Kaley v Trump Vil. Section 4, Inc.
2022 NY Slip Op 33599(U)
October 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 506893/2020
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of October, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

FRANCINE KALEY,
Plaintiff,

- against -

TRUMP VILLAGE SECTION 4, INC.
And MAJOR ELEVATOR CORP.,
Defendants.

- X

DECISION/ORDER

Index No. 506893/2020
Motion Seq. # 3

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations) Annexed	70-81
Opposing Affidavits (Affirmations)	82-83; 87-95
Reply Affidavits (Affirmations)	96

Upon the foregoing papers, defendant Trump Village Section 4, Inc. (Trump Village) moves for summary judgment (in motion sequence [mot. seq.] three) dismissing the complaint on the issue of liability, in this action which arises from a slip/trip and fall accident, or, in the alternative, granting it summary judgment on its cross-claims against the co-defendant. For the reasons which follow, both branches of the motion are denied.

Background

On March 19, 2020, plaintiff Francine Kaley (Kaley) commenced this action against defendants Trump Village and Major Elevator Corp. (Major) by filing a summons and a

complaint. The complaint alleges that on August 24, 2019, Kaley sustained personal injuries due to an unsafe condition in the 23rd floor hallway at the premises, located at 2944 West 5th Street, Brooklyn, NY. She alleges that she slipped or tripped on a piece of Masonite which had been placed on the floor to protect the flooring while elevator repair/replacement work was performed by defendant Major. The elevator modernization work had started in November, 2018, almost a year before plaintiff's accident. At the time of the accident, Kaley was a residential tenant at the premises. Both defendants answered the complaint, and this action is now on the trial calendar.

<u>The motion for summary judgment on liability</u>

Movant Trump Village moves to dismiss the complaint on the grounds that "Plaintiff has clearly failed to establish or provide any evidence that Trump Village either created the allegedly defective condition or had actual or constructive notice of the allegedly defective condition" [Aff ¶22]. This seems to be addressed to the part of plaintiff's claim that either the Masonite boards had curled up, or the tape holding the Masonite boards together had curled up, which caused her to trip. Counsel then [¶23] turns to her claim that there was a greasy substance on the floor, and continues "plaintiff repeatedly testified and admitted that the grease that caused her to fall was created by the employees of Major Elevator who were doing repair and installation work at the Premises, and not by any associated with Trump Village."

Movant supports the motion with the pleadings, Trump Village's contracts with Major, and the EBT transcript for plaintiff's deposition. Movant Trump Village did not include either of defendants' EBT transcripts in the motion papers.

At her deposition, plaintiff testified that a few days before her accident, there was a big "blotch" of grease on the Masonite on her floor, and she reported it to a porter. When she came home that day, it had been cleaned up. But [Doc 80 Page 58] "it's not like they changed the Masonite, they just wiped it up so it just smeared more." At the time of her accident, she left her apartment and "I slipped on the old grease, and as I was slipping my (left) foot got caught (stuck) on that old tape that was there, that tape that was like curling" and she fell to the floor [Page 63].

In opposition to the motion, co-defendant Major provides solely an attorney's affirmation. Counsel avers that Trump Village fails to make a prima facie case for summary judgment. He quotes plaintiff's testimony and Trump Village's EBT, which was only subsequently e-filed by plaintiff. Plaintiff also opposes, and provides an attorneys' affirmation, the EBT transcript of Joseph Gaba, a senior assistant manager for Trump Village, and an affidavit from another tenant at the premises. Counsel for plaintiff also avers that the court should find that Trump Village has failed to make a prima facie case for summary judgment.

Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of

law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the

opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Discussion

Because the plaintiff seems to be asserting claims of both a transient greasy condition and of a hazardous premises condition with regard to the "curling" of the Masonite boards/tape, the court will address each separately.

In order to establish freedom from liability in a slip and fall case, that is, where the allegation is of a transient condition, the defendant, "To meet its initial burden on the issue

of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956, 2021 NY Slip Op 06386 [2d Dept 2021]; *Jeremias v Lake Forest Estates*, 147 AD3d 742 [2d Dept 2017]; *Ellis v Sirico's Catering*, 194 AD3d 692, 693 [2d Dept 2021]). Counsel for defendant Trump Village in this motion makes no mention whatsoever of this burden of proof in his affirmation in support, nor does movant provide any evidence of when the area was last cleaned or inspected before plaintiff's accident. Thus, movant fails to make a prima facie case for dismissal.

A property owner may be liable for a trip and fall on its property if it "'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2010], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see Banscher v Actus Lend Lease, LLC,* 132 AD3d 707, 709 [2015]). In order to establish freedom from liability in a trip and fall case, that is, where the allegation is of a hazardous condition, the defendant "has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence" (*see Guzman v Jewish Bd. of Family & Children's Servs., Inc*., 103 AD3d 776, 777, 960 NYS2d 151 [2013]; *Kruger v Donzelli Realty Corp*., 111 AD3d 897, 975 NYS2d 689 [2013], *lv denied* 22 NY3d 864, 9 NE3d 368, 986 NYS2d 18, 2014 NY Slip Op 68066 [2014]). "To constitute 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 [the defendant] to discover and remedy it" (*Garris v Lindemann*, 117 AD3d 785, 786 [2d Dept 2014]). Here, with only the plaintiff's EBT transcript and no other evidence,

defendant Trump Village fails to make a prima facie case for summary judgment. It must be noted that in opposition, plaintiff provides the EBT transcript of Trump Village's witness, and he testified that it was Trump Village's employees who had installed the Masonite [Doc 90 Page 49 Lines 19-20]. And that their employees regularly clean and mop the hallway floors. Whether the Masonite had curled, or the tape holding the Masonite together had curled, and if either of these situations created an inherently dangerous condition, is a question of fact for the jury (*see Carpenter v 130 W. Merrick, Inc.*, 71 AD3d 715 [2d Dept 2010]; *Naletilic v Dan's Key Food*, 47 AD3d 903 [2d Dept 2008]; *Rivera v YMCA of Greater N.Y.*, 37 AD3d 579, 580 [2d Dept 2007]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [2d Dept 2004]; *Greenstein v R & R of G.C., Inc.*, 50 AD3d 637 [2d Dept 2008]). But there is no dispute that if the condition was hazardous, it was a condition created by Trump Village, not major. This would be so whether the negligence was with regard to the installation of the Masonite, or with regard to the cleaning/mopping of it, if doing so with liquids caused the "curling."

In considering a summary judgment motion, the court is required to view the evidence in the light most favorable to the nonmoving party, and afford her/him/it the benefit of every favorable inference (*see Ruiz v Griffin*, 71 AD3d 1112, 1115, 898 NYS2d 590 [2010]) As the Second Department explains in *LeBlanc v Skinner*, 103 AD3d 202, 211-212 [2d Dept 2012], "a motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' (*Ruiz v Griffin*, 71 AD3d at 1115, quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348, 741 NYS2d 708 [2002]). Resolving questions

of credibility, determining the accuracy of witnesses' testimony, and reconciling the testimony of the witnesses are for the trier of fact (*Gille v Long Beach City School Dist*., 84 AD3d 1022, 1023, 923 NYS2d 649 [2011]; *see Republic Long Is., Inc. v Andrew J. Vanacore, Inc*., 29 AD3d 665, 815 NYS2d 163 [2006]; *Harty v Kornish Distribs*., 119 AD2d 729, 501 NYS2d 142 [1986])."

The Motion for Summary Judgment on Trump Village's Cross-Claims

In its answer, filed June 18, 2020, Trump Village asserts three cross claims against co-defendant Major for contribution (first), common law indemnification (second) and contractual indemnification (third). In the motion, counsel seeks summary judgment on its claims for common law and contractual indemnification as against Major.

Whether seeking full or conditional indemnification, on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability" (see *Winter v ESRT Empire State Bldg., LLC*, 201 AD3d 844, 845 [2d Dept 2022]).

The indemnification clauses in the contracts, one for elevator maintenance and one for the modernization work, are broad, but of course Major cannot be required to indemnify Trump Village for its own negligence. With the facts as described above, the court cannot conclude that Trump Village was free of negligence and that its liability is solely vicarious. Until the fact finder determines whether Major was negligent, and if so, what percentage of the overall negligence is attributable to Major, to Trump Village, and to plaintiff, the contractual provisions for contribution and "partial indemnity" cannot be applied or

enforced. Thus, this application will have to wait until liability for the accident is determined.

Accordingly, it is hereby

ORDERED that the branch of defendant Trump Village's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the branch of defendant Trump Village's motion for summary judgment on its cross-claims against Major is also denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.