SHORT FORM ORDER

INDEX No. 18-601474
CAL. No. 19-00670OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 5-30-19 (002)
MOTION DATE 7-3-19 (003)
ADJ. DATE 7-17-19
Mot. Seq. # 002 - MD
003 - XMD

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JANET CLANCY,

Plaintiff,

- against -

FUR-REAL INC., JCJ FURMAN REALTY CORP., and NORTH STAR CLEANING CO., INC.,

Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers by defendants Fur-Real Inc. And JCJ Furman Realty Corp., dated May 7, 2019; Notice of Cross Motion and supporting papers by plaintiff dated June 10, 2019; Answering Affidavits and supporting papers by plaintiff, dated February 8, 2019; Replying Affidavits and supporting papers by defendants Fur-Real Inc. and JCJ Furman Realty Corp., dated June 24, 2019; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Fur-Real Inc. and JCJ Furman Realty Corp. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by plaintiff for an order granting summary judgment in her favor on the issue of liability is denied.

Plaintiff Janet Clancy commenced this action to recover damages for personal injuries she allegedly sustained on January 26, 2016, when she slipped and fell while walking in a common hallway of a commercial building owned by defendants Fur-Real Inc. (Fur-Real) and JCJ Furman Realty Corp. (JCJ Furman). Plaintiff's complaint alleges that defendants caused, permitted or allowed a dangerous

condition to exist in the interior of the premises, and that such condition caused plaintiff to sustain serious injuries. More specifically, plaintiff alleges in her bill of particulars that defendants were negligent, among other things, in causing or allowing water or another liquid to accumulate on the floor of the premises, and in failing to properly maintain, inspect, and clean the floor at the accident site.

Fur-Real and JCJ Furman now move for summary judgment, arguing that they should not be held liable for the alleged acts of negligence by defendant North Star Cleaning Co., (North Star), an independent contractor, and that they did not create or have actual or constructive notice of the alleged dangerous condition that caused plaintiff to slip and fall. In support of the motion, Fur-Real and JCJ Furman submit, among other things, copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, copies of invoices from North Star, and payment checks to North Star from JCJ Furman. Plaintiff opposes the motion and cross-moves for summary judgment, arguing that Fur-Real and JCJ Furman had a nondelegable duty to maintain the premises in a reasonably safe condition, and that they failed to demonstrate that they lacked notice of the alleged slippery condition. The court notes that North Star has not appeared in the action.

At her examination before trial, plaintiff testified that she was involved in a slip and fall accident on January 26, 2016. She testified that the accident occurred in a hallway outside of her employer's office in a building known as 8 West, owned by Fur-Real in Patchogue, New York. Plaintiff testified that at the time of the accident she worked for Party Rock Entertainment, which maintained an office on the second floor of 8 West. She testified that the hallway on the second floor was common to the building, and that she had access to the hallway for ingress and egress to the Party Rock Entertainment office, as well as to the bathrooms and building exit. Plaintiff testified the flooring of the second floor consisted of linoleum. She testified that on the date of accident she used the hallway to enter the offices of Party Rock Entertainment. Plaintiff testified that after spending twenty minutes opening the Party Rock Entertainment offices, she walked back into the hallway, took three or four steps, and then she slipped and fell. She testified that after she fell, she observed that the floor was oily or greasy, and smelled like pine. She testified the substance was all over her hands and feet as she was lying on the floor, that she was covered with the oily substance when she got up from the floor, and that the oily substance was in an oval shape on the floor. Plaintiff testified that after she was able to get herself up, she sent a text message to Joel Furman, the owner of the building. She testified that approximately fifteen minutes after her text message, Mr. Furman arrived at Party Rock Entertainment and attempted to clean the oily substance of the floor. Plaintiff testified that approximately two weeks after the accident, she had a conversation with Mr. Furman, who indicated that a representative of North Star stated that a new employee had left excess Pine-Sol or Murphy's Oil on the floor.

Joel Furman testified at his examination before trial that Fur-Real is the owner of the premises known as 8 West Main Street, Patchogue, New York. He testified that plaintiff was employed by Party Rock Entertainment, one of tenants in the building. Furman testified that North Star, an independent cleaning service, was used to clean the building, and that, pursuant to an oral agreement, it had been retained in October 2014 to clean the building every other week. Furman testified that North Star set its own cleaning schedule, and its duties included cleaning two bathrooms on the second floor, cleaning the hallway, vacuuming, and occasionally cleaning the tiles and the common staircase. He testified that the second floor of the building had six offices, a common hallway, and bathrooms at the end of the hallway.

Furman testified that the flooring of the common hallway consisted of linoleum. He testified that on January 26, 2016, he received a text message from plaintiff stating that she had fallen in common hallway and that the floor was slippery. Furman testified that after he received plaintiff's text message, he immediately went to the office where plaintiff was working and examined the common hallway. He testified that he observed a "couple of shiny spots on the floor," and he described these spots on the floor as being a "little bit damp." Furman testified that he then went back to his office and got paper towels to clean the spots on the floor. He testified that he was unable to identify the liquid that was on the floor, but that it had a pungent smell. Furman testified that after the incident, he spoke with a representative from North Star, who indicated that the liquid was probably Pine-Sol that had not been diluted with water. He testified that the representative from North Star stated that a new employee had cleaned the building the night before plaintiff's accident.

