SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

PARAMDEEP SINGH,

Plaintiff,

- v -

NALPAK 1196 COMPANY, LLC,

Defendant.

INDEX NO. 151010/2014

MOTION DATE 05/16/2018

MOTION SEQ. NO. 005

DECISION AND ORDER

----------X

NALPAK 1196 COMPANY, LLC,

Third-Party Plaintiff,

- v -

SPD 1196, INC.,

Third-Party Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for Summary Judgment

HON. KELLY O'NEILL LEVY:

This is a personal injury action arising from a slip and fall accident.

Defendant NALPAK 1196 COMPANY, LLC (hereinafter, NALPAK) moves, pursuant to CPLR § 3212, for summary judgment in its favor as to liability on plaintiff Paramdeep Singh's negligence claim and dismissal of plaintiff's complaint. Plaintiff opposes.

BACKGROUND

NALPAK owns and operates the building located at 1196 Sixth Avenue in Manhattan (hereinafter, the building). NALPAK leased the basement of the building to Third-Party Defendant, SPD 1196, INC. (hereinafter, SPD), in April 2007 [Lease Agreement (ex. J to the

Toomey aff.)]. SPD operated Akshar Coffee Shop (hereinafter, the coffee shop) on the leased premises. Plaintiff worked as a manager at the coffee shop.

Plaintiff alleges that on October 18, 2013, he slipped and fell while carrying a coffee beaker to the sink to be cleaned, spilling approximately 30-40 cups of hot coffee on his legs [Singh tr. (ex. F to the Toomey aff.) at 34]. He claims to have slipped on a loose tile that was cracked for approximately 1½ to 2 months prior to the date of the accident which broke when coffee shop employees slid a heavy refrigerator over the tiles (*id.* at 38-40). Plaintiff alleges that he asked NALPAK's building superintendent, Mino Omeragic, to fix the broken tile nearly every day during the 1½ to 2-month period when the tile was broken (*id.* at 43-44, 52). NALPAK disputes these allegations, stating that the building did not have notice of the damage to SPD's floor. NALPAK's property manager, James Rabito, testified that neither plaintiff nor any other employee notified or complained to him about a broken tile [Rabito tr. (ex. G to the Toomey aff.) at 54]. Omeragic testified that he did not remember if he had been asked to fix a broken tile at the coffee shop [Omeragic tr. (ex. H to the Toomey aff.) at 26].

Pursuant to the lease agreement between SPD and NALPAK, SPD was required to make all non-structural repairs to the premises (Lease Agreement at ¶4). However, plaintiff claims repairs such as a broken tile would be made by NALPAK (Singh tr. at 45). Plaintiff asserts that on at least two occasions prior to the accident the superintendent of the building repaired similar cracks in the floor tile [Singh aff. (ex. A to the Kleeger aff.) at ¶8]. NALPAK disputes these allegations, arguing that the building and the superintendent were only responsible for HVAC, electrical, and plumbing maintenance within the coffee shop, and that all other repairs were the responsibility of the tenants (Rabito tr. at 34-37). Omeragic denied ever making any repairs to the coffee shop floor (Omeragic tr. at 18). He testified that if a repair was needed, the coffee

shop would call Rabito (*id.* at 24). Rabito would then assess whether Omeragic could handle the repair, or whether they should retain the building's contractor to make the repair (*id.*). Omeragic confirmed that had the building's contractor been made aware of the broken floor tiles, it would have fixed them (*id.* at 25).

NALPAK asserts that the building had no duty to repair damaged floor tiles in the coffee shop. NALPAK claims that the lease agreement between NALPAK and SPD required SPD to make all non-structural repairs (Lease Agreement at ¶4), relieving NALPAK of any duty to perform maintenance on the broken floor tile. Plaintiff acknowledges the terms of the lease agreement but contends that NALPAK assumed a duty to make repairs through its prior course of conduct in its maintenance of the coffee shop. Plaintiff maintains that a triable issue exists as to whether NALPAK owed a duty to repair the tiles in the coffee shop. NALPAK also argues that the building did not have constructive or actual notice of the damaged tile.

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

There can be no negligence if there is no legally recognized duty of care owed by the moving defendant to plaintiff. *Becker v. Schwartz*, 46 N.Y.2d 401, 413 (1978). While a lack of contractual obligation to make repairs to the premises normally discharges an out-of-possession landlord of any duty owed to its tenants, there are exceptions to this general rule. *Vera v. Dance Space Center, Inc.*, 66 A.D.3d 554, 554 (1st Dep't 2009). In determining control over the premises, New York courts look not only to the terms of the lease agreement, but also to the parties' prior course of conduct in making repairs to the premises. *Ritto v. Goldberg*, 27 N.Y.2d 887, 889 (1970) (holding that a landlord may be held liable absent a contractual obligation if, by a long course of conduct of repairs, the landlord "so intervened in the operation of the business as to give rise to a reliance by . . . tenants."); *Dimas v. 160 Water Street Associates,* 191 A.D.2d 290, 290 (1st Dep't 1993) (holding that although a lease required tenant to repair the lighting fixtures in its portion of the building, the landlord assumed control of such maintenance through prior repairs).

NALPAK asserts that the "course of conduct" exception outlined in *Ritto* and *Dimas* should be narrowly construed to assign liability to an out-of-possession landlord only if the landlord had previously repaired the exact type of item that later caused the injury. It distinguishes *Ritto* in that there, the defendant developed a practice of fixing the very washing machines that later malfunctioned and injured the plaintiff. *Ritto*, 27 N.Y.2d at 889. NALPAK maintains that it never made repairs to broken floor tiles in the coffee shop and that repairs to electrical, HVAC, and plumbing systems were irrelevant to the accident at issue.

NALPAK contends that plaintiff's affidavit alleging that Omeragic had repaired floor tiles in the coffee shop on two previous occasions is self-serving and should not be given weight. NALPAK notes that plaintiff made no mention of any previously-repaired tiles in his deposition

testimony and suspects that such a crucial fact conveniently arose for the first time nearly four years after the litigation commenced. Self-serving affidavits alone are insufficient to defeat summary judgment. *Caraballo v. Kingsbridge Apt. Corp.*, 873 N.Y.S.2d 299, 299 (1st Dep't 2009). However, plaintiff's affidavit does not contradict his deposition testimony. While plaintiff answered numerous questions on floor tiles, he was never specifically asked whether tiles had been repaired in the past and did not testify on the issue. Thus, the court will consider plaintiff's affidavit.

Furthermore, material factual issues still exist that prevent summary judgment. As mentioned above, NALPAK maintains that it only ever made electrical, HVAC, and plumbing repairs in the coffee shop and never repaired broken floor tiles there (Rabito tr. at 34-37). However, when asked if he would have repaired floor tiles in the coffee shop, Omeragic did not corroborate Rabito's testimony that the building had no responsibility to make such repairs (Omeragic tr. at 24). Instead, Omeragic testified that Rabito himself would have examined the floor tile to determine whether Omeragic could handle the repair or whether they should retain the building's contractor (*id.*). Omeragic's testimony that NALPAK would have hired an outside contractor for repairs such as broken floor tiles raises a material issue of fact. Plaintiff's claim that NALPAK had a duty due to its prior course of conduct as articulated in *Ritto* and *Dimas* is sufficient to defeat the present motion.

The existence of an alleged dangerous condition alone does not give rise to a cause of action for negligence. *Mercer v. City of New York*, 223 A.D.2d 688, 688 (2d Dep't 1996). Instead, the plaintiff must establish that the defendant either created the condition, or otherwise had actual or constructive knowledge of the alleged dangerous condition and a reasonable time within which to correct it. *Id.* Plaintiff acknowledges that defendant did not create the

dangerous condition and that the tile broke when the coffee shop employees slid a heavy refrigerator over the tiles about two months prior (Singh tr. at 39-40). However, the parties disagree over whether defendant was notified of the defective condition. While Rabito claims to have never been notified, plaintiff testified that he had complained about the tile nearly every day over the prior two-month span *(id.* at 43-44, 52). Omeragic was neither able to confirm or deny whether he was notified or asked to repair the broken tile (Omeragic tr. at 26).

Material issues of fact exist as to whether NALPAK had performed similar maintenance in the coffee shop in the past and whether NALPAK was properly notified of the broken floor tile and owed a duty to plaintiff. Accoridngly, the court denies NALPAK's motion.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant NALPAK 1196 COMPANY, LLC's motion, pursuant to CPLR § 3212, for summary judgment in its favor as to liability on plaintiff Paramdeep Singh's claim of negligence and for dismissal of the complaint is denied.

This constitutes the decision and order of the court.

July 16, 2018
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED	x	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE