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

----------X

STEVEN PRETE,

Plaintiff,

-against-

TRINITY CENTRE, LLC, LEGACY BUILDERS DEVELOPMENT CORP., and TOP SHELF ELECTRIC CORP.,

Defendants.

----------X

TRINITY CENTRE, LLC,

Third-Party Plaintiff,

-against-

KONICA MINOLTA BUSINESS SOLUTIONS U.S.A., INC.,

Third-Party Defendant.

----------X

Index No. 162263/2015
Motion Seq. Nos. 004, 005, 006

DECISION AND ORDER

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

In this premises liability action, defendant Trinity Centre LLC ("Trinity") moves to dismiss the Complaint and all claims and cross-claims against it pursuant to CPLR 3212 (Motion Seq. 005). Plaintiff Steven Prete and Third-Party Defendant Konica Minolta Business Solutions U.S.A., Inc. ("Konica") oppose the motion. Konica also cross-moves for an order pursuant to CPLR 1010 dismissing or severing the third-party complaint, or alternatively to vacate Plaintiff's Note of Issue pursuant to 22 NYCRR 202.21(e) to allow Konia to conduct discovery. Additionally, defendant Top Shelf Electric Corp. ("Top Shelf") moves for summary judgment

dismissing all claims and cross-claims against it pursuant to CPLR 3212 (Motion Seq. 004), and defendant Legacy Builders Development Corp. ("Legacy") moves for summary judgment dismissing all claims and cross-claims against it pursuant to CPLR 3212 (Motion Seq. 006). Plaintiff opposes the motions. The three motions are consolidated for disposition.

BACKGROUND FACTS

On September 9, 2013, Plaintiff, an employee of Konica, was injured at the company's offices in lower Manhattan. While walking back to his desk from a break room, Plaintiff slipped on an object on the floor that was apparently removed from the ceiling (NYSCEF doc No. 152 at 32-33). Plaintiff testified that the object appeared to be some sort of tray or plate that was used to cover a smoke alarm or other type of utility (*id.*). Plaintiff believes that the object was left by workers who were in his office area at the time of the accident. Plaintiff sustained injuries to his back and tailbone and claims to suffer pain years after the accident. On November 30, 2015, Plaintiff commenced an action against Trinity, the owner of the office building, along with Legacy, a contractor that was performing renovation work at the building during the time of the accident, as well as Top Shelf, an electrician subcontractor hired by Legacy. The complaint alleges that the object Plaintiff slipped on was negligently placed on the floor by employees of Legacy or Top Shelf, and that Trinity negligently maintained the premises of the office and negligently supervised Legacy and Top Shelf's employees (NYSCEF doc No. 1 at 4). Following the close of discovery and the filing of the Note of Issue, Trinity filed a third-party complaint against Konica, arguing that as Konica was the tenant in control of the office space where Plaintiff was injured, any injury suffered by Plaintiff was necessarily caused by Konica's

negligence. Therefore, Trinity argues that it is entitled to judgment against Konica for any verdict obtained in Plaintiff's favor against Trinity.

Top Shelf, Trinity, and Legacy now all move to dismiss the Complaint and all claims and counter-claims against them in the proceeding. Trinity argues that as the out-of-possession landlord of the office building where Plaintiff's accident occurred, it was not responsible for the safety of the premises and did not create the alleged safety defect, nor did it have actual or constructive notice of the defect. Legacy and Top Shelf argue that they are entitled to dismissal as Plaintiff has put forth no evidence that their workers were actually in Konica's office space. Legacy had been contracted to perform renovation work at Paperless Post, a company that shared a floor in the building with Konica, but, by its own unrebutted account, never entered into Konica's space. Nor is there any evidence that Top Shelf's workers performed any electrical work in Konica's space. Legacy further contends it is entitled to contractual indemnification from Top Shelf in the event the Complaint is not dismissed. In reply, Plaintiff and Konica argue there is a question of fact as to whether Legacy's and Top Shelf's employees were ever in Konica's offices, and that summary judgment is inappropriate as there is a triable issue regarding what caused Plaintiff's accident.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then

shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, *"'regardless of the sufficiency of the opposing papers'"* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

A property owner seeking summary judgment in a negligence action is "required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, the defendant who moves for summary judgment must demonstrate "that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]).

A property owner seeking summary judgment in a negligence action is "required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, the defendant who moves for summary judgment must demonstrate "that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]). For out-of-possession property owners, it is well settled law that:

> "[a]n out-of-possession landlord is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision"

(*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525 [1st Dept 2017]).

The out-of-possession landlord must have had either actual or constructive notice of the hazardous condition and have had a reasonable opportunity to repair the condition for liability to be imposed (*Federal Ins. Co. v Evans Constr. of N.Y. Corp.*, 257 AD2d 508, 509 [1st Dept 1999]). Generally, when the landlord has only a limited right to enter and inspect the premises from time to time, liability is extended only in situations where "the basis of the liability is a significant structural or design defect that is contrary to a specific safety provision" (*Kittay v Moskowitz* (95 AD3d 451 [1st Dept 2012]). When the accident does not stem from a structural or

design defect, out-of-possession landlords can only be held liable by a contractual obligation beyond a mere right of reentry, or a record of their past course of conduct indicating that they acted to maintain the premises *(see Ritto v Goldberg,* 27 NY2d 887, 889 [1970]; *Dimas v 160 Water St. Assoc.,* 191 AD2d 290 [1993]; *Del Giacco v Noteworthy Co.,* 175 AD2d 516, 518 [1991]).

A contractor seeking summary judgment in a negligence action must demonstrate that it did not perform work negligently at the site of the plaintiff's accident. When a defendant contractor establishes it has performed no construction work at the site of an alleged accident, it has demonstrated entitlement to summary judgment as a matter of law (*Flores v City of New York,* 29 AD3d 356 [1st Dept 2006]). Additionally, a defendant is entitled to summary judgment when a plaintiff "is unable to identify the defect that caused his or her injury" (*Siegel v City of New* York, 86 AD 3d 452, 454 [1st Dept 2011]). To challenge the defendant's entitlement to summary judgment, the plaintiff must demonstrate the existence of "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Ingersoll v Liberty Bank of Buffalo*, 14 NE2d 828 [1938]). Such evidence, however, must be "based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743 [1986]). Mere speculation is insufficient to raise a triable issue of fact as to whether a defendant contractor performed work at the site of the plaintiff's injury (*Tepper v City of New York,* 13 AD3d 124 [2004]).

Trinity's Motion to Dismiss

Here, Trinity has established that it is an out-of-possession landlord and did not create the alleged defect, nor did it have either actual or constructive notice of the defect. The lease between Trinity and Konica for the office space stipulates that Konica is required to "take good care of the demised premises" and make all necessary repairs (NYSCEF doc No. 143, ¶ 4). The lease also contains an indemnification provision where Konica agrees to indemnify and hold harmless Trinity from all liabilities caused by "the carelessness, negligence, or improper conduct of [Konica]" (*id.* at ¶ 8). Michael Albert, the treasurer of Trinity, has submitted an affidavit stipulating that Trinity did not contract for any construction work in Konica's offices, nor did it receive any notice or complaint of a defect in the break room. As discussed, the caselaw is clear that in a slip-and-fall action, an out-of-possession landlord must have actual or constructive notice, and the defect must be one that is structural and in violation of a specific statutory safety provision (*see Sorrentini v. Netta Realty Group*, 100 AD3d 484, 485-486 [1st Dept. 2012] ["out-of-possession building owner's motion for summary judgment was properly granted, as there was no evidence offered to show that the building owner . . . retained any obligation to maintain the premises, and particularly an obligation to rectify transient conditions"] citing *Stryker v. D'Agostino Supermarkets Inc.*, 88 AD3d 584 [1st Dept. 2011]; *Babich v. R.G.T. Rest. Corp.*, 75 AD3d 439 [1st Dept. 2010]). Plaintiff alleges that the object he slipped on was a smoke detector or thermostat cover or plate, and nothing suggests that such an object falling from a ceiling or wall is a structural defect.

In reply, Plaintiff argues that Trinity was responsible for the structural portions of the building, which according to the lease include the structural portions of the premises and "the

public portions of the building interior and the building, plumbing, electrical, heating and ventilating systems" (NYSCEF doc No. 143, ¶ 4). However, Konica's office space cannot be interpreted as a "public portion" of the office building and the clause does not obligate Trinity to make repairs to transient defects in Konica's office space. Plaintiff does not put forth any legal arguments that challenge the settled legal concept that "a landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant" (*Babich*, 75 AD3d at 440). Plaintiff instead argues that Trinity's motion should be dismissed due to technicalities, as it relies in part on unsigned transcripts. However, the First Department has held that unsigned but certified deposition transcripts are admissible (*see Zabari v City of NY*, 242 AD2d 15, 17 [1st Dept. 1998] ["CPLR 3116 (a) allows a deposition transcript to be admitted as though it were signed, especially where, as here, the transcript was certified as accurate"] [internal citations omitted]).

Here, there is no dispute as to the accuracy of the transcripts, and the transcripts are notarized. Furthermore, Plaintiff cites to the very same transcripts in its moving papers (NYSCEF Doc No. 176 at ¶¶ 27-30). The deposition transcripts are thus clearly admissible, and do not negate the fact that Plaintiff has not raised a triable issue of fact alleging that Plaintiff's accident was caused by a structural defect, nor that Trinity had actual or constructive notice. Thus, Trinity is entitled to dismissal of the Complaint.

All claims for common-law indemnification and contribution against Trinity are also improper as "common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assocs., Inc.*, 72 AD3d

483, 484 [1st Dept] 2010] citing *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept. 1999]). Contribution under the common-law similarly requires a showing of fault by a tortfeasor (*Aiello v. Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 237 [1st Dept. 2013]. Additionally, as discussed, the indemnification clause in the lease is in favor of Trinity. Therefore, Trinity is entitled to dismissal of all cross-claims against it along with the Complaint.

Trinity's Third-Party Complaint and Konica's Cross-Motion

As Trinity's motion has been granted, its third-party complaint against Konica is dismissed as moot. The third-party complaint is no longer actionable as Trinity has been dismissed from this proceeding, and therefore the Court need not reach the arguments in Konica's cross-motion to dismiss the third-party complaint.

Top Shelf's Motion for Summary Judgment

Top Shelf is an electrician that was subcontracted by Legacy to perform work in the offices of Paperless Post, a tenant in Trinity's building that shared a floor with Konica but had no common office space (NYSCEF doc No. 116 at 9-10). Trinity's representative also confirmed that Paperless Post and Konica had completely separate office suites (NYSCEF doc No. 117 at 22). Tim Ponticello, the Vice President of Project Management of Top Shelf, produced an affidavit stating that Top Shelf performed no work in Konica's office space, and also stipulated that Top Shelf only used equipment and materials that were aluminum and silver in color (NYSCEF doc No. 131). Plaintiff alleged that the object he slipped on was beige or transient in color (NYSCEF doc No. 128 at 32). Top Shelf argues that Plaintiff has not introduced any evidence Top Shelf's employees would have removed any objects from the walls or ceilings of his office. Additionally, Plaintiff has only been able to speculate about the identity of the object

that actually caused the accident and has not demonstrated that Top Shelf had any sort of notice of the defect or could otherwise owe some duty to Plaintiff, as Top Shelf was not even in Koncia's offices. In reply, Plaintiff argues that Gustaf Betancourt, Plaintiff's coworker and the sole witness to the accident, testified that he witnessed workers working with wiring in Konica's ceiling who were not employed by Konica (NYSCEF doc No. 157 at 12-16). Additionally, Mr. Ponticello testified that he did not know for a fact if any of Top Shelf's employees went into Konica's offices on the date of the accident (NYSCEF doc No. 155 at 20-23). Plaintiff contends there is thus an issue of fact as to whether Top Shelf's employees were in Konica's office and removed the object that caused Plaintiff's accident.

However, Plaintiff has merely provided speculation that Top Shelf may have been working in his office space, based on the fact that he and his witness saw workers in the vicinity. It is well established that "unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Murphy v Herbert Constr. Co.,* 297 AD2d 503, 504 [1st Dept 2002] [internal quotation marks and citation omitted]). Where, as here, "allegations of negligence and causation are based entirely on speculation, and may not be reasonably inferred," summary judgment is warranted (*Rivera v Adinolfl*, 249 A.D.2d 55, 57 [1st Dept. 1998] citing *State v Tarrytown Corp. Center II*, 208 A.D.2d 1009, 1011 [3rd Dept 1994]; *Thomas v New York City Transit Auth.*, 194 A.D.2d 663, 664 [2nd Dept 1993]; cf., *Khan v Economics Laboratory*, 222 A.D.2d 297 [1st Dept 1995]). Documentary evidence establishes that Top Shelf was not performing any work in Konica's office, nor did they have reason to enter into the office space. Additionally, Plaintiff has been unable to concretely identify the object he slipped on, describing it in different moving papers and in deposition testimony as alternatively a tray, a plate, and a

thermostat cover either beige or clear in color (NYSCEF doc No. 196, ¶ 11). As Plaintiff's description of the cause of his accident is impermissibly speculative, and Top Shelf has established its workers were not present in the situs of the accident, summary judgment must be granted.

Legacy's Motion for Summary Judgment

Legacy similarly argues it is entitled to summary judgment as Plaintiff has not put forth any evidence demonstrating that Legacy was performing work in Konica's offices during the time of the accident. In deposition, Thomas Bennardo, the project manager overseeing the construction, testified that no work was done by Legacy in Konica's offices but only at the offices of Paperless Post. He further testified that Legacy did not have to enter Konica's offices at any point during the construction at Paperless Post (*id.* at 12). Bennardo reviewed construction documents and contracts from the Paperless Post project to confirm there was no reason Legacy needed access to Konica's space (*id.* at 13). Mr. Betancourt, Plaintiff's coworker and witness, also testified that there was no construction ongoing in Konica's offices at the time of the accident, and that he saw construction workers in the hallway, but did not see any workers or construction materials in the break room where Plaintiff slipped (NYSCEF doc No. 120 at 9-14). In his own deposition testimony, Plaintiff conceded that while he saw workers in the vicinity on the day of his accident, no ongoing construction work was being performed in his office at the time (NYSCEF doc No. 115 at 31).

In reply to Legacy's motion, Plaintiff argues that the motion was not timely filed. However, Legacy's motion was originally filed on December 6, 2018, within 60 days of Plaintiff's Note of Issue and Certificate of Readiness, which was filed October 9, 2018. Legacy

later refiled the motion in February 2019 due to an incorrect return date that was listed on the original motion (NYSCEF doc No. 198, ¶ 3). As the motion was originally filed within the proper time period, it was timely filed. Plaintiff also claims Legacy's motion should be denied because an accident report was submitted by Konica to Legacy and Top Shelf, but Plaintiff does not articulate why the submission of the report demonstrates evidence of liability or negligence on the part of either defendant.

Plaintiff's testimony that he recalls seeing employees and ladders in his office space does not sufficiently raise a question of fact as to Legacy's liability. As discussed, *supra,* Plaintiff has not put forth substantial evidence that Legacy performed work in Konica's office space, and therefore his allegations are not a sufficient basis on which to deny Legacy's motion for summary judgment. Plaintiff argues that Legacy's deposition testimony is similarly speculative, but Legacy's representative relied on contracts and daily reports in his testimony, not his recollection alone. Plaintiff also argues Legacy (and Top Shelf) should be precluded from introducing new evidence pertaining to its work or correcting omissions of said evidence in its reply papers, but neither defendant does so in its reply. Plaintiff has asserted no factual basis for why Legacy was responsible for the placement of the object on the floor that caused Plaintiff's fall. As Plaintiff has introduced no triable issue of fact regarding Legacy's negligence, summary judgment must be granted.[1]

[1] Legacy has contended that to the extent Plaintiff's compliant and cross-claims are not dismissed as against it, it is entitled to contractual indemnification pursuant to the Indemnification Clause in its agreement with Top Shelf. However, as Legacy's motion is granted, the Court need not reach this argument.

As all three defendants in this action have demonstrated their entitlement to summary judgment dismissing the Complaint against them, Plaintiff's Complaint is dismissed in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant Top Shelf Electric Corp.'s motion to dismiss the Complaint and all cross-claims against it (Motion Seq. 004) is granted in its entirety; and it is further

ORDERED that Defendant Trinity Centre, LLC's motion for summary judgment dismissing the Complaint and all cross-claims against it (Motion Seq. 005) is granted in its entirety; and it is further

ORDERED that Defendant Legacy Builders Development Corp.'s motion for summary judgment dismissing the Complaint and all cross-claims against it (Motion Seq. 006) is granted in its entirety; and it is further

ORDERED that Defendant and Third-Party Plaintiff Trinity Centre, LLC's third-party complaint against Third-Party Defendant Konica Minolta Business Solutions U.S.A. Inc. is dismissed as moot; and it is further

ORDERED that the cross-motion of Third-Party Defendant Konica Minolta Business Solutions U.S.A. Inc. is dismissed as moot; and it is further

ORDERED that Plaintiff's Complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: May 10, 2019

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

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