

**Russo v Pina Constr. Corp.**

2021 NY Slip Op 33256(U)

January 12, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 617468/2018

Judge: Martha L. Luft

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 617468/2018  
CAL. No. 202000463OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. MARTHA L. LUFT  
Acting Justice of the Supreme Court

MOTION DATE 9/8/20 (001 & 002)  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 001 MotD  
002 MG

-----X

MARIE RUSSO,  
  
  
  
  
  
  
  
  
  
Plaintiff,

CHARLES G. EICHINGER, P.C.  
Attorney for Plaintiff Russo  
One Suffolk Square, Suite 510  
1601 Veterans Memorial Highway  
Islandia, New York 11749

- against -

MCGIVNEY & KLUGER & COOK, P.C.  
Attorney for Defendant Pina Construction Corp.  
80 Broadway, 23rd Floor  
New York New York 10004

PINA CONSTRUCTION CORP.,  
MARSHALLS, INC., and MARSHALLS OF  
MA, INC.,

MCANDREW, CONBOY & PRISCO ESQS.  
Attorney for Defendants/Third-Party Plaintiff  
Marshalls of MA, Inc.  
1860 Walt Whitman Road, Suite 800  
Melville, New York 11747

Defendants.

Retail Handyman, Inc.  
P.O. Box 151265  
Cape Coral, Florida 33915

-----X

MARSHALLS OF MA, INC.,  
  
Third-Party Plaintiff,  
  
- against -

RETAIL HANDYMAN, INC.  
  
Third-Party Defendants.

-----X

Russo v Pina Construction Corp.  
Index No. 617468/2018  
Page 2

Upon the following papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant Pina Construction Corp., dated July 31, 2020; Notice of Cross Motion and supporting papers by plaintiff, dated August 27, 2020; Answering Affidavits and supporting papers by defendant/third-party plaintiff Marshalls of MA, Inc., dated September 2, 2020; Replying Affidavits and supporting papers by plaintiff, dated September 4, 2020; it is,

**ORDERED** that the motion by defendant Pina Construction Corp., for, inter alia, summary judgment dismissing the complaint against it is granted to the extent provided herein, and is otherwise denied; and it is further

**ORDERED** that the cross motion by plaintiff for partial summary judgment on the issue of defendant Marshalls of MA, Inc.'s liability is granted.

This action was commenced by plaintiff Marie Russo to recover damages for injuries she allegedly sustained August 10, 2018, when she tripped and fell on uneven flooring inside the Marshalls department store located on Route 25A in Miller Place, New York. It is undisputed that defendant/third-party plaintiff Marshalls of MA, Inc. (Marshalls) leased the subject premises from the property's owner, defendant Pina Construction Corp. Pina Construction Corp., asserts cross claims against Marshalls for common law and contractual indemnification. Marshalls filed a third-party action against Retail Handyman, Inc., but it has not appeared in this proceeding.

Pina Construction Corp. (Pina) now moves for summary judgment in its favor as to plaintiff's complaint, arguing that as an out-of-possession landlord it owed plaintiff no duty of care. Pina also moves for summary judgment in its favor as to its cross claims against defendant Marshalls for common law and contractual indemnification, including reimbursement for the costs of defending this action. In support of its motion, Pina submits, among other things, transcripts of the parties' deposition testimony, and a copy of a unexecuted lease agreement.

Plaintiff cross-moves for partial summary judgment in her favor on the issue of Marshalls' liability, arguing that its negligence was the sole proximate cause of her alleged injuries. In support of her cross motion, plaintiff submits an affirmation of her counsel.

Plaintiff testified that at shortly before 1:00 p.m. on the date in question, she was inside the Miller Place Marshall's store. She indicated that she had been to the store well over 20 times previously, and that on this occasion she intended to exchange a pair of shoes. Plaintiff indicated that she browsed the store's shoe department, but could not find a pair she liked. Intending to now return, rather than exchange, the pair of shoes she had brought into the store, plaintiff walked toward the cash registers. Asked to describe the floor along her path of travel, she stated that it was "inexpensive wood" and very "wavy," or uneven. Plaintiff testified that as she walked, looking forward, she tripped on the uneven floor and fell.

Maria Piechocki testified that she has been employed by TJX, the "master company" of Marshalls, for 28 years, and had been working in the subject Marshalls store for two years as an assistant merchandising manager. She indicated that she was present at the time of plaintiff's alleged incident, and came to plaintiff's assistance. Questioned regarding the floor in the area of plaintiff's alleged fall,

Russo v Pina Construction Corp.  
Index No. 617468/2018  
Page 3

Ms. Piechocki described it as “fake wood” laminate flooring, and that it was “buckled” and “raised.” She stated that such buckling was a recurring condition that she observes “[e]very three months,” following the re-waxing of the store’s floors by an outside contractor. Asked if she ever reported the buckling of the flooring, Ms. Piechocki replied in the affirmative, explaining that, every three months, she would inform the “facilities” department, which would then hire “someone” to “pull up the old laminate tiles and lay new ones.” Upon questioning she stated that the Marshalls “home office” was responsible for maintaining the flooring in the store, and that Retail Handyman, Inc., was an entity hired by Marshalls to perform repairs at the premises.

Antonio Militello testified that he has been the sole shareholder of Pina for approximately 35 years, and that it is the sole owner of the property upon which the subject Marshalls store sits. He stated that Pina leases a portion of premises to Marshalls, that Marshalls installed the flooring in question, and that Marshalls had the obligation to maintain the interior of its store.

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

“To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant’s part to plaintiff, breach of the duty and damages” (*Orlando v New York Homes By J & J Corp.*, 128 AD3d 784, 785, 11 NYS3d 76 [2d Dept 2015], quoting *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576, 934 NYS2d 43 [2011]). “An owner of property or tenant in possession of real property has a duty to maintain the property in a reasonably safe condition” (*Costidis v City of New York*, 159 AD3d 871, 871, 70 NYS3d 74 [2d Dept 2018]). Further, a defendant “who has actual knowledge of a recurrent dangerous condition in a specific area can be charged with constructive notice of each specific reoccurrence of the condition” (*D’Amato v Vitale*, 187 AD3d 983, 131 NYS3d 252 [2d Dept 2020]). Although the owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]), “[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct” (*Rodriguez v Sheridan One Co., LLC*, 177 AD3d 801, 801, 110 NYS3d 316 [2d Dept 2019] [internal quotation marks omitted]).

Russo v Pina Construction Corp.  
Index No. 617468/2018  
Page 4

Here, Pina established a prima facie case of entitlement to summary judgment in its favor (*see Rodriguez v Sheridan One Co., LLC, supra; see generally Alvarez v Prospect Hosp., supra*). It demonstrated through the deposition testimony that it was an out-of-possession landlord and that Marshalls had a duty to maintain the flooring at the subject premises. No party opposes Pina's application. Accordingly, that branch of Pina's motion seeking summary judgment dismissing the complaint against it is granted.

In light of the foregoing, Pina's application for a finding that Marshalls was obligated to indemnify Pina, pursuant to common law or contract, against claims in this action is largely moot. However, regarding that portion of Pina's application seeking reimbursement by Marshalls for funds expended by Pina in its defense of this action, Pina fails to establish a prima facie case of entitlement thereto. "The right to contractual indemnification depends upon the specific language of the contract [and] [t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). Pina argues that the lease agreement between it, as landlord, and Marshalls, as tenant, contains a provision obligating Marshalls to indemnify Pina in various circumstances. However, the copy of a lease agreement submitted by Pina in support of its motion is not in admissible form (*see United Specialty Ins. v Columbia Cas. Co.*, 186 AD3d 650 [2d Dept 2020]; *O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 63 NYS3d 504 [2d Dept 2017]; *see generally Zuckerman v City of New York, supra*). Specifically, such document is unsigned and unauthenticated. Therefore, the Court has no admissible evidence of Marshalls' obligation, if any, to indemnify Pina (*see generally Valente v Dave & Buster's of NY, Inc.*, 132 AD3d 973, 19 NYS3d 533 [2d Dept 2015]). Accordingly, that branch of Pina's motion for an order finding that Marshalls is contractually obligated to defend it in this action is denied.

As to her cross motion, plaintiff has established a prima facie case of entitlement for partial summary judgment in her favor as to Marshalls' liability (*see Glockenberg v Costco Wholesale Corp.*, 110 AD3d 952, 973 NYS2d 360 [2d Dept 2013]). Through reference to her own testimony, as well as that of Ms. Piechocki, plaintiff demonstrated, prima facie, that there was a defective condition present at the subject premises, that Marshalls had actual notice of the recurring defective condition, that Marshalls had an obligation to remedy the defective condition, and that such condition caused her alleged fall. The burden then shifted to Marshalls to raise a triable issue (*see generally Vega v Restani Constr. Corp., supra*).

In opposition to plaintiff's cross motion, Marshalls argues that it did not have notice of the alleged defective condition, and that it was "trivial in nature and thus, not actionable." It further argues that triable issues remain as to plaintiff's comparative negligence. Initially, the Court notes that a plaintiff "is no longer required to show freedom from comparative fault in establishing his or her prima facie case" (*Ashby v Estate of Encarnacion*, 178 AD3d 763, 765, 111 NYS3d 894 [2d Dept 2019]; *see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). Any apportionment of liability would be determined by the factfinder at the damages phase of any trial. As to Marshalls' contention that the flooring defect upon which plaintiff allegedly tripped was trivial, it has failed to adduce any evidence in support of that argument, such as photographs, testimony, or an affidavit of an expert. It is not plaintiff's burden on a cross motion for partial summary judgment to demonstrate that the alleged

Russo v Pina Construction Corp.  
Index No. 617468/2018  
Page 5

defect was not trivial. Rather, it is Marshalls' burden to offer some evidence of its triviality. It has not done so. Accordingly, plaintiff's cross motion for partial summary judgment on the issue of Marshalls' liability is granted.

Dated: January 12, 2021

Martha L Luft

A.J.S.C.

**HON. MARTHA L. LUFT**

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION