SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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EDWARD MOLLETTE

Plaintiff

Index No. 150844/15
DECISION AND ORDER

111 JOHN REALTY CORP. and 7-ELEVEN, INC.

Defendants. MOT SEQ 003, 004
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NANCY M. BANNON, J.:

I. BACKGROUND

In this action seeking damages for personal injuries, the plaintiff, Edward Mollette, a fire safety inspector, claims that, on July 10, 2013, while inspecting refrigeration equipment in the mechanical room in the basement of a newly constructed 7-Eleven store, he stepped in a puddle or wet spot near a refrigerator unit and, while walking back up the concrete staircase from the basement area, he slipped and injured his wrist. Defendant 111 John Realty Corp. (111 John Realty), the owner of the building, moves for summary judgment pursuant 3212 seeking to dismiss the complaint as against it or, in the alternative, a conditional order of summary judgment on its cross-claims for contractual and common-law indemnification against co-defendant 7-Eleven, Inc. (7-Eleven) (MOT SEQ 003). The plaintiff and 7-Eleven oppose that motion. 7-Eleven also moves for summary judgment seeking to

dismiss the complaint and all cross-claims (MOT SEQ 004). The plaintiff opposes that motion. Both motions are denied.

The parties depositions revealed the following:

The plaintiff had no difficulty walking down the stairs to the mechanical room and did not notice anything on the stairs. He was carrying a briefcase and possibly a flashlight in his hands. He saw "wetness" or a puddle or some type of liquid on the floor of the mechanical room, which was "coming from underneath the machinery." He assumed it was a leak, and that it was likely coming from a refrigeration or air conditioning unit since it had no odor. He stepped into the puddle since he had to get closer to the machinery but he could not recall the dimensions of the puddle. About 15 minutes after descending into the mechanical room, the plaintiff started to walk back up. He slipped on a step and his left hand hit the wall. He believed that the cause of his fall was "something wet on my feet." He did not know which step he slipped on. He may have informed the building super of his accident before he left. He called his supervisor to report that he may not be into work the next day since he was in a lot of pain. His experienced swelling and pain in his wrist, and was prescribed pain relievers and an ace bandage the next day. A doctor told him he had bruised ligaments. He later underwent surgery in November 2014 and wore a cast.

Eric Roemer testified that as a project manager for 7-Eleven, he oversaw the construction of the subject 7-Eleven store, which opened on 7/11/2013. He was there about once per week, including the day before the store opened. The store had use of a portion of the basement which included a storage room and a mechanical room, which contained plumbing, duct work and heating and air conditioning equipment as well as a water filtration system, all equipment having been installed by or for 7-Eleven. He did not recall ever seeing water on the floor of the mechanical room, including on July 10, 2013. He was not aware of the plaintiff's accident until sometime after that date. According to Roemer, since this location was a "corporate store", up until the time the store opened a corporate store manager for 7-Eleven would be responsible for cleaning, and that responsibility shifted to the property owner upon opening day.

Abe Tesser, as the plaintiff's managing agent, oversaw the construction of the 7-Eleven store at 111 John Street. Tesser testified that he did not need to ask permission to gain access to the basement. He testified that it was his understanding that, under the lease terms, all equipment in the mechanical room was installed by 7-Eleven and was the responsibility of 7-Eleven but he did not know if any building-wide water or steam pipes ran through that room. Tesser could not recall if he ever saw any leaks coming from the equipment in the mechanical room. Tesser

testified that on at least one occasion, the building engineer told him there was water on the floor in the mechanical room and he went to inspect it. He observed the water but could not recall where it was located or how much water was on the floor and did not know its source. He may have instructed someone else to clean it up.

II. DISCUSSION

A. The Legal Standards

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of

New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

The rules concerning premises liability are well settled. A landowner has a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017). However, an out-of-possession landlord, that is, one who "has surrendered possession and control over premises leased to a tenant" (Mehl v Fleisher, 234 AD2d 274, 274 [2nd Dept 1996]), generally is not liable for the condition of leased premises unless it is statutorily

obligated to maintain the premises or "'contractually obligated to make repairs or maintain the premises or . . . has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.'" DeJesus v Tavares, 140 AD3d 433, 433 (1st Dept 2016), quoting Vasquez v The Rector, 40 AD3d 265, 266 (1st Dept 2007); see Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (1st Dept 2012).

An out-of-possession landlord also can be liable for defective conditions on its property where it has "through a course of conduct . . . become obligated to maintain or repair the property or a portion of the property which contains the defective condition." Melendez v American Airlines, Inc., 290 AD2d 241, 242 (1st Dept 2002); see Ritto, supra at 889; Colicchio v Port Auth. of N.Y. & N.J., 246 AD2d 464, 465 (1st Dept 1998). Where a lease exists, "the court looks not only to the terms of the agreement but to the parties' course of conduct . . . to determine whether the landowner surrendered control over the property such that the landowner's duty of care is extinguished as a matter of law." Gronski, supra at 380-381; see Mendoza v Manila Bar & Rest. Corp., 140 AD3d 934, 935 (2nd Dept 2016); Davidson v Steel Equities, 138 AD3d 911, 912 (2nd Dept 2016).

In premises liability matters, defendants moving for summary judgment have "the initial burden of making a prima facie

showing that [they] neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." Amendola v City of New York, 89 AD3d 775 (2nd Dept. 2011). "In order to constitute constructive notice, a defect must be visible and apparent for a sufficient length of time to permit the defendant's employees to discovery and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836 [1986])." Atashi v Fred-Doug 117 LLC, 87 AD3d 455, 456 (1st Dept. 2011); see Harrison v New York City Tr. Auth., 113 AD3d 472 [1st Dept 2014]; Lancaster v New York City Tr. Auth., 226 AD2d 145 (1st Dept. 1996).

B. Motion by Defendant 111 John Realty Corp.

In support of its motion for summary judgment, 111 John Realty submits, *inter alia*, the pleadings, its lease agreement with 7-Eleven, the deposition testimony of the plaintiff, as well as the testimony of Eric Romer, a regional project manager for 7-Eleven, and Abe Tesser, of Misrad Associates, a real estate management company.

The lease, effective from June 1, 2013, through May 31, 2023, describes the leased premises on the ground floor and basement levels and also grants the tenant access to common areas of the building. Article 8 of the lease provides that 7-Eleven

was responsible for maintaining the interior of the premises, including plumbing, heating, air conditioning and ventilation systems "at its sole cost, risk and expense." However, in the same article, the landlord retains the "right to enter the premises to perform its obligation hereunder and to access the electrical, plumbing and other mechanical and electrical systems of the building as landlord deems necessary or desirable." The landlord's obligations included a duty to "keep in good repair any plumbing and electrical servicing."

The proof, including the deposition testimony, submitted by 111 John Realty establishes that it was an out of possession landlord, but also shows that it retained access to the premises for limited maintenance purposes and that its managing agent regularly accessed the premises. It also establishes that the managing agent observed water on the floor of the mechanical room on at least one occasion, and he did not know its source and did not know if building wide systems ran through the mechanical room. Thus, 111 John Realty did not meet its burden in the first instance by "making a prima facie showing that [it] neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." Amendola v City of New York, supra at 775. Indeed, in opposition, 7-Eleven also relies upon the deposition testimony of Abe Tesser to show that the landlord and

building employees had access to the mechanical room for maintenance purposes, may have building wide equipment in that room and had some notice of a leak.

Turning to 111 John Realty's motion for a conditional order of summary judgment on the cross-claims for contractual and common-law indemnification, the lease agreement with 111 John Realty provides that 7-Eleven shall indemnify 111 John Realty "excepting in each case any such damages, injuries, claims, liabilities…as shall result from…the negligence of willful misconduct of the Landlord, its agents, employees, or contractors." As discussed above, the papers present a triable issue of fact as to whether it was the landlord, or an employee of the landlord, who caused the wet spot. As there is a triable issue of fact with regard to 111 John Realty's potential negligence in causing the wet spot, summary judgment on contractual indemnification is not granted. Similarly, for common law indemnification, which requires a showing of vicarious liability without any proof of negligence or actual supervision on the part of the movant, (see McCarthy v Turner Const., Inc., 17 NY3d 369 [2011]), summary judgment is not granted, as there is a triable issue of fact regarding 111 John Realty's potential negligence.

Finally, the court notes that while in its Notice of Motion defendant 111 John Realty purports to also move pursuant to CPLR 3211, no such grounds are argued.

C. Motion of Defendant 7-Eleven, Inc.

On 7-Eleven's motion, it is well settled that a defendant moving for such summary judgment in a slip-and-fall case can establish its *prima facie* burden by showing that it did not create the hazardous condition and that it did not have actual or constructive notice of the condition's existence for a sufficient length of time to discover and remedy the issue. See Mitchell v City of New York, 29 AD3d 372 (2006); Irizarry v 15 Mosholu Four, LLC, 24 AD3d 373 (2005). For a defendant to meet its initial burden on the issue of lack of constructive notice, they must offer evidence as to when the area in question was last cleaned or inspected relative to the time of the accident. See Radosta v Schechter, 171 AD3d 1112 (2nd Dept. 2019).

Here, 7-Eleven fails to establish its *prima facie* burden, as it cannot demonstrate that it did not create the hazardous condition or have actual or constructive notice of the wet spot for a sufficient length of time to discover and remedy it. The evidence submitted by 7-Eleven shows that there was no wet spot in the basement at the time Eric Roemer, the project manager for

7-Eleven, inspected it on the morning of the accident, or in the evening following the accident, and that, per the deposition testimony from Abe Tesser, the building manager at the time, the landlord and building employees could access the mechanical room. Although the evidence submitted does raise the possibility of another party causing the wet spot, and narrows the times in which the spill could have occurred, it does not establish the absence of issues of triable fact such that summary judgment is warranted.

In its moving papers,7-Eleven seeks summary judgment on the cross-motions for contractual and common-law indemnification to the extent that such motions would be inapplicable were 7-Eleven granted summary judgment as against the plaintiff. As such, 7-Eleven fails to establish that there are no triable issues of fact regarding 111 John Realty's cross-motion for contractual and common-law indemnification, particularly inasmuch as 7-Eleven fails to establish that 111 John Realty was negligent, and therefore unable to prevail on its claims.

IV. CONCLUSION

Accordingly, it is,

ORDERED that motion of defendant 111 John Realty Corp. for summary judgment (MOT SEQ 003) is denied; and it is further,

ORDERED that the motion of defendant 7-Eleven, Inc. for summary judgment (MOT SEQ 004) is denied.

This constitutes the Decision and Order of the court.

Dated: June 1, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON