SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JAMES KEENAN,

Plaintiff,

- v -

CHRISTIE'S INC., and RCPI LANDMARK PROPERTIES, L.L.C.,

Defendants.

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INDEX NO. 154986/2016

MOTION DATE

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

CHRISTIE'S INC.,

Third-Party Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendant.

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Third-Party
Index No. 595016/2017

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54-64, 82, 84, 86-96, 106, 107

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65-81, 83, 85, 97-105

were read on this motion for summary judgment.

By notice of motion, defendant/third-party plaintiff Christie's Inc. moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and for summary judgment on its third-party complaint. Plaintiff and third-party defendant Cushman & Wakefield, Inc. (Cushman) oppose. (Mot. seq. 001).

By notice of motion, defendant RCPI Landmark Properties, L.L.C. (RCPI), moves

pursuant to CPLR 3212 for an order summarily dismissing the complaint and dismissing all claims asserted against it by third-party defendant. Plaintiff opposes. (Mot. seq. 002).

I. BACKGROUND

By lease dated March 24, 1997, RCPI rented to Christie's a portion of the premises located at 1230 Avenue of the Americas and 10 Rockefeller Plaza in Manhattan. Pursuant to the lease, RCPI retained the right to enter the premises for inspection. (NYSCEF 75).

By contract dated May 20, 2015, Christie's engaged Cushman to serve as manager of the premises. Pursuant to their agreement, Cushman agreed to "indemnify, defend, and save harmless" Christie's for all liability that results from Cushman's negligence. (NYSCEF 87).

By summons and complaint dated June 14, 2016, plaintiff alleges that while employed by Cushman, on November 30, 2015, he slipped and fell at the premises, sustaining injury. He advances causes of action for violations of the Labor Law and common-law negligence. (NYSCEF 55).

By summons and complaint dated January 5, 2017, Christie's initiated a third-party action against Cushman, advancing causes of action for contribution and indemnification. In its answer, Cushman advanced counterclaims for contribution and indemnification against Christie's and RCPI. (NYSCEF 56).

In his verified bill of particulars dated September 1, 2016, plaintiff alleges that defendants were negligent:

> [...] in permitting [him] to use a floor, passageway, walkway, and/or platform which was in a slippery condition; in causing and/or permitting water and/or such other foreign substance, which may cause slippery footing to accumulate, and/or in failing to remove, sand or cover same to provide safe footing; in failing to take steps to prevent the accumulation of water and/or such other foreign surface upon the area where [he] was then working; in failing to provide [him] with waterproof boots having safety insoles or with pullover boots or rubber safety shoes to protect [him] when required to work in wet conditions; in failing to provide for

> adequate drainage, including but not limited to drains or such other adequate drainage on the floor upon which [he] was then working [...]

(NYSCEF 57).

In opposition to defendants' motions, plaintiff does not oppose the dismissal of his second, third, fourth, and fifth causes of action, alleging violations of the Labor Law. (NYSCEF 90, 97). Accordingly, only plaintiff's first cause of action for common-law negligence is addressed.

II. MOTIONS FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT

At his deposition, plaintiff testified that he was assigned to work the mechanical room located on the mezzanine level of the building. In the room, there was a set of pipes running along the floor leading to a drain the middle of the floor. Additionally, on the floor were carpet tiles that had been laid down by a former employee of a company that no longer performed services at the building. Because the room was not heated, the tiles placed on the cold cement floor, and had been there for "years."

Plaintiff described how on the day of his accident, he had been eating lunch in the mechanical room, got up, and stepped over the pipes on the floor of the room to go to his locker. On his way back, after stepping completely over the pipes, he slipped on a carpet tile and fell, landing on the pipes. Plaintiff did not know why he fell but claimed that the carpet "tile was wet underneath." When asked about the source of the wetness, plaintiff stated that "it had to come from the drain," although he had seen no drain back up that day nor does he know of anyone who did. While the drain occasionally backed up, plaintiff did not recall how often it occurred or the last time it occurred. Nor had plaintiff or anyone else complained about the conditions in the mechanical room, including wetness. (NYSCEF 63).

Plaintiff's supervisor, a Cushman engineer, testified that he visited the mechanical room

daily but saw no liquid on the floor, nor had plaintiff complained to him about the condition of the mechanical room. (NYSCEF 62).

RCPI's chief operating engineer testified that he had been to the building "recently," and that he would have removed the tiles if he had seen them on the floor. In addition, he claimed to never have had an issue with the floor drain in the mechanical room. (NYSCEF 59).

Christie's general manager of operations testified at a deposition that he had never received complaints or reports about the drain or wetness in the mechanical room, nor was he aware of any instance of the drain backing up before plaintiff's accident. He claims to have been to the mechanical room approximately ten times. (NYSCEF 60).

A. Contentions

1. Christie's (NYSCEF 54-64)

Christie's asserts that it lacked actual and constructive notice of the accumulation of water in the mechanical room, relying on the testimony of its general manager of operations, and observing that plaintiff had testified that he had walked through the area multiple times before his accident and had never seen, felt, or noticed any moisture, and that Cushman's supervisor had never observed any wetness.

To the extent plaintiff argues that the accumulation of water in the mechanical room was a recurring condition, Christie's contends that plaintiff's allegation is speculative given his testimony. Moreover, even if there had been a recurring condition, Christie's denies having had notice of it, and to the extent that Cushman had notice, it cannot be imputed to Christie's, as Cushman is an independent contractor, not an agent.

2. RCPI (NYSCEF 65-81)

RCPI argues that it lacked actual and constructive notice of water accumulation in the

mechanical room. It claims that it would only have received notice of a hazardous condition from Christie's, relying on the testimony of Christie's engineer. RCPI also asserts that the testimony of plaintiff and his supervisor establishes a lack of constructive notice.

As plaintiff admitted that he did not know the source of the wetness, RCPI argues, he cannot claim that the condition is recurring, and that plaintiff did not see the floor drain on the day of his accident and could not say how frequently the alleged wetness occurred. Moreover, RCPI lacked notice of the wetness, and thus, cannot be liable for the recurring condition.

3. Plaintiff (NYSCEF 90-103)

Plaintiff contends that whether the floor was wet or not is irrelevant, given his allegation that he had slipped on a loose carpet tile on the floor. And he also claims that his fall was caused by the pipes and drain lines running in the middle of room, the dispersed carpet tile cutouts which absorbed moisture, the lack of heat in the room, and the cold concrete floor.

Plaintiff also alleges that the dangerous condition existed for years, as evidenced by the testimony of Cushman's engineer, and argues that Christie's should have noticed the dangerous condition given the engineer's testimony that he had been to mechanical room approximately ten times before November 2015. In addition, RCPI, as owner, has a general duty to conduct inspections of the premises to find defective conditions, and RCPI's chief engineer testified that he had gone to the mechanical room recently, thereby demonstrating its access to the mechanical room. Plaintiff submits undated photographs of the mechanical room, reflecting tiles scattered across the floor and a pipe running along the center of the floor. (NYSCEF 92).

Plaintiff contends that if the court were to search the record, it could grant summary judgment in his favor on the issue of liability. Plaintiff argues, citing *Sweeney-Kamouh v City of New York*, 180 AD2d 487 (1st Dept 1992), that defendants' lack of notice of the wet condition is

insufficient, as two or more conditions can be the proximate cause of an accident.

4. RCPI's reply (NYSCEF 104-105)

To the extent that plaintiff claims in his opposition that his fall was not due to wetness, it should be rejected, RCPI argues, as plaintiff testified that the cause of his fall was a wet carpet tile. Moreover, plaintiff's bill of particulars reflects that the cause of his accident was the accumulation of water. RCPI observes that plaintiff has not submitted an affidavit supporting his new allegations.

Even if plaintiff is permitted to change his theory of causation in opposition to its motion, RCPI contends, Christie's built the mechanical room, and the tiles and drain pipe were subsequently installed by some other contractor. Moreover, as on out of possession owner with a right of re-entry, it was not responsible for general maintenance of the premises, and here, the hazards were neither structural nor design defects that violated a specific statute. Even if the plaintiff's accident was due to a structural or design defect, RCPI cannot be held liable because the conditions did not proximately cause his fall.

5. Christie's reply (NYSCEF 106-107)

Christie's contends that plaintiff's opposition should be disregarded because in his bill of particulars, he claims that his fall was due to water accumulation and slippery conditions, and in his deposition, he attributed it to wetness under a floor tile. Christie's observes that plaintiff admits that he does not know whether the carpet tile was wet.

To the extent that plaintiff now attempts to claim his accident was due to something other than water, it should be rejected. Christie's argues that plaintiff never suggested he fell because the room was cold or that the floor was concrete, nor does the evidence support that. In addition, plaintiff never claimed to have tripped over the drain pipe.

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A defendant moving for summary judgment in an action involving a dangerous condition bears the *prima facie* burden of establishing that it neither created nor had actual or constructive notice of the condition. (*Del Marte v Leka Realty LLC*, 156 AD3d 453, 453 [1st Dept 2017]). For a defendant to be deemed to have had 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." (*Hauptner v Laurel Dev., LLC*, 65 AD3d 900, 902 [1st Dept 2009], quoting *Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

Having demonstrated that it had received no complaints that the drain backed up or that any water had accumulated nor had it been witnessed, Christie's establishes, *prima facie*, that it had no notice of the alleged hazardous condition sufficient to discover and remedy it. (*See Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011] ["A defendant demonstrates

lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell"]). Nor does plaintiff does not raise a triable issue of fact as to notice.

It is undisputed that RCPI was an out-of-possession landlord with the right of re-entry and lacked actual notice of the accumulation of water. As such, it cannot be held liable for injuries to third parties "unless it had notice of the defect and consented to be responsible for repairs or maintenance." (*Gomez v 192 E. 151st St. Assocs., L.P.*, 26 AD3d 276, 277 [1st Dept 2006]). Moreover, the dangerous conditions must "constitute significant structural or design defects that violated specific safety statutes." (*Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539 [1st Dept 2018]).

Here, plaintiff fails to allege a violation of a specific safety statute, and thus, RCPI demonstrates, *prima facie*, that it cannot be deemed to have had constructive notice of the water accumulation. (*See DeJesus v Tavares*, 140 AD3d 433, 433 [1st Dept 2016] ["Defendant sustained her initial burden of demonstrating that she was an out-of-possession landlord and that the alleged leak in the pipe in the kitchen sink was not a significant structural or design defect, and plaintiff failed to cite any specific statutory safety provision that was violated"]). Plaintiff raises no factual issue as to RCPI's notice.

Plaintiff does not dispute that defendants lacked notice of the wet condition in the mechanical room, and he admits that he did not know whether the floor or carpet tile was wet at the time of his accident. Instead, solely in opposition to this motion, he advances a variety of new theories, all of which allegedly contributed to his accident, and none of which is referenced in his complaint or bill of particulars. Likewise, at his deposition, he referenced only wetness under a

carpet tile. Thus, plaintiff is precluded from now asserting a new theory of liability as a means of opposing summary judgment. (*See Biondi v Behrman*, 149 AD3d 562, 563–564 [1st Dept 2017], *lv dismissed and denied* 30 NY3d 1012 [2017] ["It is axiomatic that a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers"]; *see e.g.*, *Gyarbin v Concord Limousine, Inc.*, 139 AD3d 672, 673 [2d Dept 2016] [rejecting plaintiff's claim that she was hurt when car abruptly stopped when she originally claimed to be hurt when car hit another car]; *Araujo v Brooklyn Martial Arts Acad.*, 304 AD2d 779, 780 [2d Dept 2003] [plaintiff's allegation in opposition to summary judgment motion that she fell due to lack of handrail rejected where she originally alleged that she fell due to wet spot on stairs]; *Scanlon v Stuyvesant Plaza, Inc.*, 195 AD2d 854, 855 [3d Dept 1993] [plaintiff failed to raise issue of fact by claiming that floor she slipped on was in and of itself slippery, when she originally claimed that she slipped on liquid]).

Sweeney-Kamouh v City of New York is distinguishable, as there, the plaintiff gave notice that he was injured by a cord on a defective window shade. (180 AD2d 487, 488 [1st Dept 1992]). Here, by contrast, plaintiff asserts that defendants were negligent in permitting water to accumulate in the mechanical room. Notice of the cold temperature in the mechanical room, the concrete flooring, and the presence of carpet tiles does not constitute notice of a water accumulation.

III. MOTION ON THIRD-PARTY COMPLAINT

The evidence in the record demonstrates that neither RCPI, Christie's, nor Cushman had notice of the water accumulation in the mechanical room, and plaintiff offers no evidence to the contrary. As Cushman demonstrates that it was free from negligence in maintaining the

mechanical room, Christie's may not seek contribution or indemnification from it. Likewise, Cushman has no basis to seek contribution or indemnification from RCPI or Christie's.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Christie's motion for summary judgment is granted to the extent it seeks dismissal of plaintiff's causes of action, as asserted against it, and is otherwise denied; it is further

ORDERED, that defendant RCPI's motion for summary judgment is granted in its entirety; it is further

ORDERED, that plaintiff's complaint is dismissed; it is further

ORDERED, that Christie's third-party complaint is dismissed; and it is further

ORDERED, that Cushman's counterclaims are dismissed.

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9/5/2019
DATE

BARBARA JAFFE, J.S.C.

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