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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

AMANDA TURNER,

Plaintiff,

-against-

350 REALTY CO., LLC, EMPIRE HOTEL GROUP, LLC and JAY DOMB,

Defendants.

INDEX NO.	161516/2013
MOTION DATE	09/28/2016
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion for summary judgment is granted to the extent of dismissing the complaint against Empire Hotel Group, LLC, and dismissing the second cause of action for negligent hiring, retention and training. The remainder of the relief sought is denied.

Plaintiff commenced this action for personal injuries she sustained in the lobby of her apartment building at 350 West 88th Street, New York, New York (herein "the building"). (Mot. Exh. A). Defendant 350 Realty Co., LLC (herein "owner") is the owner of the building. (Mot. Exh. F at P 11 & Mot. Exh. G). Defendant Jay Domb (herein "Defendant Domb") has a 40% ownership interest in, and manages, the building. (Mot. Exh. F at PP 8 & 12). Defendant Empire Hotel Group LLC (herein "Defendant Empire") is a trade name used by Defendant Domb to manage several properties for sales and marketing purposes. (Mot. Exh. F at P 9).

Issue was joined, the parties proceeded with discovery, and the Note of Issue was filed on February 4, 2016 (Mot. Exh. C).

Defendants now move for an Order for summary judgment dismissing the Complaint pursuant to CPLR §3212.

Defendants contend that the vacuum in use at the time of Plaintiff's accident was an open and obvious condition, that they fulfilled their duties to maintain the premises in a safe condition, that the claims for negligent hiring and retention must be dismissed, and that Defendant Empire must be dismissed from the action.

Defendants contend that Plaintiff testified she saw the vacuum on and in use by the janitor as she stepped off the elevator, and that she had observed the lobby being vacuumed on prior occasions. (Mot. Exh. E at PP 32-33). That Defendant Domb testified the vacuum was a standard upright vacuum that made typical noise, and that the lobby was vacuumed twice a day. (Mot. Exh. F at PP 21-22, and 25-26). Defendants argue that this establishes that the alleged dangerous condition of the vacuum cleaner was readily observable given the reasonable use of one's senses, and therefore was an open and obvious condition warranting dismissal of the claims.

Defendants also contend that neither a vacuum, nor vacuuming, are dangerous conditions, and that the act of vacuuming itself is an act taken to maintain a premises in a safe condition. That the vacuum was not unattended, that the Plaintiff saw the vacuum, the vacuum was emitting normal vacuum sounds, and that the lobby was vacuumed twice a day. Defendants further contend that Plaintiff made no prior complaints about the vacuuming, about building maintenance staff or about the work they performed prior to her incident. Therefore, Defendants argue that because Plaintiff must show that the Defendants either created, or had actual or constructive notice of the condition, and that no defective or dangerous condition existed, Plaintiff's claims must be dismissed.

The claims for negligent hiring and retention, Defendants argue, must also be dismissed because the record is devoid of any indication that the Defendants knew or could have known that the janitor's conduct could have caused Plaintiff's alleged injury. That there is no harmful conduct at issue, no evidence of prior complaints about the janitor or his vacuuming of the lobby, and no indication that the Defendants were aware of any harmful conduct.

Finally, Defendants contend that Defendant Empire must be dismissed from the action because it is an improper party. That Defendant Empire does not have any ownership interest in the building, that Defendant Domb uses Defendant Empire for the sales and marketing of various properties, that there are no contracts between Defendant Owner and Defendant Empire (Mot. Exh. F at P 36), and that Defendant Owner is the sole owner of the building.

Plaintiff opposes the motion only as to Defendants' open and obvious, and dangerous condition arguments. The arguments for dismissal of the negligent hiring and retention claim, and dismissal of Defendant Empire from the action, are unopposed.

Plaintiff argues that Defendants have failed to establish their burden for summary judgment, and that at the very least the theories of whether a condition was "open and obvious", and/or whether there was notice of or creation of a dangerous condition, are questions of fact for a jury to decide.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination" (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Defendants 350 Realty and Domb have not established their right to summary judgment on the claims of negligence. Issues of fact remain as to whether the janitor, an employee of Defendant 350, caused or created the condition that resulted in Plaintiff's injury. Defendants argue there was no dangerous condition because vacuuming is not a dangerous act, nor is a vacuum a dangerous condition, and if there were any condition it was open and obvious because the Plaintiff had seen the lobby being vacuumed on prior occasions, and saw the vacuum as she stepped on to it while exiting the elevator. However, Plaintiff testified at her deposition that as she stepped off the elevator the janitor shoved the vacuum cleaner underneath her foot, causing her to stumble backwards and twist her knee. (Mot. Exh. E at PP 32-33). Therefore, there remain issues as to whether or not the Plaintiff had the opportunity to avoid stepping onto or coming in contact with the vacuum, whether the janitor was negligent in his actions thereby causing Plaintiff to step onto the vacuum and twist her knee, and whether Defendants 350 Realty and Domb are responsible because the janitor is their employee.

Defendants have, however, established their right to summary judgment dismissing the Complaint as against Defendant Empire. Defendants argue that there is no connection between Defendant Empire and Defendant 350 Realty, and provide the Deed which shows that the sole owner of the building is Defendant 350 Realty. Plaintiff neither opposes this argument, nor does she provide any evidence to the contrary. Therefore, summary judgment is granted dismissing the Complaint as to Defendant Empire only.

Defendants have also established their right to summary judgment on the second cause of action for negligent hiring, retention or training. "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention," (Karoon v. New York City Transit Authority, 241 A.D.2d 323, 659 N.Y.S.2d 27 [1st Dept. 1997], citing Eifert v. Bush, 27 A.D.2d 950, 279 N.Y.S.2d 368 [2nd Dept. 1967], affd. 22 N.Y.2d 681, 291 N.Y.S.2d 372, 238 N.E.2d 759 [1968]). "This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training." (Karoon, Supra). The janitor, who was an employee of Defendants 350 Realty and Domb, was using the vacuum within the scope of his employment at the time of Plaintiff's incident. Plaintiff does not address the dismissal of this cause of action in her opposition. Therefore, the second cause of action for negligent hiring, retention, and training is dismissed.

The Court has considered Defendants remaining arguments and find them to be without merit.

Accordingly, it is ORDERED, that Defendants' 350 Realty Co., LLC, Empire Hotel Group LLC and Jay Domb's motion for summary judgment is granted to the extent of dismissing the Complaint as against Defendant Empire Hotel Group LLC, and dismissing the second cause of action for negligent hiring, training and retention, and it is further,

ORDERED, that the second cause of action for negligent hiring, training and retention is hereby severed and dismissed, and it is further,

Ordered, that the causes of action in the Complaint against Defendant Empire Hotel Group LLC, are hereby severed and dismissed, and it is further,

ORDERED, that the remaining causes of action in the Complaint asserted against Defendants 350 Realty Co., LLC and Jay Domb, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

AMANDA TURNER,
Plaintiff,

-against-

350 REALTY CO., LLC, and JAY DOMB,
Defendants.

and it is further,

ORDERED, that within 20 days from the date of entry of this Order the moving party shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly, and it is further,

ORDERED, that the remainder of the relief sought is denied.

ENTER:

Dated: October 26, 2016

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE