SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

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Juan Estevez,

Plaintiff,

Index Number: 157160/2012

-against-

DECISION/ORDER

Seasons Affiliates, LLC, Thurcon Properties, Ltd., Herald Hotel Associates, L.P., and Radisson Hotels International, Inc.,

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, defendants move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Verified Complaint (the "Complaint"). Plaintiff opposes the motion.

BACKGROUND

Parties and Underlying Allegations

Plaintiff alleges that, on October 12, 2011, he was employed as the front desk manager at the Radisson Martinique Hotel (the "Hotel"), located at 49 West 32nd Street, New York, New York (Plaintiff Deposition at 14, 16; Verified Bill of Particulars ["Bill of Particulars"], ¶ 2). Seasons Affiliates, LLC ("Seasons") is the owner of the real property on which the Hotel is located (Anselona Deposition at 15-16; Delgado Affidavit, ¶ 21). Thurcon Properties, Ltd. ("Thurcon") is the management company for the property (Anselona Deposition at 16-17).

Radisson Hotels International, Inc. ("Radisson") is a "licensor of quality guest lodging systems [but it] does not itself own or operate hotels . . . [,but rather it] enters into license agreements . . . in connection with the operation of [the licensed hotel]" (Mason Affidavit, ¶¶ 6, 9, 11). Herald Associates, L.P. ("Herald") operates the Hotel, pursuant to a license agreement with Radisson (*id.*, ¶¶ 13-14). 1260 Payco Ltd. ("Payco") is a 'paymaster' company that issued paychecks to non-union personnel working at the Hotel (Delgado Affidavit, ¶¶ 6-7).

Plaintiff contends that, on October 12, 2011, at about 11:30 a.m., he fell down on steps (the "Steps") behind the front desk of the Hotel as he was coming from the manager's back office (Bill of Particulars, ¶ 1; Plaintiff Deposition at 27). The fall allegedly caused plaintiff severe injuries necessitating multiple surgeries (Bill of Particulars, ¶¶ 1-3, 13; Second through Fifth Supplemental Verified Bill of Particulars; Plaintiff Deposition at 31, 33). Plaintiff testified at his deposition that the Steps were dangerous given their height differential. Plaintiff also maintained that he had visual difficulty in distinguishing between the Steps as a result of the pattern of the carpeting. (*id.* at 33, 35, 45-46).[1] Plaintiff states that the visual

[1]Plaintiff testified that the steps were carpeted, and that "everything looked the same with the patterns on the steps"" (Plaintiff Deposition at 35). Plaintiff's allegation that his fall was caused by visual confusion is not alleged in his Complaint or Bill of Particulars or any supplement thereto (Tr. Oral Argument at 3). When asked at his deposition if anything other than a visual problem with the carpeting and the different height of the steps caused him to fall,

problem and the differential in height of the Steps were issues for him both going up and down the Steps (Plaintiff Deposition at 45-46). Plaintiff claims that he and other employees had complained to Fatima Williams ("Williams"), plaintiff's supervisor, about the Steps and that he also complained to three front desk managers (*id.* at 36-39, 47-48).[2]

Plaintiff testified that he was employed by Payco and that his paycheck indicated Payco but that he did not know of any other role that Payco played beyond the fact that he saw Payco on his paycheck (*id.* at 13-14, 25-27). Plaintiff also claimed that he had never heard of Herald (*id.* at 25-26).

Defendants argue that plaintiff has not identified the cause of his accident, since he stated that he did not remember tripping or slipping on the Steps (*id.* at 60-61), and therefore, his Complaint should be dismissed in its entirety. Alternatively, defendants contend that Seasons was an out-of-possession landlord without any responsibility for the condition of the Steps and, similarly, that Thurcon was a management company which was not in complete and exclusive control of the

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plaintiff responded "No" (Tr. Oral Argument at 36). However, in his Bill of Particulars, plaintiff alleged that "the defect or condition which caused the accident consisted of: lack of handrails, loose carpets" (Bill of Particulars, ¶ 4).

[2]Plaintiff testified at his deposition that, at the time he started working at the Hotel, one of the front desk managers informed him to be careful of the Steps (Plaintiff Deposition at 48). However, at another point in his deposition, plaintiff testified that he did not remember anyone making a complaint about the condition of the Steps (Plaintiff Deposition at 50).

premises and was furthermore not negligent in connection with the Steps. Consequently, defendants maintain that plaintiff's Complaint should be dismissed against Seasons and Thurcon.

In addition, defendants argue that Radisson is a franchisor without any responsibility for the operation of the Hotel and, as such, plaintiff's Complaint against Radisson should be dismissed. With respect to plaintiff's claims against Herald, defendants also contend that the source of Payco's funds was from Herald and that Herald "was responsible for the management, maintenance and repair of the [S]teps where [t]he accident happened" (Delgado Affidavit, ¶ 16). Accordingly, defendants assert that plaintiff was a special employee of Herald therefore entitling Herald to the exclusivity of the Workers' Compensation Law.

DISCUSSION

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied regardless of the sufficiency of the opposing papers (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Premises Liability

Generally, "in order to make out a prima facie case of negligence involving defective or dangerous conditions present on property, a plaintiff must demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Mitchell v City of New* York, 29 AD3d 372, 374 [1st Dept 2006] [internal quotation

marks and citations omitted]; *see* Gordon *v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). " A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011].

"An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or [the] right to reenter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (*id.* at 420 [internal citation omitted]; *Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014].

To be responsible, a "managing agent for the premises [must have] had complete and exclusive control of the demised space [where the accident occurred]" (*Howard v Alexandra Rest.*, 84 AD3d 498, 499 [1st Dept 2011]; *see also Mangual v U.S.A Realty Corp.*, 63 AD3d 493, 493 [1st Dept 2009]; *Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 375 [1st Dept 2007]).

Franchisor Liability

"The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of

its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee" (*Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 671 [1st Dept 2007]; *see also Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 149 AD3d 496, 497 [1st Dept 2017]; *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]).

Workers Compensation Exclusivity and Special Employment

"[W]hen an employee is injured in the course of employment, the sole remedy for the employee lies in the Workers' Compensation Law . . . [so as] to guarantee an injured employee scheduled compensation regardless of fault in exchange for reduced costs and risks of litigation" (*Reich v Manhattan Boiler & Equip. Corp.*, 91 NY2d 772, 779 [1998]; *see also Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 156 [1980]). However, "a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for the payment of wages and for maintaining workers' compensation and other employee benefits" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). "[A]n employee, although generally employed by one employer, may be specially employed by another employer, and [a] special employer may avail itself of the Workers' Compensation Law" (*Bellamy v Columbia Univ.*, 50 AD3d 160, 161 [1st Dept 2008]). "A special

employee is described as one who is transferred for a limited amount of time of whatever duration to the service of another" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557; *see also Bellamy v Columbia Univ.*, 50 AD3d at 161). "[A] person's characterization as a special employee is usually a question of fact" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557). "Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive. While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (*id.*, at 558 [internal citations omitted]; *see Bellamy v Columbia Univ.*, 50 AD3d at 162-163; *Holmes v Business Relocation Servs., Inc.*, 117 AD3d 468, 468-469 [1st Dept 2014]).

Determination

Initially, all defendants seek dismissal of the Complaint, based upon the contention that plaintiff did not adequately identify the cause of his fall. "[A] defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]). However, in this case, defendants have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law on the issue of proximate cause (*see Haibi v*

790 Riverside Dr. Owners, Inc., 156 AD3d 144 [1st Dept 2017]). "A plaintiff's inability to identify the cause of a fall is fatal to an action because a finding that the defendant's negligence proximately caused a plaintiff's injuries would be based on speculation. However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred" (*id.* at 147; *see Pajovic v 94-06 34th Rd. Realty Co., LLC*, 152 AD3d 781 [2d Dept 2017]). "Ordinarily, it is for the trier of fact to determine the issue of proximate cause" (*Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d at 147).

Here, plaintiff's deposition testimony as to the height differential of the Steps in addition to his testimony of visual confusion, allegedly caused by the carpeting, was sufficient to demonstrate a causal nexus between such defects and plaintiff's fall (*see Kovach v PJA, LLC*, 128 AD3d 445, 445 [1st Dept 2015]).[3] Accordingly, the portion of defendants' motion that seeks dismissal of plaintiff's Complaint on grounds that plaintiff allegedly could not describe how he fell is denied.

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[3]"'Optical confusion' occurs when conditions in an area create the illusion of a flat surface, visually obscuring any steps. [F]indings of liability have typically turned on factors such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [fnt *] [1st Dept 2011]). Here, plaintiff testified at his deposition that there was a problem "visually, because the carpeting, everything looked the same with the patterns on the steps, the steps were carpeted too" (Plaintiff Deposition at 35).

Seasons and Thurcon

Seasons seeks dismissal based upon its status as an out-of-possession owner and Thurcon seeks dismissal based on its status as the management company, both defendants claiming that these entities lacked control over the Steps. Plaintiff argues that such defendants have not established their right to dismissal, on grounds that no person from either Seasons or Thurcon has submitted any evidence in admissible form.

However, with respect to Seasons, defendants have presented deposition testimony as to the status of Seasons evidencing Seasons' lack of control over the Hotel. As an out-of-possession landlord, Seasons would not be liable "unless [it] had a contractual obligation to maintain the premises, or [the] right to reenter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d at 420 [internal citation omitted]; *see Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014].

Plaintiff has failed to controvert the substance of the evidence proffered by defendants establishing that Seasons leased the premises to Herald, and that Herald, as tenant, was responsible for repairs (Delgado Affidavit, ¶ 22; Memorandum of Lease, Article 10). Furthermore, plaintiff has failed to raise

an issue of fact as to whether the riser height of the Steps constituted a "significant structural or design defect contrary to a statutory provision" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d at 420; *see Quing Sui Li v 37-65 LLC*, 114 AD3d 538, 539 [1st Dept 2014]). Plaintiff has likewise failed to oppose defendants' arguments that none of the Administrative Code provisions alleged by plaintiff in his Supplemental Verified Bill of Particulars are applicable to the subject Steps.[4] Consequently, defendants' motion for summary judgment dismissing the Complaint against Seasons is granted.

With respect to Thurcon, a "managing agent for the premises [must have] had complete and exclusive control of the demised space [where the accident occurred]" (*Howard v Alexandra Rest.*, 84 AD3d at 499). Defendants submit a copy of the Management Agreement entered into between Herald Hotel Associates, L.P., as owner and Thurcon, as operator of the Holiday Inn at Herald Square.[5] The Management Agreement provides that Thurcon is an exclusive agent of Herald and has rights to manage and operate the subject property, including making repairs at Herald's expense. However, the Delgado Affidavit and the Anselona

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[4]Defendants allege that the subject Administrative Code provisions are either inapplicable to the Steps or have been repealed (Affirmation in Support, ¶¶ 212-217).

[5] The Management Agreement is signed on behalf of Herald Hotel Associates, L.P. and Thurcon by Harold Thurman as President of both entities. Plaintiff has not submitted any evidence demonstrating that said Management Agreement is not applicable to the subject Hotel.

deposition raise an issue of fact as to the role of Thurcon. Delgado attests that Herald was responsible for the "management, maintenance and repair of the [S]teps" and that the Steps "are maintained by the engineering department at the Hotel" (Delgado Affidavit, ¶¶ 16-17). Furthermore, Susan Anselona, general manager of Herald and the Hotel, testified that nobody from Thurcon directed or supervised plaintiff's employment (Anselona Deposition, page 17).[6] As such, the portion of defendants' motion that seeks dismissal of plaintiff's Complaint against Thurcon is denied.

Radisson

Radisson seeks dismissal on grounds that it was a franchisor and has presented evidence demonstrating that it had no control over the day-to-day operations of the Hotel (*see Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 149 AD3d at 497; *Martinez v Higher Powered Pizza, Inc.*, 43 AD3d at 671). In opposition, plaintiff has failed to submit any evidentiary proof to support his contention that Radisson had a sufficient degree of control over the Hotel's operations to impose liability on it as a franchisor. Accordingly, the portion of defendants' motion for summary judgment that seeks dismissal of plaintiff's Complaint

[6]Plaintiff testified that he is unaware if Thurcon had any connection with the Hotel beyond being the head company of Payco and providing his health insurance (Plaintiff Deposition at 24-25).

against Radisson is granted.[7]

Herald

Herald contends that plaintiff was a special employee of Herald and that Herald is an alter ego of Payco, and as such, plaintiff's claim against Herald is barred by plaintiff's recovery of Workers' Compensation benefits. However, "a person's characterization as a special employee is usually a matter of fact" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557). In this case, plaintiff asserts that he was an employee of Payco and that he had never heard of Herald (Plaintiff Deposition at 13-14, 25-26). Defendants contend that (i) Payco was a mere paymaster, used solely to pay non union employees at the Hotel, (ii) Payco and Herald operate as a single integrated entity, (iv) Herald supplied the funds from which Payco paid plaintiff, (v) Herald paid for the Worker's Compensation policy issued to Payco, and (vi) Herald hired and supervised plaintiff. As a result, defendants argue that Herald was the entity in control of the Hotel and it was therefore plaintiff's real employer.

Based on the foregoing, there is an issue of fact as to the relationship between Payco and Herald and as to whether Herald "control[led] and direct[ed] the manner, details and ultimate result of the [plaintiff's] work" (*id.*, 78 NY2d at 558; *Bellamy v*

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[7]This Court need not reach defendants' alternative arguments, that Radisson neither had actual nor constructive notice of the alleged subject defects, nor created the defective condition.

Columbia Univ., 50 AD3d at 162; *see also Holmes v Business Relocation Servs., Inc.*, 117 AD3d at 468-469). Accordingly, the portion of defendants' motion for summary judgment that seeks dismissal of plaintiff's Complaint against Herald, based upon the contention that plaintiff was its special employee or that Payco and Herald were alter egos, is denied.

CONCLUSION

On the basis of the foregoing, it is

ORDERED that the motion of defendants for summary judgment dismissing plaintiff's Complaint is granted to the extent of dismissing plaintiff's Complaint as against Season Affiliates, LLC, and Radisson Hotels International, Inc., and the Complaint is dismissed in its entirety as against said defendants, and is otherwise denied, and it is further

ORDERED that the action is severed and continued against the remaining defendants Thurcon Properties Ltd. and Herald Hotel Associates, L.P.

The Clerk shall enter judgment accordingly.

Dated: September 18, 2018 ENTER:

J.S.C.

SHLOMO HAGLER J.S.C.

14