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

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MAO CHEN,

Plaintiff,

-against-

10 WEST 32ND STREET REALTY, LLC and MISS KOREA BBQ,

Defendants.

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DECISION/ORDER

Index No.: 152046/2016

Mot. Seqs. 002 & 003

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

MEMORANDUM DECISION

This is an action for personal injury. In motion sequence 002, defendant TGM 21, Inc. ("TGM"), sued incorrectly herein as Miss Korea BBQ,[1] now moves pursuant to CPLR 3212 for summary dismissal of the Complaint of plaintiff, Mao Chen ("Plaintiff") and the cross-claims of co-defendant 10 West 32nd Street Realty, LLC ("10 West"). In motion sequence 003, 10 West now moves for summary dismissal of the Complaint and summary judgment of its cross-claims against TGM. Motion sequences 002 and 003 are consolidated for joint disposition.

Factual Background

Plaintiff alleges that on the date of his accident he visited TGM, a restaurant located on the third floor of a five-story building. 10 West owned the building. Plaintiff alleges that at approximately 9:00 p.m. he was walking down the stairs of the building when he slipped on a wet surface on the stairs between the second and third floors. Plaintiff filed the Complaint against defendants under a theory of negligence. TGM filed the cross-claim against 10 West for

[1] TGM's Answer indicates that at the time of Plaintiff's accident it was a Domestic Business Corporation d/b/a in New York as Miss Korea BBQ.

common law indemnification and contribution. 10 West filed the cross-claims against TGM for contractual and common law indemnification, contribution, and breach of contract for failure to procure insurance.

TGM's Motion

In support of its motion, TGM argues that it did not have a duty to Plaintiff, since it was not required to maintain the subject stairway pursuant to the rental lease and rider between 10 West and TGM ("Lease"). TGM submits the affidavit of Sophia Lee ("Lee"), the principal of TGM 21, Inc., wherein she states that she is a signatory to the Lease and that the Lease did not require TGM to maintain the subject stairway. TGM further argues that it did not control the subject stairway. Additionally, TGM argues that it did not create the alleged wet condition that caused the accident.

Next, TGM argues that 10 West's cross-claim for common law and contractual indemnification should be dismissed since it did not cause Plaintiff's accident. TGM also argues that 10 West's cross-claim for breach of contract for failure to procure insurance should also be dismissed, because Plaintiff's alleged accident did not occur in the area of the building the insurance covered. Specifically, the Lease required that the insurance coverage was required for "demised premises," which only included the third floor and not the subject stairway.

10 West's Opposition and Motion

In opposition, 10 West argues that TGM had a duty to maintain the subject stairway under the Lease, which states that TGM is required to maintain all exits and means of egress. 10 West further contends that the testimony of Chung Song Kim ("Kim"), an employee of TGM, demonstrates that that TGM was responsible for the maintenance of the stairway, as Kim testified that a TGM employee mopped the subject staircase the morning of the incident and that it was their standard protocol to place a "wet floor" sign in the stairway when it rained.

In support of 10 West's motion for summary dismissal of the Complaint, 10 West argues that there is no evidence regarding the length of time the alleged wet condition existed or that water was dripping onto the stairway. 10 West submits the testimony of Julian Asencio ("Asencio"), an employee of 10 West and manager of the subject building, wherein he testified that he did not notice any leaks or water dripping anywhere near the staircase on the night of the accident and that he was unaware of any leaks in the building that needed to be repaired at any time in 2015.

Next, 10 West argues that it is entitled to common law indemnification, since it was not negligent and TGM was required to maintain the subject stairway. Moreover, 10 West argues that it is entitled to contractual indemnification under the Lease.

Plaintiff's Opposition

In opposition to TGM's motion, Plaintiff contends that Lee's affidavit should not be considered since it is not sworn under the penalty of perjury. Next, Plaintiff argues that the Lease is unclear as to whether TGM was required to maintain the stairway. Plaintiff further argues that there is an issue of fact as to whether TGM created the alleged wet condition by mopping the steps the day of Plaintiff's accident.

In opposition to 10 West's motion, Plaintiff argues that the Lease indicates that 10 West had the right of reentry to the premises.[2] Further, 10 West has failed to demonstrate that it inspected the premise on the date of Plaintiff's accident.

TGM's Reply and Opposition

In reply, TGM argues that the provision of the Lease requiring that TGM maintain the means of egress refers to the exits and entrances to the third floor, and not the subject stairway. TGM also argues that the accident occurred in the evening and any mopping that occurred in the

[2] 10 West do not argue that they are an out of possession landlord.

morning could not have caused Plaintiff's alleged accident. Moreover, TGM argues that the fact it mopped the floor earlier in the day and placed the "wet floor" sign on the steps does not create a duty to maintain the subject steps. Moreover, the Lease demonstrates that 10 West was not an out of possession landlord, and had a duty to maintain the stairs.

In opposition to 10 West's motion, TGM argues that there is no evidence that it caused the wet condition. Further, the indemnification provision in the Lease is inapplicable, since the accident did not occur in the demised premises and Plaintiffs accident did not arise from or in connection with the occupancy or use of the premises. TGM further argues that 10 West is not entitled to common law indemnification because TGM was not negligent. Moreover, TGM contends that there is no evidence that a leak from the restaurant caused Plaintiff's injury. Further, as to the cross-claim that it failed to procure insurance, TGM argues that 10 West failed to demonstrate that TGM did not comply with its contractual obligation.

Discussion

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 A.D.3d 606, 607 [1st Dept 2012], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The burden then 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]; *Sokolowsky*, 101 A.D.3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M Muller Constr. Co.*, 46 N.Y.2d 276, 281-282 [1978]; *Carroll v. Radoniqi*, 105 A.D.3d 493 [1st Dept 2013]). The Court

views the evidence in the light most favorable to the non-moving party, and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 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 N.Y.2d 223, 231 [1978]).

Negligence

A defendant may not be held liable for negligence unless he or she owes a duty to the plaintiff (*see Pulka v. Edelman*, 40 N.Y.2d 781 [1976]; *see also Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339, 342 (1928]). It is well established "[a]n owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition" (*Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). In order for a landlord to be held liable for injuries resulting from a defective condition upon its premises, the plaintiff must establish that the landlord created or had actual or constructive notice of the hazardous condition (*Frank v. Time Equities, Inc.*, 292 A.D.2d 186 [1st Dept 2002]; *Segretti v. Shorenstein Co., East. L.P.*, 256 A.D.2d 234 [1st Dept 1998]).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]; *Budd v. Gotham House Owners Corp.*, 17 A.D.3d 122 [1st Dept 2005]). Further, "[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" (*Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500 [1st Dept 2008]).

Here, TGM has demonstrated that it did not owe Plaintiff a duty at the time of his accident since it was not responsible for maintaining the subject stairway. At the outset, Plaintiff's argument that Lee's affidavit may not authenticate the Lease is meritless, as her affidavit was administered by a Notary Public in New York (*see* CPLR 2309).

A plain reading of the Lease reveals that there is no language designating any responsibility of the subject stairway to TGM. The Lease indicates that TGM leased the "Third Floor" of the building, and that TGM "keep the demised premises clean and in order, to the satisfaction of the Owner" (Levine Moving Aff., Ex. H, 1, ¶30). Importantly, the Lease does not identify the subject stairway as part of the leased premises. Moreover, Lee, the principal of TGM, affirmed that the Lease does not contain a provision requiring TGM to maintain or clean the common staircase and that the subject stairway is not part of the leased premises (*id.*, Ex., G, ¶¶3, 5).

Instead, the Lease indicates that 10 West is responsible for the maintenance of the subject stairway. Paragraph 4 of the Lease indicates that the "Owner shall maintain and repair the public portions of the building, both exterior and interior[]." Lee affirmed that that the subject stairway provides access to the second, third, fourth and fifth floors of the building and is used by the workers and customers of the tenants on each of those floors, demonstrating that the stairway is a public portion of the stairway, to which neither Plaintiff nor 10 West argue otherwise (*id.*, Ex., G, ¶4) (*see Rubinstein v. 115 Spring St. Owners Corp.*, 146 A.D.3d 618, 618 [1st Dept 2017]).

10 West and Plaintiff's argument that Paragraph 78 of the Lease delegates responsibility maintain the subject stairway is unfounded. Paragraph 78 states that: "[t]enant is to adequately and properly maintain all exits and means of egress in accordance with all municipal codes and regulations including fire department rules and regulations." Designating TGM the responsible

party to maintain the subject stairway on the basis of Paragraph 78 would contradict the plain language of the Lease apportioning responsibility to maintain the public area of the subject building to 10 West. Moreover, adopting 10 West and Plaintiff's interpretation of the Lease would logically results in TGM being responsible for maintaining all of the stairs in the subject building—clearly not the intention of the agreement.

Plaintiff's argument the TGM created the alleged wet condition that caused Plaintiff to fall is speculative. While Kim testified that a TGM employee mopped the subject stairway on the morning of Plaintiff's accident—several hours from when the accident occurred—there is no evidence that TGM negligently mopped the stairway. Moreover, Plaintiff's own testimony indicates that water dripped from "above" the stairway and that he observed a steady flow of water dripping from the ceiling onto the stairway (*id.*, Ex., E, 24:7-25:25).

As to the owner of the building, there is an issue of fact as to whether 10 West had constructive notice of the alleged wet condition, since there is no evidence indicating when the last time 10 West inspected the stairway and the stairway's condition. Asencio, an employee of 10 West, testified that he checked the building in the mornings, including inspecting the stairs to make sure they work properly. However, there is no testimony indicating when he last inspected the accident location (*see Jahn v. SH Entm't, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014]; *Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421 [1st Dept 2011]).

Indemnification and Contribution

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 N.Y.2d 149, 153 [1973]; *see also Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 [2004]).

10 West is not entitled to contractual indemnification from TGM. The relevant indemnification provision in the Lease states that:

> "Tenant shall indemnify and hold Owner harmless from and against any liability, claim, loss . . . by reason of injury to any person or persons or injury or damage . . . arising from or in connection with the occupancy or use of the premises . . . ."
> (Levine Moving Aff., Ex. H, ¶105).

Plaintiff's injury did not occur within the demised premises contemplated by the Lease—the third floor of the building. Plaintiff's injury took place on the stairway between the second and third floors, which is not covered in the indemnification provision. Moreover, as discussed above, there is no evidence that Plaintiff's accident was the result of TGM's occupancy of the premises.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' " (*Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept 1999]). Here, 10 West has not shown its entitlement to common law indemnification or contribution, as it has failed to show that TGM was negligent as a matter of law and that it was not negligent in causing Plaintiff's accident (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003])

Breach of Obligation to Procure Insurance

"A party which breaches its obligation to procure insurance naming such party as an additional insured is liable for the resulting damages, including the amount of damages awarded to or paid to the injured party in the main action, within the limits of the policy that was to have been procured, as well as the costs incurred in defense of the main action" (*Encarnacion v.*

Manhattan Powell L.P., 258 A.D.2d 339, 340 [1st Dept 1999], citing *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 219 [1990]). Here, the Lease requires TGM procure insurance in the favor of 10 West against claims for bodily injury occurring in the demised premises (i.e. the third floor). However, as addressed above, TGM is not liable for Plaintiff's accident. Tellingly, 10 West does not oppose the branch of TGM's motion to dismiss the cross-claim for failure to procure insurance.

CONCLUSION

Accordingly, it is

ORDERED that defendant TGM 21, Inc.'s motion pursuant to CPLR 3212, for summary judgment dismissing the Complaint and cross-claims against it are granted, and the Complaint and cross-claims are dismissed as against TGM BBQ. It is further

ORDERED that the branches of defendant 10 West 32nd Street Realty, LLC's motion pursuant to CPLR 3212 for summary dismissal of the Complaint and summary judgment on its cross-claims are denied. It is further

ORDERED that counsel for defendant TGM 21, Inc. shall serve on all parties a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 27, 2018

Hon. Carol Robinson Edmead, J.S.C.