Liability for a dangerous condition on real property is generally based on ownership, possession, control or special use of such property (*see* ***Casson v McConnell***, 148 AD3d 863, 49 NYS3d 711 [2d Dept 2017). An owner or possessor of real property has a continuous duty to maintain such property in a reasonably safe condition considering all of the circumstances, such as the likelihood and seriousness of injury to others and the burden of avoiding the risk (*see* ***Cupo v Karfunkel***, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003]; *see also* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). A defendant moving for summary judgment in a slip-and-fall case bears the initial burden of establishing, prima facie, that it neither created nor had actual or constructive notice of the alleged hazardous or defective condition (*see* ***Jackson v Jamaica First Parking, LLC***, 91 AD3d 602, 936 NYS2d 278 [2d Dept 2012]; ***Stroppel v Wal-Mart Stores, Inc***, 53 AD3d 651, 862 NYS2d 554 [2d Dept 2008]). The burden cannot be satisfied by pointing out gaps in plaintiff's case (*see* ***Maio v John Andrew, Inc.***, 85 AD3d 741, 924 NYS2d 803 [2d Dept 2011]; ***Williams v JP Morgan Chase & Co.***, 39 AD3d 852, 834 NYS2d 310 [2d Dept 2007]). Furthermore, to satisfy its initial burden on the issue of lack of constructive notice, defendant must offer some evidence as to when the subject area was last inspected or cleaned relative to the time of the plaintiff's fall (*see* ***Maria De Los Angelses Baez v Willow Wood., LP***, 159 AD3d 785, 69 NYS23d 814 [2d Dept 2018]; ***Lombardo v Kimco Cent. Islip Venture, LLC***, 153 AD3d 1340, 60 NYS3d 497 [2d Dept 2017]; ***Santos v 786 Flatbush Food Corp.***, 89 AD3d 828, 932 NYS2d 525 [2d Dept 2011]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]).

The general rule is that a party who retains an independent contractor is not liable for the independent contractor's negligent acts (***Brothers v New York State Elec. & Gas Corp.***, 11 NY3d 251898, 869 NYS2d 356 [2008]; ***Kleeman v Rheingold***, 81 NY2d 270, 598 NYS2d 149 [1993]; ***Nachman v Koureichi***, 165 AD3d 818, 85 NYS3d 185 [2d Dept 2018]). Where one has no control over the means or manner that another employs, it would be inequitable to impose the risk of loss on such person or entity (*see* ***Feliberty v Damon***, 72 NY2d 112, 531 NYS2d 778 [1988]; ***Begley v City of New York***, 111 AD3d 5, 972 NYS2d 48 [2d Dept 2013]). However, several exceptions to the general rule have developed. As relevant here, an owner or possessor of property may be held vicariously liable for the negligence of its independent contractor if such negligence violated the owner's nondelegable duty to maintain the premises in a reasonably safe condition (*see* ***Pesante v Vertical Indus. Dev. Corp.***, 142 AD3d 656, 36 NYS3d 716 [2d Dept 2016]; ***Horowitz v 763 E. Assoc., LLC***, 125 AD3d 808, 5 NYS3d 118 [2d Dept 2015]; ***Grizzell v JQ Associates***, 110 AD3d 762, 973 NYS2d 268 [2d Dept 2013]; ***Olivieri***

v GM Realty Co., LLC, 37 AD3d 569, 830 NYS2d 284 [2d Dept 2007]). "New York Courts have long imposed a special duty on property owners to keep the entrances and passageways of a public building safe for tenants, their visitors, and their employees, all classes of people who come onto the premises for reasonably foreseeable purposes" (***Backiel v Citibank, N.A.***, 299 AD2d 504, 506, 751 NYS2d 492 [2d Dept 2002]). "Whenever the general public is invited into stores, office buildings, and other places of public assembly, 'the owners of such premises is charged with the duty to provide members off the general public with a reasonably safe premises, including a safe means of ingress and egress'" (***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 869, 978 NYS2d 291 [2d Dept 2013] quoting ***Thomassen v J & K Diner***, 152 AD2d 421, 424, 549 NYS2d 416 [2d Dept 1989]). Furthermore, "[t]he use of the term "members of the general public is significant, as it is difficult to conceive of a larger class of protected persons. Clearly the plaintiff must be considered a member of the 'general public.' Indeed it is commonly defined as relating to or affecting all of the people and not limited or restricted to a particular class of persons" (***Backiel v Citibank, N.A.***, *supra* at 507).

Here, the evidence submitted in support of defendants' motion, including the deposition testimony of the parties, did not demonstrate, prima facie, that the incident did not occur in a public area or that plaintiff was not a person protected under the nondelegable duty exception (*see* ***Backiel v Citibank, N.A.***, *supra*; ***Blatt v L'Pogee, Inc.***, *supra*). Moreover, there are issues of fact as to whether the alleged dangerous condition was created by the actions of North Star, and whether Fur-Real and JCJ Furman may be vicariously liable pursuant to a nondelegable duty to keep the common hallway in a reasonably safe condition (*see* ***Grizzell v JQ Associates***, *supra*; ***Olivieri v GM Realty Co.***, *supra*; ***Edwards v BP/CG Center***, 102 AD3d 413, 958 NYS2d 333 [1st Dept 2013]; ***Podlaski v Long Island Paneling Center***, 58 AD3d 825, 873 NYS2d 109 [2d Dept 2009]). Accordingly, both the motion by defendant and the cross motion by plaintiff are denied.

Dated: January 13, 2020

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION