexington Ave., LLC*, 32 A.D.3d 302, 303 (1st Dept 2006).

In the instant action, Temco is not entitled to summary judgment as it has not shown that it did not create the condition on which plaintiff slipped. It is undisputed that Temco's employees created the condition by stripping and waxing the west corridor of the third floor of the building and that this condition caused plaintiff's accident. Temco's assertion that it is entitled to summary judgment, even though it created the condition, because it discharged its duty to plaintiff by repeatedly warning plaintiff that it was performing stripping and waxing work is without merit. As an initial matter, there exists an issue of fact as to whether the warnings that were given to plaintiff were sufficient to discharge Temco's duty to plaintiff. Plaintiff alleges that he did not see any Temco employees working in the west corridor prior to his accident and that he was not told that Temco would be stripping and waxing the floor of the west corridor. However, Temco's employees have alleged that they informed plaintiff they would be working in the Microscope room and in the west corridor. Further, Jason Carasquillo, a Temco cleaner, testified that before Temco started their cleaning work, he warned plaintiff that the floors and hallways were "off limits" and that plaintiff was warned twice more not to walk in the hallways. Additionally, the "Wet Floor" barricades and caution tape used by Temco were placed at either

end of the west corridor but were not placed at the door of the Microscope room leading to the west corridor, where plaintiff slipped. Whether it was sufficient for Temco to place the barricades and caution tape at each end of the west corridor and not at the door of the Microscope room is an issue of fact that should be left to the jury. Thus, Temco's motion for summary judgment must be denied.

The court next turns to Hines' motion for summary judgment. In the instant action, Hines has failed to establish its prima facie right to summary judgment as it has not shown that it is not vicariously liable for the acts of Temco, its independent contractor, as a matter of law. Generally, "a party who retains an independent contractor, as distinguished from mere employee or servant, is not liable for the independent contractor's negligent acts." *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273 (1993). However,"[a]n exception to this general rule is the nondelegable duty exception, which is applicable where the party 'is under a duty to keep premises safe.'"*Backiel v. Citibank, N.A.*, 299 A.D.2d 504, 505 (2d Dept 2002), citing *Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 668 (1992); *see also Joyce v. Manhattan College*, 1 A.D.3d 202 (1st Dept 2003). "New York courts have long imposed a special duty on property owners to keep the entrances and passageways of a public building safe for tenants, their visitors, and their employees, all classes of people who come onto the premises for reasonably foreseeable purposes." *Backiel*, 299 A.D.2d at 506; *see also Correa v. City of New York*, 66 A.D.3d 573 (1st Dept 2009). The party is not permitted to delegate this duty "to its agents or employees or to an independent contractor." *Backiel*, 299 A.D.2d at 505.

Applying these principles to the case at bar, this court finds that Hines, as the party which retained the services of Temco as an independent contractor, owes a nondelegable duty to

provide safe hallways and passageways to all persons lawfully in the building, including the plaintiff, an FDA employee. It was reasonably foreseeable that plaintiff, as an FDA employee, would be working in the building, especially as he was required to be there on certain weekends by the FDA. Accordingly, Hines may not avoid liability to plaintiff for its alleged failure to maintain the building in a safe condition by having delegated the cleaning and maintenance services work to Temco. As it is undisputed that Temco created the condition and there are issues of fact as to whether Temco sufficiently discharged its duty owed to plaintiff, thus, there is also an issue of fact as to whether Hines is vicariously liable pursuant to its nondelegable duty to keep the premises safe. Thus, Hines' motion for summary judgment must be denied.

Accordingly, Hines' and Temco's motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 6/26/12

Enter: _____
J.S.C.