SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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EDWARD SCHOCK and SYLVIA SCHOCK,

Plaintiffs,

-against-

608 COMPANY, LLC, SWISS CENTER, INC. and KABACK ENTERPRISES, INC.,

Defendants.

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608 COMPANY, LLC and SWISS CENTER, INC.,

Third-Party Plaintiffs,

-against-

PERFECT BUILDING MAINTENANCE,

Third-Party Defendant.

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Index No.: 153136/2012

DECISION AND ORDER

MOTION SEQUENCE NOS. 002, 003

Nancy M. Bannon, J.:

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

I. INTRODUCTION

This is an action to recover damages for personal injuries allegedly sustained by Edward Schock (hereinafter the plaintiff) on July 12, 2011, when he slipped on water on a sloped, setback roof located at 608 Fifth Avenue, New York, New York (the premises).

The defendants third-party plaintiffs 608 Company, LLC (608 Company), and Swiss Center, Inc. (Swiss) (together the Swiss defendants) owned the premises. The defendant Kaback Enterprises, Inc. (Kaback), is an air conditioning installation, maintenance, and repair company.

The plaintiff was a porter and freight car operator employed by the third-party defendant Perfect Building Maintenance (PBM), a company retained by Swiss to clean and maintain the premises. In motion sequence number 002, the Swiss defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, all cross claims, and all counterclaims against them and on their third-party cause of action for contractual indemnification against PBM. In motion sequence number 003, Kaback moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

II. BACKGROUND

A. The Plaintiff's Deposition Testimony

The plaintiff testified at his deposition that, on the day of his accident, he was employed by PBM as a freight car operator and porter. His duties included sweeping and mopping the freight area and the outside of the premises, operating the freight car, and dropping off deliveries. He reported to, and only took instruction from, the building supervisor, Walter Woychowski, who was also a PBM employee.

The plaintiff asserted that, on July 9, 2011, he observed a leak coming from the ceiling of the kitchen in Alfredo's Kitchen, a restaurant located on the first floor of the premises, and called Woychowski that day to inform him of the leak.

According to the plaintiff, on July 12, 2011, he went to the window of an office located on the third floor of the premises to see if he could ascertain the source of the leak. From that window, he was able to view a "setback area" located on a roof between the second and third floors of the premises where an air conditioning unit had been installed. The plaintiff testified

that he observed a condensation pipe sticking out of a wall on that roof, water dripping out of the pipe, and a garden-type hose nearby that appeared as if it had been recently disconnected from the pipe. As the plaintiff recounted it, at approximately 1:30 p.m. on that date, he and Woychowski descended a ladder from the third floor onto the roof and, once there, entered an air conditioning room leading to another ladder that afforded them access to the portion of the roof where the air conditioning units had been installed. As explained by the plaintiff, in order to reach the leak from there, and reattach the hose to the pipe, it was necessary for him to step down onto the roof from a ledge or parapet situated two to three feet above the roof.

The plaintiff explained that the accident occurred when he squatted and then leapt from the ledge or parapet and onto the roof. He testified that the roof was both pitched and wet and that, when he stepped with his left foot down and onto the roof, that foot slipped out from underneath him, causing him to fall onto the surface of the roof. Based upon the amount of water on his shirt following the accident, the plaintiff opined that between 1 and 1 1/2 inches of water covered the relevant portion of the roof at the time of the accident.

The plaintiff further testified that, after the accident, Woychowski apologized to him, telling him that he could not wait for Kaback to arrive to try to fix the leak, inasmuch as water was already beginning to leak into a men's clothing store located near the restaurant.

B. Deposition Testimony of Walter Woychowski

Woychowski testified that he was employed by PBM as the building superintendent for the premises on the day of the accident. He described the premises as improved by a 14-story commercial building. Woychowski explained that it was his responsibility to take care of

tenants' complaints, clean bathrooms within the building, and make sure that everything at the premises ran smoothly. In addition, Woychowski stated that he supervised the work both of the plaintiff and Ralph Medina, a handyman.

Woychowski averred that, on the day of the accident, he was notified by building security that Alfredo's Kitchen, a tenant at the premises, had a leak in its kitchen, which was the first time that he had ever received any leak complaints from that tenant. Woychowski also maintained that, prior to the day of the accident, the plaintiff never notified him of any leaks at Alfredo's.

According to Woychowski, after he received the complaint, he, the plaintiff, and two other men went to the roof of the premises, where they observed water "dripping" from a pipe, which stuck out of a window of the mechanical room located on the second floor. Woychowski testified that this was the first time that he observed a leak flowing out of that pipe.

Woychowski asserted that the plaintiff was injured when, after stepping off a parapet wall and onto the portion of the roof where the pipe was located, the plaintiff slipped on water that had accumulated there. Woychowski's understanding was that it had been the plaintiff's intention to reattach a hose to the pipe. When asked why the water was leaking from the pipe, Woychowski responded, "Well, Kaback I guess said there was a hose, supposed to be a hose on it and the hose was disconnected, dislodged I guess." As Woychowski recounted it, after the accident, he noticed that there was approximately an inch of water covering the surface of the roof near the pipe, and then called Kaback "to get that unit checked."

Woychowski described the roof as being located on the outside of the premises and, as such, water usually landed on it when it rained, and was then transported from the roof via a drain. Woychowski maintained that, prior to the accident, he never observed any problems with

water drainage on the roof, and that it was the porter's responsibility to clean the setback and make sure that the drain remained clear of clogs.

C. Deposition Testimony of Lisa Acampura

Lisa Acampura testified that, on the day of the accident, nonparty RFR Realty, LLC (RFR), managed the premises, and that she was employed by RFR as the assistant property manager of three buildings, including the premises, that were all owned by Swiss. Acampura explained that her duties included monthly inspections of the premises, including its several roofs. She further explained that the roof between the second and third floors of the premises was denominated as a "setback," which housed mechanical equipment, including a small cooling tower and air conditioning units.

Acampura asserted that RFR retained PBM pursuant to a contract (the PBM Contract), to provide cleaning services at the premises. Acampura averred that she personally supervised the plaintiff, Woychowski, Medina, and all PBM employees. As she described it, while PBM performed basic repairs and general maintenance at the premises, Woychowski contracted out the larger maintenance items to various vendors such as Kaback, which entered into a service contract requiring it to perform general maintenance on the building's air conditioning units four times per year. Acampura stated that Kaback also repaired the units on an as-needed basis.

Acampura explained that the protocol at the premises was that building leaks were reported directly to Woychowski, who would then investigate the situation, but that if Woychowski were not able to remedy an air conditioning leak, he called Kaback to do so. Acampura did not recall whether, prior to the date of the accident, Kaback was ever called to

repair the air conditioning units at the premises. Acampura maintained that she never observed any condensation or flooding on the roof, nor did she ever receive any complaints regarding such conditions.

Acampura further testified that Woychowski notified her of the accident, but that when she asked him what caused the accident, he could not state the cause. She also noted that, at her instruction, Woychowski filled out an incident report.

D. Deposition Testimony of James Justice

James Justice testified that, on the day of the accident, he was Kaback's vice-president of servicing and that, as such, he was responsible for all aspects of Kaback's service department, including the maintenance and servicing of heating and air conditioning units. He stated that, pursuant to a service agreement, Swiss hired Kaback to service the air conditioners at the premises, including the unit at issue in this case. Justice asserted the none of the condensing units or cooling towers at the premises had hoses attached to them.

E. The Kaback Work Orders

Kaback's work order # 208594, dated June 6, 2011, six weeks prior to the accident, states that Kaback performed the following work:

> "Upon arrival, find drain pan clogged; vacuum pan out completely; blow out vacuum drain line; find clear hose attached to stub of drain line in set-back, restricting flow; remove and fit tubing to lengthen drain line, away from building and window sill. Unit draining normally"

In addition, Kaback's work order # 220320, dated July 12, 2011, the day of the accident,

indicates that Kaback employees arrived at the premises at 11:30 on that morning, more than two hours prior to the time of the accident, and checked out at 12:45 p.m. in connection with work performed in Suite 310 of the building, but that no work was performed on the setback of the cooling tower. This work order described the work performed by Kaback at that time as follows: "[b]low drain line with CO2, dry up unit, test light water operation at pump and drain pipe . . . check water leak, need cleanup [on] roof [and] drain pipe building job." Kaback's work order # 220321, also dated July 12, 2011, indicates that Kaback employees performed work in Suite 210 from 1:15 p.m. to 2:45 p.m., and that no work was undertaken on the setback of the cooling tower in connection with that order.

III. DISCUSSION

A. Standards Applicable to Summary Judgment Motions

"'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.'" Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept. 2006), quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept. 2006), citing Zuckerman v City of New York, 49 NY2d 557 (1980); see DeRosa v City of New York, 30 AD3d 323 (1st Dept. 2006). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224 (1st Dept. 2002).

B. Negligence Cause of Action Against the Swiss Defendants (motion sequence 002)

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause." Kenney v City of New York, 30 AD3d 261, 262 (1st Dept. 2006); see Marasco v C.D.R. Electronics Sec. & Surveillance Sys. Co., 1 AD3d 578 (2nd Dept. 2003); Zavaro v Westbury Prop. Inv. Co., 244 AD2d 547 (2nd Dept. 1997).

As to the Swiss defendants, "[i]t is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances." Waiters v Northern Trust Co. of N.Y., 29 AD3d 325, 326 (1st Dept. 2006). Therefore, the Swiss defendants, as owners of the premises, owed a duty of care to the plaintiff to keep the premises safe from slipping.

> "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof"

Smith v Costco Wholesale Corp., 50 AD3d 499, 500 (1st Dept. 2008) (citations omitted); see Manning v Americold Logistics, LLC, 33 AD3d 427 (1st Dept. 2006); Mitchell v City of New York, 29 AD3d 372 (1st Dept. 2006); Zuk v Great Atl. & Pac. Tea Co., Inc., 21 AD3d 275 (1st Dept. 2005).

"To constitute constructive notice, a defect must be visible and apparent and . . . must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986); see Seneglia v FPL Foods, 273 AD2d 221 (2nd Dept. 2000). A general awareness of the

existence of a dangerous condition does not supply the requisite notice. Rather, the plaintiff must ultimately prove that the defendant had notice of the specific defect that allegedly caused the accident. See Piacquadio v Recine Realty Corp., 84 NY2d 967 (1994).

The plaintiff alleges that he was caused to slip and fall because water, which allegedly leaked from the pipe of the air conditioning unit onto the roof, accumulated on the roof, creating a hazardous condition. The plaintiff argues that, inasmuch as he testified that the leak existed for at least four days prior to the accident, a question of fact exists as to whether the Swiss defendants had constructive notice of the unsafe condition.

The Swiss defendants established that, at the time of the accident, the plaintiff, his supervisor, and his coworkers were on their way to remedy the leak and consequent accumulation of water on the roof. With respect to an owner, "a maintenance or cleaning worker has no claim of law for injuries suffered from a dangerous condition that he or she was hired to remedy." Waiters v Northern Trust Co. of N.Y., supra, at 327; see Jackson v Board of Educ. of City of N.Y., 30 AD3d 57 (1st Dept. 2006). In opposition to the Swiss defendants' showing that part of the plaintiff's responsibility as a porter was to clean up the water that had accumulated on the roof, the plaintiff failed to raise a triable issue of fact as to whether he had no such responsibility, or whether some exception to the general rule was applicable to his accident. For this reason alone, the Swiss defendants cannot be held liable to the plaintiff.

In any event, the Swiss defendants also established their prima facie entitlement to judgment as a matter of law by showing that they did not create the dangerous condition, and had no actual or constructive notice thereof. The plaintiff also failed to raise a triable issue of fact in opposition to that showing. Indeed, a review of the record reveals no evidence to suggest that the

Swiss defendants had actual or constructive notice of the unsafe condition that caused the accident. Neither the condition of the setback roof where the air conditioning units were installed nor the water accumulated thereon were visible and apparent for a sufficient period of time, as no one had occasion to climb up to the roof in the days leading up to the accident. See generally Feuerherm v Grodinsky, 124 AD3d 1189 (3rd Dept. 2015).

Thus, the Swiss defendants are thus entitled to summary judgment dismissing the negligence cause of action insofar as asserted against them.

C. The Swiss Defendants' Contractual Indemnification Claim Against PBM (motion sequence 002)

In the PBM Contract, RFR is identified as a "[m]anager," as an "agent for [Owner/Entity]," and as a "Customer." The PBM Contract describes PBM's scope of work as including "all phases of building services throughout the premises including, but not limited to . . . roof/roof setbacks." In addition, the PBM Contract contains an indemnification provision, which states, in pertinent part, as follows:

> "[PMB] agrees that, to the fullest extent permitted by law, [PMB] shall indemnify Customer, Owner, Manager, any mortgagee of the Property, and superior lessor of the Property and their respective partners, members, managers . . . and any other parties claiming by, through or under Customer, whether or not named herein . . . and hold them harmless and defend them with counsel of Customer's choice from and against all claims, damages, losses, expenses, settlements, judgments, costs, fees (including attorneys' fees) and expenses arising out of or resulting from [PBM's] or [PBM's] Employees' acts or omissions, performance of, or failure to perform, the Services" (emphasis added).

Further, an amendment to the PBM Contract was executed on January 1, 2011, wherein Swiss was identified as the "Owner".

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 (1987), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see Tonking v Port Auth. of N.Y. & N.J, 3 NY3d 486 (2004); Torres v Morse Diesel Intl., Inc., 14 AD3d 401 (1st Dept 2005).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability. Where, as here, the subject indemnification provision obligates the indemnitor to pay the indemnitee for all losses "arising out of" its conduct (see Burlington Ins. Co. v New York City Tr. Auth., 29 NY3d 313 [2017]), "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant.'" De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 (1st Dept. 2003) (citation omitted); see Keena v Gucci Shops, 300 AD2d 82 (1st Dept. 2002).

Here, the plaintiff's accident "arises out of" of PBM's work. Nonetheless, in light of the dismissal of the main action against the Swiss defendants, they are only entitled to summary judgment on so much of the third-party cause of action for contractual indemnification as seeks to recover the costs, expenses, and attorneys' fees that they incurred in defending the action. The remaining portions of that cause of action must be dismissed as academic. See Payne v 100 Motor Parkway Assoc., LLC, 45 AD3d 550 (2nd Dept. 2007).

D. Negligence Cause of Action Against Kaback (motion sequence 003)

Kaback, unlike the Swiss defendants, was not an owner and thus did not owe a common-

law duty to the plaintiff to maintain the premises in a safe condition. Rather, Kaback was contractually obligated to the Swiss defendants to maintain and repair air conditioners at the premises. As such, a duty of care to a noncontracting party such as the plaintiff can only be imposed upon Kaback if, in the course of discharging its contractual obligations, (a) it created an unreasonable risk of harm to others, increased that risk, or launched a force or instrument of harm, (b) the plaintiff suffered injury as a result of a reasonable reliance upon its continuing performance of a contractual obligation, or (c) it entirely displaced the Swiss defendants' duty to maintain the premises safely. See Espinal v Melville Snow Contrs., 98 NY2d 136, 138 (2002); see also Church v Callanan Indus., 99 NY2d 104 (2002); Moch Co. v Rensselaer Water Co., 247 NY 160 (1928); Timmins v Tishman Constr. Corp., 9 AD3d 62 (1st Dept. 2004).

"[A] contracting defendant moving for summary judgment need negate only those exceptions [to the Espinal rule] that were expressly pleaded by the plaintiff or expressly set forth in the bill of particulars." Mavis v Rexcorp Realty, LLC, 143 AD3d 678, 679 (2nd Dept. 2016). In his bill of particulars, the plaintiff alleges, as relevant here, only that Kaback "caused and created the dangerous conditions complained of" and "negligently permitt[ed] liquid to leak from the subject air conditioning vent." To the extent that these allegations are the equivalent of asserting that Kaback launched a force or instrument of harm, Kaback established, prima facie, that it did not do so. Prior to the date of the accident, the only relevant work that Kaback did in the setback area was on June 1, 2011, when it replaced a clear hose that was restricting water flow to a drain line, and replaced it with tubing to lengthen the drain line away from the building. Inasmuch as this work was undertaken six weeks prior to the accident, there were no complaints or problems with leaks until three days prior to the accident, and Kaback's work on the date of

the accident did not encompass activity on the roof, Kaback made a prima facie showing that it did not create the slippery condition present on the roof on the day of the accident.

Inasmuch as the accumulation of water on the roof began on July 9, 2011, and was not cleaned up until July 12, 2011, Kaback also demonstrated, prima facie, that it did not increase the risk to the plaintiff beyond that which existed before it began its work on July 12, 2011, since it showed that its work on that date in Suite 310 did not cause an additional accumulation or cause the existing accumulation to spread to that portion of the roof where the plaintiff fell. See generally Church v Callanan Indus., supra.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the branch of the motion of the defendants third-party plaintiffs 608 Company, LLC, and Swiss Center, Inc., which is for summary judgment dismissing the complaint, all cross claims, and all counterclaims against them (SEQ 002) is granted, and the complaint, all cross claims, and all counterclaims are dismissed as against the the defendants third-party plaintiffs 608 Company, LLC, and Swiss Center, Inc.; and it is further,

ORDERED that the branch of the motion of the defendants third-party plaintiffs 608 Company, LLC, and Swiss Center, Inc., which is for summary judgment on their third-party cause of action for contractual indemnification as against the third-party defendant Perfect Building Maintenance (SEQ 002) is granted to the extent that they are awarded summary judgment on so much of that cause of action as seeks contractual indemnification for the costs, expenses, and attorneys' fees that they incurred in defending this action, the motion is otherwise

denied, and so much of that cause of action as seeks contractual indemnification for items other than costs, expenses, and attorneys' fees is dismissed as academic; and it is further,

ORDERED that the motion of the defendant Kaback Enterprises, Inc., for summary judgment dismissing the complaint and all cross claims against it (SEQ 003) is granted, and the complaint and all cross claims are dismissed as against Kaback Enterprises, Inc.; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: August 29, 2017

J.S.C.

HON. NANCY M. BANNON