SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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LINDA HENAGHAN,

Plaintiff,

-against-

STORM KING GROUP, INC., HUDSON BUILDERS GROUP and HEALTH QUEST MEDICAL PRACTICE, P.C.,

Defendants.

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HUDSON BUILDERS GROUP,

Third-Party Plaintiff,

-against-

HEALTH QUEST MEDICAL PRACTICE, P.C.,

Third-Party Defendant.

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HUDSON BUILDERS GROUP,

Second Third-Party Plaintiff,

-against-

HEALTH QUEST SYSTEMS, INC.,

Second Third-Party Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of upon all parties.

Index No. EF005406-2016

Motion Date: November 30, 2018

Third-Party
Index No. EF005406-2016

Second Third-Party
Index No. EF005406-2016

The following papers numbered 1 to 9 were read on the parties' motions for summary judgment:

Notice of Motion (Hudson) - Affirmation / Exhibits 1-2

Affirmation in Opposition / Exhibits 3

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

This is an action to recover for personal injuries sustained by plaintiff Linda Henaghan in a fall from a "ramp" on premises owned by her employer, Second Third-Party Defendant Health Quest Systems, Inc. ("HQ Systems"). The procedural posture of this case is as follows:

(1) Plaintiff's action as against defendant Storm King Group, Inc. has been discontinued.

(2) Defendant/Third-Party Defendant Health Quest Medical Practice, P.C. ("HQ Medical") moves for summary judgment dismissing all claims against it on the ground that it had no relationship to the premises / structures at issue in this case.

(3) Defendant / Third-Party Plaintiff Hudson Builders Group ("Hudson"), which constructed the "ramp" at issue here pursuant to contract with HQ Systems, moves for summary judgment dismissing the Complaint on the ground that Plaintiff is unable to identify the dangerous or defective condition that caused her fall.

(4) Second Third-Party Defendant HQ Systems moves for summary judgment dismissing Hudson's third-party complaint for indemnification and contribution on the grounds that those claims are barred by the exclusive remedy provisions of the Workers Compensation Law.

A. HQ Medical Is Entitled To Summary Judgment

HQ Medical demonstrated by admissible evidence that it did not and does not own, lease, manage or otherwise control the property, land, or structures on the premises where Plaintiff's accident occurred, and did not contract with, retain or otherwise enter into any agreement with Hudson to perform work on the premises. In short, it established *prima facie* that it had no relationship to the premises in question or to Plaintiff's injury and is therefore entitled to summary judgment.

Plaintiff does not oppose HQ Medical's motion, and Hudson has adduced no evidence in opposition thereto. Hudson's contention that the motion is premature because HQ Medical's deposition has not been taken is without merit, as Hudson failed to timely pursue the deposition in accordance with this Court's orders, in consequence of which it has been deemed waived.

Therefore, HQ Medical's motion for summary judgment is granted.

B. Hudson Failed To Demonstrate *Prima Facie* Entitlement To Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). The movant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Id.*

Plaintiff's accident occurred during lunchtime on the premises of Vassar Brothers Medical Center. Plaintiff procured her lunch in a cafeteria inside the building, and carried her lunch tray outside through a set of double doors, across a short landing and down an exterior staircase to a patio area with picnic tables. The patio, staircase and landing were all in a rather

dilapidated condition. Pending renovation, HQ Systems retained Hudson to perform a temporary fix involving the installation of lumber treads atop the steps and lumber walkway or "ramp" atop the landing. When Plaintiff finished eating, she had to go back inside to dispose of her tray. She ascended the steps, and fell when she reached the walkway or "ramp" on the landing.

Hudson claims entitlement to summary judgment on the purported ground that Plaintiff is unable to identify the dangerous or defective condition that caused her fall, and testified only that she fell because she "lost her footing." However, when confronted with the accident report she filed on the date of the accident, Plaintiff further testified in accordance with her report that she fell because she stepped off the right side of the "ramp", which was raised several inches above the surface of the landing, and that she did not see the edge of the "ramp." Contrary to Hudson's assertion, then, Plaintiff *did* identify the condition that caused her fell.

Hudson on its motion does not address the question whether the "ramp" which it constructed gave rise to a dangerous or defective condition. Plaintiff in her Verified Bill of Particulars asserted *inter alia* that the "ramp" created conditions in the nature of a "trap." In *Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 (2015), the Court of Appeals identified four factors that may be indicative of a "trap": (1) a rough, irregular surface; (2) the presence of other defects in the vicinity; (3) poor lighting; and (4) a location, such as a premises entrance / exit, where pedestrians are naturally distracted from looking downward at their feet. *Id.*, 26 NY3d at 78. Arguably, three of those four factors are present here.

Photographs show that the "ramp" was constructed of a series of parallel boards with spaces left between them, thereby creating an irregular surface. There were other defects in the vicinity; indeed, the entire area was in a dilapidated condition. The "ramp" was located at an

entrance / exit where employees would be carrying lunch trays in and out, and up and down the adjacent steps, and thus naturally distracted from looking downward at their feet. In addition, the right edge of the "ramp" from which Plaintiff fell was located just inches outside the door frame, and approximately one foot *inside* the metal handrail on the right side of the staircase, and thus in an area where pedestrians would foreseeably be walking. Finally, the evidence shows that yellow strips marking the edges of the "ramp" on either side were not present on the date of the accident.

Hudson's failure, in the face of such circumstances, to address the question whether the "ramp" gave rise to a dangerous or defective condition which caused or contributed to Plaintiff's accident leads ineluctably to the conclusion that it has failed to demonstrate *prima facie* entitlement to summary judgment. Consequently, Hudson's motion for summary judgment dismissing Plaintiff's complaint must be denied.

C. HQ Systems Is Entitled To Summary Judgment

HQ Systems demonstrated by admissible evidence that Plaintiff is its employee, that she applied for and received Workers Compensation benefits from HQ Systems in connection with this accident, that she has not sustained a "grave injury" within the meaning of Workers Compensation Law §11, that it did not expressly agree to indemnification or contribution, and consequently, that Hudson's third-party claims are barred by the exclusive remedy provisions of the Workers Compensation Law.

Hudson, in opposition, asserts that there is a triable issue of fact whether HQ Systems is liable for contractual indemnification and/or contribution. Hudson relies on Workers Compensation Law §11, which provides in pertinent part that the Workers Compensation bar

does not apply to:

> ...a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

See, Workers Compensation Law §11 (emphasis added). Hudson points in this regard to a sentence in its principal's email conveying the "Stair Treads - Walkway Proposal", to which HQ Systems agreed:

> "This is a temporary fix and HBG will not be liable for any flaw / structural defects because of pre-existing conditions."

For two reasons, Hudson's contention is unavailing.

First, Section 11 of the Workers Compensation Law requires an express agreement whereby the employer undertook to provide contribution and/or indemnification for the type of loss suffered. No such agreement may be supplied by implication. *See, Tonking v. Port Authority,* 3 NY3d 486 (2004); *Nicholson v. Sabey Data Ctr. Props.*, 160 AD3d 587 (1st Dept. 2018). The single sentence upon which Hudson relies does not contain an express agreement for contribution or indemnification, much less contribution or indemnification for third-party personal injury claims.

Second, even if the language of the Proposal were deemed to give rise to an ambiguity, it would have to be resolved against Hudson based on the testimony of its principal, Dan Spiegel. Mr. Spiegel, the author of the emailed Proposal, testified that in referencing "flaw / structural defects because of pre-existing conditions", his concern was for the "stability of the substrate", i.e., that "if I attached lumber on top of that and something below it gave way, whatever I put on it was not going to hold through." (*See,* Spiegel Dep. Tr., pp. 41, 62) Neither the defect at issue

here nor the Plaintiff's accident and injury had anything to do with the stability of the substrate. The "ramp" did not move or give way because the substrate could not hold it; Plaintiff simply stepped over the edge. Hence, even on Hudson's understanding, the parties' agreement would not give rise to an obligation on the part of HQ Systems to indemnify Hudson or provide contribution for Plaintiff's loss.

Therefore, HQ Systems' motion for summary judgment dismissing Hudson's third-party complaint against it is granted.

It is therefore

ORDERED, that the motion of Defendant / Third-Party Defendant Health Quest Medical Practice, P.C. for summary judgment is granted, and Plaintiff's claims as well as Hudson's Third-Party Complaint against it are hereby dismissed, and it is further

ORDERED, that the motion of Defendant Hudson Builders Group for summary judgment is denied, and it is further

ORDERED, that the motion of Second Third-Party Defendant Health Quest Systems, Inc. for summary judgment is granted, and Hudson's Second Third-Party Complaint against it is hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: January 22, 2019 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE