[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

SUSAN ARDIGO and DENNIS ARDIGO,

Plaintiff,

-against-

TRUMP 767 5TH AVENUE LLC and TRIANGLE SERVICES, INC.,

Defendants.

INDEX NO. 107715/05

MOTION SEQ. NO. 002

TRUMP 767 5TH AVENUE

Third-Party Plaintiff,

-against-

AZTEC SERVICE, GROUP,

Third-Party Defendant.

The following papers, numbered 1 to 4, were read on this motion by defendant/third-party plaintiff Trump 767 5th Avenue LLC for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ■ Yes ☐ No

This is a negligence action, brought by Susan Ardigo (plaintiff) and her husband Dennis Ardigo derivatively, to recover damages for injuries allegedly sustained when plaintiff slipped and fell on water on the lobby floor of a building located at 767 Fifth Avenue, New York, New York. The defendant/third-party plaintiff Trump 767 5th Avenue LLC (Trump), owned the building at the time of the occurrence. Trump contracted with defendant, Triangle Services, Inc. (Triangle) for cleaning and janitorial services at the building. Trump moves for summary judgment and a dismissal of the complaint and all cross-claims asserted against it and also

seeks an order granting it summary judgment against Triangle on its cross-claims for contractual and common law indemnification and breach of contract for failure to procure insurance, and setting this matter down for a hearing to determine an award of attorney's fees, costs, disbursements and expenses related to Trump's defense of this matter. Triangle cross-moves for summary judgment seeking dismissal of the complaint and all cross-claims against it, and opposes Trump's motion for summary judgment on its cross-claims asserted against Triangle. The plaintiff is in opposition to both motions for summary judgment seeking to dismiss the complaint.

BACKGROUND

According to her Verified Bill of Particulars, the plaintiff was injured at approximately 9:30 a.m., on May 21, 2003, when she slipped and fell "on an accumulation of water and/or moisture" on the floor of the lobby of the Trump building at 767 Fifth Avenue, New York, New York (Affirmation of John Serio, Esq. [Serio Aff.], exhibit C, p 1). Plaintiff had entered the building from Madison Avenue and had walked about twenty feet to a security desk (Serio Aff., exhibit E, pp. 9-11, 16, 21, 22). She proceeded to walk down a straight corridor towards an elevator bank and then slipped and fell in the corridor next to elevator bank 40 to 50 (*id.* at 24-25). Plaintiff testified at her deposition that she first noticed that there was water on the floor after her fall, and that she did not know how long the water existed on the floor prior to her fall (*id.* at 25, 30-1, 93).

It was raining heavily at the time of the plaintiff's accident and there were rain mats that had been placed at the front of the Madison Avenue entrance to the building (*id.* at 13, 21). Plaintiff was unaware of any prior complaints regarding water on the lobby floor during rainstorms and she had never previously complained about water in the lobby (*id.* at 82).

Trump was the owner of the building at the time of the accident (Serio Aff., Ex. G, p. 9). Trump had entered into a contract with Triangle pursuant to which Triangle would provide

janitors and maintenance workers to staff the building. Trump did not directly supervise Triangle's employees. As part of their contract with Trump, Triangle was required to place rain mats and wet floor signs in the lobby when there was precipitation in the area (*id.* at 13-16, 20, 24).

Before the Court is Trump's motion for summary judgment and Triangle's cross-motion for summary judgment. Trump argues that, as the property owner, it cannot be held liable to the plaintiff because it exercised reasonable care in maintaining its premises during a rain storm because rain mats were deployed in the lobby and it was the responsibility of its contractor, Triangle, to remedy any dangerous conditions. Trump maintains that under New York law, it did not have a duty to cover its entire lobby with rain mats and that it could not have been expected to prevent water accumulation on its lobby floors while a rainstorm was in progress. Trump also claims that the plaintiff cannot establish that Trump had either actual or constructive notice of the alleged water condition or that Trump caused or created the water condition upon which the plaintiff allegedly slipped and fell. Trump also seeks summary judgment on its cross-claims against Triangle for common law and contractual indemnification and breach of contract for failure to procure insurance.

Triangle maintains it did not owe a duty to plaintiff to remedy the allegedly defective condition of the floor, as there is no evidence it caused or created the condition upon which the plaintiff claims to have slipped. Triangle also argues that even if a duty of care existed, the complaint should still be dismissed as asserted against it because plaintiff cannot establish that Triangle created the alleged condition or that it had actual or constructive notice of the condition prior to the accident. Like Trump, Triangle also points to the fact that there were some mats present in the lobby on the date of the incident and maintains that there is no requirement under New York law that every portion of a commercial lobby floor be covered with mats during a rainstorm. Finally, Triangle argues that Trump's cross-claims should be dismissed as Trump

is not entitled to indemnification or contribution from Triangle.

In opposition to the motions, plaintiff argues that there are issues of fact which preclude the Court from granting Trump and Triangle's motions for summary judgment. Plaintiff proffers that the marble floor of the lobby where she fell was excessively slippery and shinny and that, coupled with the presence of water on the floor, is what caused her to slip and fall (*see* Affirmation of Jay Ringel, Esq. [Ringel Aff.]). Plaintiff also maintains that the defendants have not satisfied their burden to demonstrate that they exercised reasonable care in inspecting and maintaining the lobby and argues that they were on constructive notice of the marble floor's dangerous nature, particularly when it became wet. Plaintiff also asserts that both defendants owed her a duty of care which they breached in failing to properly maintain the lobby floor.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if

any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*id.* at 500; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). It is well settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material face" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

DISCUSSION

A defendant is not liable to a plaintiff who allegedly slips and falls on water accumulation where there is no evidence that the defendant created the alleged dangerous condition or had

actual or constructive notice of it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Gwyn v 575 Fifth Ave. Assoc.*, 12 AD3d 403, 404 [2nd Dept 2004]). Here, there is no evidence that any water accumulation on the floor was caused or created by the defendants nor is there evidence that any alleged water accumulation was reported to any employee of Trump or Triangle prior to the incident. Thus, plaintiff cannot establish that the defendants had actual notice of the specific condition that allegedly caused the plaintiff to fall.

To establish constructive notice of an alleged defect or condition, the alleged defect/condition must: (1) be visible and apparent; and (2) exist for a sufficient length of time prior to the accident to permit discovery and remedy of the alleged defect or condition (*see Gordon*, 67 NY2d at 836-837). As set forth above, the plaintiff has admitted that she did not observe any accumulation of water or moisture on the lobby floor prior to her fall. She also has no idea how long the water existed prior to her fall. Furthermore, even if plaintiff could establish that the water was visible and apparent, she has not presented any evidence that would establish that the water was present for any appreciable length of time such that the defendants would have had sufficient time to discover the defect and remedy the alleged condition. Absent proof that the specific water or liquid upon which the plaintiff fell was sufficiently visible and had been there long enough to permit discovery and remedy before the accident, it cannot be inferred that the defendants had constructive notice (*see Tarrabocchia v 245 Park Avenue*,285 AD2d 388, 389 [1st Dept 2001]; *Rouse v Lex Real Associates*, 16 AD3d 273, 273 [1st Dept 2005]; *Florio v Memorare Club Inc.*, 235 AD2d 518, 518 [2d Dept 1997]; *Hartman v H.K.E. Realty Corp.*, 228 AD2d 558, 558 [2d Dept 1996]; *Espinal v New York City Hous. Auth.*, 215 AD2d 28, 281 [1st Dept 1995]). Any allegation that the defendants possessed constructive notice of the specific condition that caused plaintiff's accident would be completely speculative, particularly given that a rainstorm was ongoing at the time of her fall, and therefore the defendants were not required to provide a constant ongoing remedy when a slippery condition

is caused by moisture tracked indoors during a storm (*see Choi v Olympia & York Water Street Co.*, 278 AD2d 106, 107 [1st Dept 2000] [holding that case should be dismissed because "it is, for example, quite possible that [the rainwater] on the floor had been tracked into the building by individuals immediately preceding plaintiff. Defendants had no obligation to provide a constant remedy for such a problem"]; *see also Joseph v* Chase, 277 AD2d 96 [1st Dept 2000]; *Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-147 [1st Dept 1999]; *Kovelsky v City Univ.*, 221 AD2d 234 [1st Dept 1995]).

In opposition to the motion, the plaintiff argues that there is an issue of fact concerning whether her accident was caused by a hazardously shinny and slippery marble floor. Absent evidence that the fall was caused by something other than the inherently slippery condition of the floor, the plaintiff's complaint is insufficient and must be dismissed (*see DeMartuni v Trump 767 5th Avenue, LLC*, 41 AD3d 181, 182 [1st Dept 2007]).

Since the plaintiff has failed to rebut the defendants' prima facie showing that it lacked actual or constructive notice of the specific water or liquid condition that allegedly caused the plaintiff to fall, the motions for summary judgment by Trump and Triangle should be granted and the complaint dismissed. The court need not consider Triangle's alternative argument that it lacked any duty towards the plaintiff.

Trump's cross-claims against Triangle

Trump has asserted cross–claims against Triangle for contractual indemnification, common law indemnification and breach of contract failure to procure insurance. Trump moves for summary judgment on its cross-claims and Triangle has cross-moved for summary judgment against Trump. For the reasons set forth below, Triangle's cross-motion is granted and the cross-claims are hereby dismissed.

The maintenance services agreement between Trump and Triangle calls for Triangle to indemnify Trump against claims that either (1) arise out of, occur in connection with or result

from "the operations performed on behalf of or on the property of [Trump] by [Triangle] . .."; (2) are due to Triangle's breach of the terms of the agreement; or (3) arise out of or in connection with or resulting from an act or omission by Triangle (Serio Aff., Ex. I). There is no evidence that the alleged transient condition that caused plaintiff to fall arose out of Triangle's performance of services pursuant to the contract with Trump; resulted from Triangle's breach of the contract with Trump; or resulted from an "act or omission" of Triangle. The dismissal of the main complaint necessarily renders inoperative and/or academic Triangle's contractual obligation to indemnify and defend Trump for any losses or claims arising out of the contracted work (*see Hajdari v 437 Madison Ave. Fee Assoc.*, 293 AD2d 360 [1st Dept 2002]). For the same reason, Triangle cannot be held liable for common law indemnification or contribution given that there is no evidence that the plaintiff's injuries were attributable to negligence by Triangle (*see Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493; *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). Finally, Trump's cross-claim against Triangle for breach of contract for failure to procure insurance naming Trump as an additional insured is dismissed, as Triangle has submitted proof that a policy was issued by Zurich American Insurance Co., which provided for Trump's inclusion as an additional insured. Accordingly, Triangle's cross-motion for summary judgment is granted and the cross-claims against it are hereby dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of defendant Trump's motion seeking summary judgment and a dismissal of the complaint against it is granted, and the complaint is hereby dismissed as against defendant Trump, and the remainder of Trump's motion is denied; and it is further,

ORDERED that Triangle's Motion for summary judgment is granted and the complaint and all cross-claims against Triangle are hereby dismissed with costs and disbursements to

defendants as taxed by the Clerk upon submission of an appropriate bill of cost; and it is further,

ORDERED that the defendant Triangle is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/29/13

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**