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SHORT FORM ORDER

INDEX No. 09-35598
CAL. No. 10-01478OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-15-12 (#001)
MOTION DATE 12-20-12 (#002 & #003)
ADJ. DATE 12-20-12
Mot. Seq. # 001 - MG
002 - MD
003 - MD

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MELISSA JACKSON,

Plaintiff,

- against -

NATIONAL AMUSEMENTS, INC. d/b/a ISLAND 16 CINEMA DELUX, METROPOLITAN CONSTRUCTION SYSTEMS, INC., and CARLISLE ROOFING SYSTEMS, INC.,

Defendants.

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NATIONAL AMUSEMENTS, INC.,

Third-Party Plaintiff,

- against -

METROPOLITAN CONSTRUCTION SYSTEMS, INC. and CARLISLE ROOFING SYSTEMS, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment ; Notices of Motions/Order to Show Cause and supporting papers 1 - 4, 10 - 13, 19 - 24 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 5 - 7, 15 - 16, 27 - 30 ; Replying Affidavits and supporting papers 8 - 9, 31 - 33 ; Other Memorandums of Law 14, 17 - 18, 25 - 26 ; it is

ORDERED that this motion for summary judgment by defendant/third-party defendant Metropolitan Construction Systems, Inc. (seq. #001) is granted and the plaintiff's complaint and cross-claims asserted against it are hereby severed and dismissed; and it is further

ORDERED that this motion for summary judgment by defendant/third-party defendant Carlisle Roofing Systems, Inc. (seq. #002) dismissing the complaint, third-party complaint and all cross-claims as asserted against it is denied; and it is further

ORDERED that this motion for summary judgment by defendant National Amusements, Inc. d/b/a Island 16 Cinema Delux (seq. #003) dismissing the complaint and all cross-claims asserted against it is denied.

Plaintiff commenced this negligence against the defendants seeking damages for personal injuries she sustained on May 9, 2008, when she slipped and fell on wet carpeting in the Island 16 Cinema Delux movie theater on Morris Avenue in Holtsville, New York ("Island 16"), which is owned and operated by defendant National Amusements, Inc. d/b/a Island 16 Cinema Delux ("National"). Plaintiff testified that it was a rainy day, she had just come from an appointment, and she was alone. She purchased her ticket for the 3:40 showing of the movie she wanted to see and walked into theater 6 which was empty but commercials were on the screen. Plaintiff walked down the entrance passageway, a carpet-covered ramp on the inside of theater 6 to the main aisle. Where the passageway ramp and the aisle meet, plaintiff suddenly slipped and fell to the floor. Plaintiff testified that when she looked up, it was "raining" in the theater.

Island 16, a multiplex cinema, was constructed in 2002. Defendant/third-party defendant Carlisle Roofing Systems, Inc. ("Carlisle") manufactures commercial roofing materials which it sells as a Roofing System directly to distributors. In March 2001, defendant/third-party defendant Metropolitan Construction Systems, Inc. ("Metropolitan"), an independent contractor, entered into a non-exclusive agreement to purchase and install Carlisle's Roofing System (the "Agreement"). In August 2001, Metropolitan was awarded a subcontract by National's general contractor to install a Carlisle Roofing System on Island 16; the installation began in January 2002 and was completed in June 2003.

The Roof System came with a 15-year warranty from Carlisle for any leaks caused by a defect in its product materials or workmanship of its authorized installer. Pursuant to the terms of the Agreement, Carlisle would inspect the work performed by its authorized installer, and upon acceptance thereof, issue the warranty. The Agreement also required Carlisle's authorized installer to make any required repairs attributable to its workmanship for two years. Prior to the expiration of the authorized installer's two-year repair period, Carlisle, at its option, could inspect the Roofing System, and any repairs it deemed necessary to assure watertight integrity was to be undertaken by the authorized installer at its expense. Pursuant to the terms of the Agreement, after the two-year period the authorized installer "shall have no further obligation to make repairs at its expense." Thereafter, if repair work was needed, Carlisle could request a bid from the original installer, or another authorized installer.

On June 13, 2003, Metropolitan completed the installation of the Roofing System on Island 16. Carlisle made its final inspection of the installation, accepted the work performed by Metropolitan, and issued its 15-year warranty effective as of July 14, 2003; on the same date Metropolitan's two-year repair period commenced. Based on the evidence proffered, Carlisle retained Metropolitan several times until

March 2007 to perform repairs at Island 16, and thereafter retained a different authorized installer, Roof Services (not a party herein). Metropolitan did not perform any repairs to the roof from March 2007 through the date of plaintiff's accident, and there is no evidence of a reported leak in theater 6 until April 2008.

Plaintiff alleges that the defendants were negligent in failing to properly install and repair the roof thereby permitting water to leak onto the carpeted floor creating a dangerous wet slippery condition, and in failing to provide her with a safe place to walk into the theater. Plaintiff alleges that the defendants actually knew about the leaky roof and should have known of the dangerous wet condition. Plaintiff also alleges that the defendants failed to inspect the theater, and that upon proper inspection they would have discovered the dangerous condition.

The defendants have each submitted an answer denying liability, with cross-claims asserted against the other for contribution and indemnification. National also commenced a third-party action against Metropolitan and Carlisle for negligence, breach of warranty and breach of contract, and seeks indemnification and contribution. Issue has been joined in the third-party action with Metropolitan and Carlisle asserting affirmative defenses and cross-claims against each other and Metropolitan asserting a counterclaim against National. Discovery has been completed and the note of issue has been filed.

Metropolitan now moves for summary judgment dismissing the complaint and all cross-claims asserted against it on the grounds that it owed no duty of care to plaintiff as it does not own, control, possess or maintain Island 16. Carlisle moves for summary dismissal of the plaintiff's complaint on the same grounds and also seeks dismissal of National's third-party complaint on the ground that it did not breach the express warranty. National moves for summary judgment dismissing the complaint on the ground that no dangerous or unsafe condition existed, and in the alternative, on the ground that it did not have notice of the condition.

It is undisputed that during the years after the Roofing System was installed, Carlisle was notified several times by National via Island 16 employees regarding leaks from the roof, and each time Carlisle sent an authorized installer to inspect and make repairs covered under the warranty. Carlisle did not always send Metropolitan to inspect and repair. According to Metropolitan, when it was called back to Island 16, the leaks at issue were not due to the Roofing System, but to an exhaust fan and an air conditioning unit, and therefore were not covered under Carlisle's warranty.

Rebecca Chapman, the house manager at Island 16 on duty the day of plaintiff's accident, was deposed on behalf of National. Chapman testified that she was summoned by walkie-talkie that someone had fallen in theater 6. When she walked into the theater, she saw a continuous light flow of water coming from the ceiling at the location where plaintiff said she had fallen. Chapman also observed that ceiling tiles were bowed and bulging at the location of the leak. Chapman had the area of the leak cordoned off, an usher removed the bulging tiles from the ceiling and Carlisle was called.

James Schleff, the managing director of Island 16 was also deposed on behalf of National. Schleff testified that Island 16 was experiencing recurrent problems involving leaks in theater 6 which required several attempts to repair. Although Schleff had no recollection as to whether the leaks were ongoing in 2008, based upon evidence before the Court, Carlisle received complaints of leaks in March and May 2008.

Specifically, plaintiff has proffered a purchase order from Carlisle dated March 28, 2008, which reflects that a leak was reported in theater 6 and theater 8 and repaired by Roof Services. A purchase order from Carlisle dated May 12, 2008 reflects that a leak was reported in theater 6 and repaired by Roof Services.

It is well-settled that an owner has a duty to maintain its property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Kellman v Tiemann***, 87 NY2d 871, 872, 638 NYS2d 937 [1995]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). This duty applies to owners who operate places of public assembly such as theaters, and requires the owner to provide members of the public with reasonably safe premises, including a safe means of ingress and egress (***Masillo v On Stage, Ltd.***, 83 AD3d 74, 921 NYS2d 20 [1st Dept 2011]; ***Branham v Loews Orpheum Cinemas, Inc.***, 31 AD3d 319, 819 NYS2d 250 [1st Dept 2006]). While it is the plaintiff's ultimate burden at trial to prove that the defendants' conduct was a proximate cause of her action (***Barker v Parmossa***, 39 NY2d 926, 386 NYS2d 576 p1976], it is the movant's initial burden on a motion for summary judgment to establish that it maintained the premises in a reasonably safe condition and neither created the allegedly dangerous condition nor had actual or constructive notice of it (***Mahoney v AMC Entertainment, Inc.***, 103 AD3d 855, ___NYS2d ___ [2d Dept 2013]; ***Halpern v Costco Warehouse/Costco Wholesale***, 95 AD3d 828, 943 NYS2d 567 [2d Dept 2012]; ***Edwards v Great Altantic & Pacific Tea Co., Inc.***, 71 AD3d 721, 895 NYS2d 723 [2d Dept 2010]).

National has failed to demonstrate its *prima facie* entitled to judgment as a matter of law. Contrary to National's contention, the record before the Court contains sufficient evidence to establish the existence of a dangerous condition which the plaintiff alleges caused her to fall, i.e., wet carpeting in theater 6. Further, National failed to demonstrate its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not have actual or constructive notice of the hazardous condition. A defendant may be charged with constructive notice of a hazardous condition if it is established that there was a recurring condition of which it had actual notice (***Chianese v Meier***, 98 NY2d 270, 746 NYS2d 627 [2002]; ***Halpern v Costco Warehouse/Costco Wholesale***, *supra*; ***Milano v Staten Is. Univ. Hosp.***, 73 AD3d 1141, 903 NYS2d 78 [2d Dept 2010]; ***Kohout v Molloy College***, 61 AD3d 640, 876 NYS2d 505 [2d Dept 2009]; ***Erikson v J.I.B. Realty Corp.***, 12 AD3d 344, 783 NYS2d 661 [2d Dept 2004]). Even absent proof that a defendant has actual knowledge of the condition on the date of the accident, a defendant's actual knowledge of the tendency of a particular condition to reoccur constitutes constructive notice of each specific recurrence of that condition (***Milano v Staten Is. Univ. Hosp.***, *supra*; ***Erikson v J.I.B. Realty Corp.***, *supra*; *see also* ***Bush v Mechanicville Warehouse Corp.***, 69 AD3d 1207, 895 NYS2d 212 [3d Dept 2010] [question of fact as to constructive notice where defendant had actual knowledge of recurring leaks in other areas of the roof]).

In the instant case, the evidence demonstrates that National had actual knowledge of the recurrent leak in the roof of theater 6 and that it was reasonably in its power to safeguard against it. Indeed, the testimony demonstrates that the area of the leak was cordoned off after plaintiff's accident, and theater 6 was closed to moviegoers. Additionally, plaintiff's claim of notice of the particular accumulation of rain water is not premised upon the length of time it was present prior to her accident, but rather on the existence of an ongoing and recurring condition that was inadequately addressed. Therefore, any admissible evidence submitted by the defendants as to inspections of theater 6 and the condition of the carpet relative to the time of the plaintiff's accident is not probative (*see* ***David v New York City Hous. Auth.***, 284 AD2d 169, 727 NYS2d 404 [1st Dept 2001]). Thus, "[t]he strength of plaintiff's case is a

matter to be resolved at trial, and not on a motion for summary judgment" (***id.***, at 171). Therefore, as National has failed to satisfy its initial burden, the motion (#003) must be denied, and the Court need not consider the sufficiency of the papers in opposition (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Edwards v Great Altantic & Pacific Tea Co., Inc.***, *supra*).

Turning to motion sequence #001 and #002, when the personal injury issue concerns a contractor hired to perform work at a property, the contractor is liable to the entity that hired it, but generally does not owe a duty of care, and is not liable in tort or for breach of contract for injuries sustained by a third party, unless one of three exceptions apply (***Espinal v Melville Snow Contrs., Inc.***, 98 NY2d 136 [2002]; ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]). The three exceptions are: "(1) where the contracting party, in failing to exercise reasonable care in performance of [its] duties, 'launches a force or instrument of harm'[citation omitted]; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citation omitted]; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, *supra* at 140; *see* ***Church v Callanan***, 99 NY2d 104, 752 NYS2d 254 [2002]). Under the first exception, the contractor who creates or exacerbates a dangerous condition is said to have "launched" it (***Espinal v Melville Snow Contrs.***, *supra* at 142-143; ***Haracz v Cee Jay, Inc.***, 74 AD3d 1145, 1146, 903 NYS2d 515 [2d Dept 2010]). Under the third exception, the contractor may be "held liable for failing to make conditions safer for the injured party" (***Church v Callanan Indus.***, *supra* at 112). Thus, the threshold and dispositive query as to Metropolitan and Carlisle is whether either party owed the plaintiff a duty of care, a question of law for the Court to decide (*see* ***Church v Callanan Indus.***, *supra*; ***Espinal v Melville Snow Contrs.***, *supra*).

Metropolitan has made a *prima facie* showing of its entitlement to judgment as a matter of law by demonstrating that it owed no duty of care to the plaintiff (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Peluso v ERM***, 63 AD3d 1025, 881 NYS2d 489 [2d Dept 2009]). There is no evidence that Metropolitan breached its contractual obligation when it installed the Carlisle Roofing System completed in June 2003, or that it assumed a continuing duty to return to Island 16 almost five years later to remedy any defect that eventually developed in the roof (*see* ***Peluso v ERM***, *supra*). Moreover, Carlisle inspected and approved Metropolitan's work after the roof was completed in 2003, thus, it cannot be concluded that Metropolitan's installation "rose to the requisite standard of creating a dangerous condition so as to 'launch a force or instrument of harm' " (***Luby v Rotterdam Sq., LP***, 47 AD3d 1053, 1055, 850 NYS2d 252 [3d Dept 2008], quoting ***Espinal v Melville Snow Contrs.***, *supra* at 141; ***Martinez v White Cottage Enters.***, 2 AD3d 506, 507-508. 768 NYS2d 500 [2d Dept 2003]).

Furthermore, there is no evidence that the plaintiff slipped and fell because she detrimentally relied on the continued performance of Metropolitan's contractual duties (*see* ***Church v Callanan Indus.***, *supra*; ***Martinez v White Cottage Enters.***, *supra*). Likewise, this case does not fall within the third exception as Metropolitan did not have a comprehensive contract to assume National's obligations to provide its Island 16 patrons with a reasonably safe premises (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***Backiel v Citibank***, 299 AD2d 504 [2d Dept 2002]; ***Arabian v Benenson***, 284 AD2d 422, 726 NYS2d 447 [2d Dept 2001]; *cf* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]). Therefore, having made its *prima facie* case, the burden shift to the non-moving parties to raise an issue of fact.

Carlisle has not submitted any opposition to Metropolitan's motion for summary dismissal of the complaint. The plaintiff argues in her opposing papers that since Metropolitan installed the Roof System in 2002, it "became responsible for effectuating any necessary repairs resulting from its defective workmanship for a two-year period which commenced approximately January 2007." Contrary to the plaintiff's contention, the two-year period commenced in July 2003, when Metropolitan's installation work passed Carlisle's inspection. Therefore, by July 2005, Metropolitan was no longer responsible for making repairs. Rather, at the time of the plaintiff's accident in 2008, the Roof System was under Carlisle's warranty.

The plaintiff's averment that the persistent leaks were caused by Metropolitan's installation of the Roof System, and specifically the way it was installed around the HVAC system is not persuasive. As discussed above, Carlisle's inspection and approval of Metropolitan's work, precludes a finding that Metropolitan owed plaintiff a duty of care in 2008. Thus, Metropolitan's motion for summary judgment dismissing the plaintiff's complaint and the cross-claims against it for contribution and indemnification is granted.

Carlisle, on the other hand, is not entitled to summary dismissal of the complaint. Pursuant to its warranty, Carlisle was responsible for investigating the leak and hiring an authorized installer to perform any necessary repairs. A Carlisle purchase order reflects that on April 28, 2008, a leak was reported in theater 6 and Carlisle retained Roof Services to make the repairs; within a week thereafter, plaintiff's accident occurred. Such evidence raises a triable issue of fact as to whether the dangerous condition which caused the plaintiff to slip and fall was created or exacerbated by the negligent repair of the leaking roof as alleged in the complaint (*see* ***Baillargeon v Kings County Waterproofing Corp.***, 91 AD3d 686, 936 NYS2d 209 [2d Dept 2012] [question of fact found as to whether the engineering consultant hired to investigate a recurrent leakage problem in the roof and the company that the engineer hired to perform the repair created or exacerbated a dangerous condition]; *see also* ***Baillargeon v Tuttle Roofing Co., Inc.*** 92 AD3d 908, 938 NYS2d 907 [2d Dept 2012]; ***Haracz v Cee Jay, Inc.***, *supra*). Under such circumstances, summary dismissal of the plaintiff's complaint and National's third-party complaint is not warranted (*see* ***Baillargeon v Kings County Waterproofing Corp.***, *supra*; ***George v Marshalls of MA, Inc.***, *supra*). Furthermore, having failed to satisfy its initial burden, the Court need not examine the sufficiency of the opposing papers (*see* (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Haracz v Cee Jay, Inc.***, *supra*).

Accordingly, motion (seq. #001) for summary judgment is granted and the plaintiff's complaint and cross-claims asserted against Metropolitan are hereby severed and dismissed; motion (seq. #002) by Carlisle and motion (seq. #003) by National for summary judgment are denied.

Dated: March 26, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION