

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

IAS PART 12

- - - - - x

ROBERT DESOUSA,

Plaintiff,

Index No.: 5578/05

- against -

Motion Date: 1/2/08

MADISON THIRD BUILDING COMPANIES, LLC,

Motion No.: 2

Defendant.

Motion Seq. No. 1

- - - - - x

MADISON THIRD BUILDING COMPANIES, LLC,

Third-Party Plaintiff,

Index No. 350298/07

- against -

DA BICE USA, INC.,

Third-Party Defendant.

- - - - - x

The following papers numbered 1 to 22 on this motion:

	<u>Papers Numbered</u>
Madison Third Building Companies, LLC's Notice of Motion-Affirmation-Affidavit(s)- Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	5-7
Da Bice USA, Inc.'s Affirmation in Partial Opposition & Supplemental Affirmation in Support-Exhibits-Service	8-11
Madison Third Building Companies, LLC's Reply Affirmation-Exhibit(s)	12-13
Da Bice USA, Inc.'s Notice of Cross-Motion Affirmation-Service-Exhibits	14-17
Defendant Madison's Affirmation in Partial Opposition-Service-Exhibits	18-20
Da Bic USA, Inc.'s Reply Affirmation	21-22

By amended notice of motion, defendant, Madison Third Building Companies, LLC (Madison), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of the complaint.

Third-party defendant, Da Bice USA, Inc. (Bice), files an affirmation in partial opposition and cross-moves for dismissal of the third-party complaint, pursuant to CPLR § 1010 and alternatively, a stay of the trial of this action pursuant to CPLR § 2201 and/or severing the third-party action pursuant to CPLR § 603 on the grounds that the third-party action is barred by laches.

Plaintiff files an affirmation in opposition to defendant Madison's motion for summary judgment.

Defendant Madison files an affirmation in partial opposition to third-party defendant's cross-motion and a reply to the opposition to their motion. Third-party defendant Bice, files a reply and a "Supplemental Affirmation in Response," not to be confused with an improper "sur-reply." Flores v. Stankiewicz, 35 AD3d 804, 805, 827 NYS2d 281 (self-entitled "supplemental affirmation" should not have been considered by the court).

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a slip or trip and fall accident on November 4, 2004, inside the premises located at 7 East 54th Street, New York, N.Y. Plaintiff, an employee of the restaurant, Bice, was walking down the stairs to the basement carrying vegetables when he tripped or slipped and fell.

The stairs, plaintiff maintains, were wet and slippery. Defendant Madison points out that plaintiff was not sure what caused the stairs to be slippery, but offered the possibility that it was from melting ice from the ice machine near the top of the stairs, or a leak from the ceiling of the basement.

Defendant Madison, the owner of the building which houses the third-party defendant Bice restaurant, argues that the action should be dismissed as against them as they owed no duty to plaintiff since such duty was assumed by the tenant Bice. Moreover, should the Court find that defendant Madison owed a duty to plaintiff, Madison did not create or have notice of the dangerous condition alleged by plaintiff. Therefore, defendant Madison seeks summary judgment and dismissal of the complaint as against them, or alternatively summary judgment declaring their entitlement to indemnification from Bice.

Madison maintains that Bice is required to indemnify them, pursuant to the lease agreement between them, specifically Art. 21.02. Moreover, Madison maintains that pursuant to Article 15, entitled Repairs and Maintenance, and in particular section § 15.01, defendant Bice, the tenant herein, shall "take good care of," and make all repairs for, among other things, plumbing. (See, defendant's Exh. E, Lease Agreement, Article 15). Section 15.02 requires the Landlord (Madison) to make repairs to, among other things, fixtures, appurtenances, systems and facilities, except...plumbing...installed by the Tenant (Bice).

The deposition testimony and other evidence submitted by defendants does not make clear which, if any, of the pipes alleged to have been leaking, were installed by defendant Bice or were otherwise the responsibility of defendant landlord (Madison).

Defendant Bice points out that plaintiff alleges in his bill of particulars that the accident was the result of negligent repair and/or maintenance by Madison; to wit, leaking pipes in the basement ceiling which caused water on the stairs. Plaintiff mentioned the possibility that there was water on the landing at the top of the stairs from the ice machine for the first time at his deposition.

Moreover, Bice maintains, plaintiff states at his deposition that he had seen leaking pipes from the kitchen above the stairs to the basement where he fell in the past, but he wasn't sure where the water came from on this occasion. He did describe the water as covering all the stairs, from one side to another.

In the affidavit of Executive Chef, Silverio Chavez, also submitted by Bice, Chef Chavez maintains that the kitchen floor in front of the stairway in question was dry and clean on the date of the accident. Mr. Chavez, who was present on that day, also maintains that the stairs were dry and clean.

Plaintiff responds that on the day of the accident he did see the ceiling leaking. (Plaintiff's EBT, at p. 70, lines 5 to 15). Plaintiff also maintains that the lease upon which defendant Madison relies for the proposition that they owed no duty to plaintiff requires defendant Madison, the owner of the building to keep and maintain the building in good repair (see defendant's Exh. E, subject lease, § 15.02).

In their cross-motion submitted herein, third-party defendant Bice maintains initially, that the third-party complaint should be dismissed pursuant to CPLR § 1010. The Court

notes that the alternative relief sought by defendant Bice in their cross-motion, to stay the matter allowing for further discovery has in fact been granted. On December 11, 2007, the matter was marked "stayed" by the Hon. Martin J. Schulman in the Trial Scheduling Part (TSP).

"As a general rule, liability for a dangerous condition on property is predicated on ownership, occupancy, control, or special use of the property (see Warren v. Wilmorite, Inc., 211 AD2d 904; Rosato v. Foodtown, 208 AD2d 705; Farrar v. Teicholz, 173 AD2d 674)." Millman v. Citibank, 216 AD2d 278, 627 NYS2d 451 (2d Dep't 1995).

There remains a question of material fact as to whether or not the pipes above the staircase to the basement were the source of the water that plaintiff alleges caused the stairs to be slippery, thereby causing him to fall. Thus, "control" and therefore repair or maintenance may be the responsibility of tenant Bice pursuant to § 15.01 of the lease or landlord, Madison pursuant to § 15.02 of the lease.

Defendant Madison, therefore, fails to meet their prima facie burden establishing that they owed plaintiff no duty herein.

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of 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. (Yioves v. T.J. Maxx, Inc., 29 AD3d 572 (2006); see Britto v. Great Atl. & Pac. Tea Co., Inc., 21 AD3d 436 (2005); Joachim v. 1824 Church Ave., Inc., 12 AD3d 409, 410 (2004); Stumacher v. Waldbaum, Inc., 274 AD2d 572 (2000). Only after the movant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition (see Britto v. Great Atl. & Pac. Tea Co., Inc., *supra*; Joachim v. 1824 Church Ave., Inc., *supra*)." Seabury v. County of Dutchess, 38 AD3d 752, 753, 832 NYS2d 269 (2d Dep't 2007).

Defendant maintains that they have met their prima facie burden by submitting plaintiff's deposition testimony which they maintain demonstrates that plaintiff "...did not know the cause of the accident." Karwowski v. New York City Tr. Auth., 44 AD3d 826, 827, 844 NYS2d 96 (2d Dep't).

This is a mischaracterization of the testimony. Plaintiff maintains that his accident occurred because the stairs were wet and slippery, and that was the reason he fell. What plaintiff

was not sure of, pursuant to his deposition testimony is where the water came from, or the source of the water.

However, "[p]laintiff was not required to identify the source of the water that was alleged to be on the [stairs], as that was well within defendant's investigatory abilities..." Bennett v. NYC Transit Authority, 4 AD3d 265, 267, 772 NYS2d 320 (1st Dep't 2004).

Accordingly, upon all of the foregoing, and viewing the evidence in a light most favorable to non-movant, defendant's motion for summary judgment and dismissal of plaintiff's complaint is denied.

Furthermore, the issue of third-party defendant Bice's obligation to indemnify defendant Madison is based on the answer to the question of whether Madison or Bice was responsible for maintaining and/or repairing the alleged leaky pipes. Thus, the second portion of defendant's motion for summary judgment is likewise denied.

Finally, in light of the order issued on December 11, 2007, as noted above, third-party defendant Bice's cross-motion is denied.

Dated: Jamaica, New York
March 11, 2008

JOSEPH P. DORSA
J.S.C.