

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

IRIS RODRIGUEZ, et al. x Index
Number 4882 2000

- against - Motion
Date December 15, 2004

PARK CITY 3 AND 4 APARTMENTS, INC. Motion
Cal. Number 33

PARK CITY 3 AND 4 APARTMENTS, INC., x
- against - Third Party Index
Number 350128 2001

INTERDISCIPLINARY CENTER FOR CHILD
DEVELOPMENT, INC. x

The following papers numbered 1 to 30 were read on this motion by the third-party defendant, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint; and, cross motion by the defendant/third-party plaintiff, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for partial summary judgment on the causes of action interposed in the third-party complaint seeking contractual and common-law indemnification.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-17
Reply Affidavits	18-30

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

On September 14, 1998, the plaintiff Iris Rodriguez (Rodriguez), an assistant teacher employed by the third-party defendant Interdisciplinary Center for Child Development, Inc. (ICCD), tripped and fell in a classroom located at a premises owned

by the defendant Park City 3 and 4 Apartments, Inc. (Park City) and leased to ICCD.

In her complaint, Rodriguez seeks damages from Park City based upon negligence, and her husband interposes a derivative claim. In response, Park City interposed a third-party complaint against ICCD seeking, inter alia, contribution and common-law and contractual indemnification. In a verified bill of particulars, Rodriguez stated, inter alia, that the accident occurred as a result of a defect in the floor of the classroom, and caused a right wrist fracture.

The Park City/ICCD lease and rider provides, inter alia, in lease paragraph Second, that ICCD would care for the premises, fixtures, and make all repairs. Pursuant to paragraph 42, Park City was responsible for structural repairs to the premises, so long as such repairs were not the result of ICCD's gross negligence or willful misconduct. Paragraph 47 provides that ICCD would give prompt notice of any defect in water pipes, gas pipes and other items so that Park City could remedy them. Paragraph Second also obligates ICCD to indemnify Park City for all liability and damages resulting from injury to persons occasioned wholly or in part by the acts or omissions of ICCD or its employees, and ICCD's occupation of the premises.

During her examination before trial (EBT), Rodriguez stated, inter alia, that she tripped over a mat or rug covering the flooring of the classroom. Previously, she walked over the mat which sometimes moved out of place, and she or other teachers would straighten it out over the rug. After she tripped, she looked at the mat and saw one area was bent, and that a corner of the mat had flipped over.

In 1996, the maintenance person attempted to level the concrete floor which was cracked, and informed her that the crack was due to the steampipe in the flooring. The crack created a "hump" in the flooring, which the rug covered. She and other teachers complained to Park City maintenance about the hump in the floor.

She tripped because the floor was not level and because there was a mat covering that area. The mat covered the hump in the floor, and the place where she tripped over the mat was located just before the area where the hump was located. As a result of the accident, she sustained injuries and received workers' compensation.

During his EBT, an ICCD representative and shareholder, who was also a former Park City Day School employee and shareholder,

stated that three to five years prior to Rodriguez' accident, there were complaints about a crack in the floor. As a result, he went to the classroom, lifted the carpet and saw the crack which was about three feet long, and which created a floor height differential. Park City was called and sent a maintenance person to patch the crack, which was depicted in a photograph in the record. The Park City maintenance person stated that the crack was caused by a steampipe in the flooring. Despite the patching, a height differential in the floor remained, and he informed ICCD employees of this fact.

The patched area was covered by an area rug, which was taped down with duct tape. No further complaints about the crack were made to Park City after the crack was patched, and no one from Rodriguez' classroom complained about the condition of the flooring. The carpet was raised where it rested on the area where the patched crack and steampipe were located.

During his EBT and in an affidavit, the Park City maintenance supervisor stated, inter alia, that he never observed or received complaints about a bulge or bump on the floor of the classroom, ICCD installed flooring when it took possession of the premises, and only ICCD maintained the flooring.

II. Motion and Cross Motion

ICCD moves for summary judgment dismissing the third-party complaint, contending that: (1) Rodriguez tripped as a result of a hump in the concrete floor caused by a steampipe; and, (2) the accident was due to a structural defect for which Park City is responsible, absent gross negligence or willful misconduct by ICCD.

Park City opposes the motion, and cross-moves for summary judgment dismissing the complaint and for partial summary judgment on the common-law and contractual indemnification causes of action interposed in its third-party complaint. It contends that the accident occurred because Rodriguez tripped over a mat controlled by ICCD and, in any event, there was no code violation and it lacked notice of any defect.

Rodriguez opposes the motion and cross motion asserting that both Park City and ICCD are liable as the mat covered a raised, cracked, rug-covered floor area, and ICCD and Park City had notice of the condition but chose to ignore the defect in the floor.

III. Decision

Landowners have both a duty to maintain their property in a reasonably safe condition and a duty to warn of latent hazards of

which they are aware (see Tagle v Jakob, 97 NY2d 165 [2001]; Bilinski v Bank of Richmondville, 12 AD3d 911 [2004]). The liability of a landlord for injuries caused by a defective condition upon leased premises depend on whether the landlord retained sufficient control of the premises to be held to have had constructive notice of the condition (see Notkin v Gristina Vineyards, 298 AD2d 445 [2002]). Thus, a plaintiff in a slip- or trip-and-fall case must demonstrate that the defendant either created the defective condition or had actual or constructive notice of it (see Garcia v U-Haul Co., Inc., 303 AD2d 453 [2003]; Christopher v New York City Transit Auth., 300 AD2d 336 [2002]).

Placing a carpet remnant on top of a carpeted floor does not, per se, constitute an inherently dangerous condition (see Mansueto v Worster, 1 AD3d 412 [2003]). Where, however, there is evidence that the mat contains a wrinkle, ripple or fold so as to constitute a tripping hazard, an inherently dangerous condition does exist, and a defendant with actual or constructive notice of the condition is obligated to remedy it within a reasonable time (see Lyons v 40 Broad Del., Inc., 307 AD2d 868 [2003]; cf. Christopher v New York City Transit Auth., supra).

Here, the evidence clearly indicates that ICCD controlled the mat and the rug, while Park City controlled the flooring beneath the mat and rug. Although Park City claims it lacked notice of any defect in the floor, it originally repaired the floor and Rodriguez stated that she and other teachers complained about the height differential to Park City employees. In addition, Rodriguez indicated that the mat repeatedly had to be straightened and covered the floor differential. In sum, the photographs and Rodriguez' testimony create issues of fact as to whether the mat or the floor differential, either alone or combined, caused Rodriguez' trip-and-fall. In addition, there are issues of fact as to actual and constructive notice by ICCD and Park City of the tripping hazard condition(s).

As there are issues of fact relating to causation and notice, the branches of the motion and cross motion seeking summary judgment on the contractual indemnification cause of action interposed in the third-party complaint are denied.

Issues relating to Workers' Compensation Law § 11 and whether Rodriguez sustained a grave injury were improperly raised for the first time in reply papers and, therefore, are not considered at this time (see Abdelaal v Gindi, 8 AD3d 410 [2003]; Aquirre v Castle Am. Constr., LLC, 307 AD2d 901 [2003], lv denied 1 NY3d 501 [2003]).

Conclusion

Based upon the papers submitted to the court and the determinations set forth above, it is

ORDERED that the motion by the third-party defendant for summary judgment dismissing the third-party complaint is denied; and it is further

ORDERED that the cross motion by the defendant/third-party plaintiff for summary judgment dismissing the complaint and for partial summary judgment on the causes of action interposed in the third-party complaint seeking contractual and common-law indemnification is denied.

Dated: March 4, 2005

J.S.C.