SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 18EFM

Justice

----------X

WAYNE BOVE

Plaintiff,

- v -

BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC,

Defendant.

----------X

INDEX NO. 157784/2017

MOTION DATE 05/01/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 36, 37, 38, 39, 40, 42, 43

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing papers, defendant Brown Harris Stevens Residential Management, LLC (Brown Harris) moves for summary judgment pursuant to CPLR 3212 on the grounds that it did not owe plaintiff a duty of care and did not create the condition. For the reasons stated herein, the motion is granted.

Plaintiff commenced this action on August 30, 2017 seeking damages arising from injuries sustained when he slipped and fell while mopping a stairway in a building located at 580 Park Avenue in the County, City and State of New York. Plaintiff, a porter employed by 580 Park Avenue Incorporated (580 Park), the owner of the building, alleges that the stairway had the defective condition of a slick, slippery floor. Plaintiff alleges that this slick and slippery condition was a result of a paintjob that occurred five or six years before the accident. Defendant Brown Harris is the management company that 580 Park contracted with to manage the building. Plaintiff alleges that his injuries were a result of Brown Harris's negligence in their management, maintenance, control, supervision, and/or repair of the premises and the stairway therein.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Failure to meet its burden requires that the motion be denied regardless of the sufficiency of the opposing papers (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (People ex rel. Spitzer v Grasso, 50 AD3d 535, 545 [1st Dept 2008], quoting Zuckerman, 49 NY2d at 562).

"Generally, 'individual liability cannot be based upon an allegation that amounts to mere nonfeasance unless plaintiff establishes, as a matter of law, that the managing agent was in complete and exclusive control of the premises'" (Vushaj v Insignia Residential Group, Inc., 50 AD3d 393, 394 [1st Dept 2008] quoting Hakim v 65 Eighth Ave., LLC, 42 AD3d 374, 375 [1st Dept 2007]). An exception exists when there is evidence that the management agreement was so "comprehensive and exclusive, so as to entirely displace the owner's duty to maintain the premises" (Clark v Kaplan, 47 AD3d 462, 462 [1st Dept 2008]). Other exceptions are where the contracting party "'launche[s] a force or instrument of harm'...[and] where the plaintiff detrimentally relies on the continued performance of the contracting party's duties" (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 140 [2002]).

Here, Brown Harris argues that it is entitled to summary judgment because it was merely an agent whose actions were taken solely on behalf of 580 Park and therefore, it was not in exclusive possession or control of the premises. Additionally, Brown Harris maintains that there was no

defective condition within the subject stairs, nor did they create or have notice of it. In opposition, plaintiff argues that Brown Harris failed to meet its burden demonstrating that no duty was owed and that no defective condition was present. Plaintiff also asserts that the motion is premature as there are questions of material fact, such as the type of paint used in the subject stairwell, which have yet to be discovered.

Contrary to plaintiff's contention, the management agreement (agreement) did not displace 580 Park's duty to maintain the premises. Pursuant to the agreement, Brown Harris was to "maintain the Building in such condition as may be advisable, including interior and exterior cleaning, ordinary repairs, and alterations." Repairs involving the expenditure of over $5,000 for any one item required prior approval and all purchases were made in principal's name. Additionally, any contract not involving a utility with a term of one year, or in excess of $5,000, required prior approval. These terms preclude a finding that the agreement displaced 580 Park's duties as Brown Harris lacked the "broad authority" to make all repairs and alterations without prior approval of 580 Park (see Davis v Prestige Mgt. Inc., 98 AD3d 909 [1st Dept 2012]; see also Vushaj v Insignia Residential Group, Inc., 50 AD3d 393 [1st Dept 2008]; Baulieu v Ardsley Assoc., L.P., 85 AD3d 554 [1st Dept 2011]; Roveccio v Ry Mgt. Co., Inc., 29 AD3d 562 [2d Dept 2006]). Nor is there any other indication that Brown Harris was in exclusive control of the building.

With respect to scenarios where the agent "launches the force or instrument," a plaintiff, to establish a prima facie case, must demonstrate that the defendant created the condition which caused the incident. (see Espinal, 98 NY2d 140). Here, plaintiff alleges that the paint or paintjob caused the accident. However, viewing the facts in the light most favorable to plaintiff, the complaint fails to plead facts that support this contention.

Assuming *arguendo*, that plaintiff's complaint was sufficient, Brown Harris met its burden in showing that they played no part in creating the alleged defective condition. The testimony of Thomas Byrne, the building's resident manager, and affidavit of Elizabeth Graham, the managing agent for 580 Park and Vice President of BHS Residential Management, both state that Brown Harris neither initiated nor supervised the paintjob. Mr. Byrne, who was employed by 580 Park, decided within his own discretion, that the stairway needed panting. He purchased the paint and tools himself, supervised the job himself, and never notified Brown Harris.

Even if it were found that Brown Harris played a part, it cannot be said that they had notice. Mr. Byrne testified that he was responsible for the maintenance of the stairways and he was unaware of any issues or accidents occurring in the subject stairway. Neither Mr. Byrne nor Ms. Graham ever received a complaint regarding the stairway and the paintjob subsequent to its completion. Notably, it was plaintiff's responsibility to clean and mop the stairway, a job he had been doing since before the stairway was painted.

In opposition, plaintiff's wholly speculative assertion that the paint, applied five or six years prior to the incident, caused the fall is not enough to defeat Brown Harris's motion (see Stancarone v Waldbaums Inc., 275 AD2d 771, 773 [2d Dept 2000]). While a plaintiff need not exclude every cause of the incident other than defendant's negligence, "other possible causes must be rendered sufficiently remote so as to enable the trier of fact to reach a conclusion based upon the logical inferences to be drawn from the evidence" (Babino v City of New York, 234 AD2d 241, 242 [2d Dept 1996]). In any event, courts have routinely rejected the argument that an inherently slippery surface was in and of itself, sufficient to support a finding of negligence (see Werner v Neary, 264 AD2d 731 [2d Dept 1999] ["in the absence of evidence of, for example, a negligent application...the mere fact that a smooth surface may be slippery does not support a cause of action to recover damages for

negligence"]). Thus, plaintiff's claim that material issues of fact still exist concerning the exact paint used does not warrant denial of the motion.

As the Court finds that Brown Harris owed no duty, we need not discuss its remaining arguments.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

8/1/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE