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SHORT FORM ORDER

INDEX No. 03-26837
CAL. No. 06-02480-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-8-06
ADJ. DATE 3-22-07
Mot. Seq. # 003 - MotD
004 - XMD

LORRAINE KOHOUT,

Plaintiff,

- against -

MOLLOY COLLEGE,

Defendant.

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MOLLOY COLLEGE,

Third-Party Plaintiff,

- against -

WHITSONS FOOD SERVICE CORPORATION,

Third-Party Defendant.

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Upon the following papers numbered 1 to 35 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 28; Answering Affidavits and supporting papers 29 - 30; 31 - 33; Replying Affidavits and supporting papers 34 - 35; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion by third-party defendant Whitsons Food Service Corporation for summary judgment dismissing the third-party complaint is granted as to third-party plaintiff's claims for contribution and common-law indemnification and is denied with respect to the claims for breach of contract for failure to procure insurance and for contractual indemnification; and it is further

ORDERED that this cross motion by defendant/third-party plaintiff Molloy College for an order precluding plaintiff and third-party defendant from introducing any expert opinion; for

summary judgment dismissing the complaint against it and for conditional summary judgment in its favor on the third-party complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Lorraine Kohout in the course of her employment with third-party defendant Whitsons Food Service Corporation (Whitsons) when on October 27, 2001 she slipped and fell on water on the kitchen floor of a building at defendant/third-party plaintiff Molloy College in Rockville Center, New York. Pursuant to a contract, dated June 12, 2000, between Whitsons and Molloy College, Whitsons was to provide food services and food services management at the College's cafeterias. Ms. Kohout was Whitsons' Director of Food Services at the College and as its highest ranking employee at the College was responsible for overseeing all of the cafeterias and catering operations.

Defendant/third party plaintiff Molloy College seeks summary judgment dismissing the complaint on the basis that it bears no culpability for plaintiff's accident. The College contends that it had no prior actual or constructive notice of the alleged wet condition of its floor. In the event that the College's request for summary judgment dismissing the complaint is denied, it seeks an order granting it conditional summary judgment in its favor on its third-party complaint.

In support, defendant/third-party plaintiff Molloy College submits, *inter alia,* the pleadings; plaintiff's original and supplemental bills of particulars; copies of the transcripts of the deposition testimony given by plaintiff; James Multari, the Director of Facilities for Molloy College; and a copy of the food services contract between Whitsons and Molloy College.

At her examination before trial plaintiff testified, in pertinent part, that on the night of her accident she was managing a catering event at the College. The dinner had proceeded to the dessert stage and she was working in the kitchen. As she walked from the rear of the kitchen to its front she slipped and fell on a wet spot on the floor. When she got up her buttocks were wet from the floor and she saw clear water measuring approximately one foot from side to side on the tile floor. She believed that the water most likely came from a nearby utility sink located in the back of the kitchen. The cooks generally used the sink to fill pots full of water and then would carry the pots from the sink to the cooking area towards the front of the kitchen. The last person she observed using the sink before her accident was a Whitsons' employee. Prior to her accident she had complained on several occasions to the College's Director of Facilities, James Multari, regarding the tendency of water to collect on the floor in that area and had requested of him that rubber mats be provided. During that same time period plaintiff asked her superior at Whitsons, Frank Felice, for rubber matting for this area of the kitchen and was advised to contact Mr. Multari regarding the need for mats. Plaintiff also testified that prior to her accident there had been a problem with the utility sink's drain which resulted in water leaking from the sink onto the kitchen floor. She had complained to Mr. Multari about the leaky drain approximately two weeks before her accident and he had sent someone to repair it.

At his examination before trial, Mr. Multari testified, in pertinent part, that plaintiff had complained about water on the kitchen floor and that she requested on several occasions that rubber mats be installed. He could not recall precisely when she made the requests but that within a month of her requests he purchased and installed the mats. The rubber mats were actually installed after her accident.

In a slip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition which caused the accident or had actual or constructive notice of that condition and failed to remedy it within a reasonable time (***Mercer v City of New York,*** 88 NY2d 955, 647159 [1966]; ***Gaberman v Metropolitan Transportation Authority,*** 277 AD2d 350, 716 NYS2d 597 [2000]). The burden may also be satisfied by providing evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed (*see,* ***O'Connor-Miele v Barhite & Holzinger, Inc.,*** 234 AD2d 106, 650 NYS2d 717 [1996]; ***Padula v Big V Supermarkets, Inc.,*** 173 AD2d 1094, 570 NYS2d 850 [1996]). However, a mere general awareness of some dangerous condition is legally insufficient to establish constructive notice (*see,* ***Piacquadio v Recline Realty Corp.,*** 84 NY2d 967, 622 NYS2d 493 [1994]).

Viewing the evidence in light most favorable to the plaintiff (*see,* ***J. Rosen Furs, Inc. v Sigma Plumbing & Heating Corp.,*** 249 AD2d 276, 670 NYS2d 595 [1998]), triable issues of material fact exist as to whether the College's employees had actual knowledge of a recurrent dangerous condition with respect to the floor in the vicinity of the utility sink, and therefore, whether the College could be charged with constructive notice of the condition (*see,* ***Sweeney v D & J Vending, Inc.,*** 291 AD2d 433, 654 NYS2d 443, 737 NYS2d 388 [2002]; ***McLaughlan v Waldbaums, Inc.,*** 237 AD2d 335, 654 NYS2d 406 [1997]; ***Chin v Harp Marketing,*** 232 AD2d 601, 648 NYS2d 697 [1996]). In addition, triable issues of fact exist regarding whether the College created the condition which may have proximately caused plaintiff's injuries (*see,* ***Martinez v One Plus Rental Sys.,*** 247 AD2d 594, 668 NYS2d 106 [1998]; ***Chin v Harp Marketing,*** *supra*). Defendant Molloy College's request for summary judgment dismissing the complaint is therefore denied.

With respect to the third-party action, third-party defendant Whitsons requests summary judgment dismissing the third-party complaint and defendant/third-party plaintiff Molloy College cross moves for conditional summary judgment in its favor on the claim for contractual indemnification set forth in the third-party complaint. By the third-party complaint Molloy College seeks common-law and contractual indemnification alleging that Whitsons' is required to indemnify and hold harmless the College for any claims, damages, losses, or expenses including attorneys fees arising out of the performance of Whitsons' work. The College also alleges that it is entitled to contribution from Whitsons. The College further alleges that Whitsons breached the insurance procurement provision of the parties' agreement.

Whitsons contends that the College's claims for common-law indemnity and contribution are barred by Worker's Compensation Law § 11 because plaintiff has not sustained a "grave injury" as defined by that section.

Workers' Compensation Law §11 generally bars claims against employers for common-law indemnification or contribution arising out of injuries sustained by an employee acting within the scope of employment, (***Martelle v City of New York,*** 31 AD3d 400, 817 NYS2d 504 [2006], except in a limited line of cases in which the plaintiff has sustained a "grave injury" (***Rubeis v Aqua Club,*** 3 NY3d 408, 788 NYS2d 292 [2004]). A "grave injury" is defined as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, blindness, total and permanent deafness, loss of nose, loss of ear, or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (***Spiegler v Gerken Building Corp.,*** 35 AD3d 715 [2006]). None of the injuries claimed by plaintiff in her original verified bill of particulars, dated January 17, 2005, her supplemental verified bill of particulars, dated October 5, 2006, and as described in her deposition testimony fall within the ambit of a "grave injury". Plaintiff also testified that she has been receiving workers' compensation benefits through her employer, Whitsons. In response to the third-party defendant's prima facie showing that plaintiff did not sustain a "grave injury" as defined by the statute, the defendant/third-party plaintiff failed to raise a triable issue of fact (***DePaola v Albany Medical College,*** 2007 NY Slip Op 4065 [NYAD 2nd Dept], 2007 WL 1366224). Third-party defendant Whitsons is therefore granted summary judgment dismissing defendant/third-party plaintiff Molloy College's claims for contribution and common-law indemnification.

Claims for contractual indemnification and to recover damages for breach of contract to procure insurance are not, however, barred the worker's compensation statute (***Murphy v Longview Owners, Inc.,*** 13 AD3d 346, 786 NYS2d 96 [2004]).

With respect to third-party defendant Whitsons' request for summary judgment dismissing the third-party complaint insofar as third-party plaintiff Molloy College alleges that Whitsons breached the parties' agreement by failing to procure insurance, summary judgment is denied. The parties' agreement provides, in pertinent part, as follows:

> 14. Insurance. During the term of the Agreement, each party shall carry the fo lowing coverage:
>
> a) WHITSONS shall obtain and maintain adequate insurance including (i) workers' compensation for all its employees as required by law; (ii) food products, product liability, and property damage insurance with limits of no less than $300,000 per occurrence, $1,000, 000 in the aggregate and an excess liability policy of $2,000,000 which policies shall name MOLLOY as an additional insured and shall proved (sic) that the insurer shall give MOLLOY thirty (30) days' prior written notice of cancellation, material alteration, or non-renewal of such policies. WHITSONS shall deliver to

MOLLOY certificates evidencing the insurance required herein upon execution of this Agreement.

Whitsons has failed to submit any documentary proof of compliance with the terms paragraph 14[a] of the parties' agreement. As such, Whitsons has failed to make a prima facie showing of entitlement to summary judgment on this claim (***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]; *see also,* ***Baval-Barbiero v Beacon Broadway Company, LLC,*** 282 AD2d 699, 724 NYS2d 317 [2001]).

With regard to the contractual indemnity claim, the Court finds that there remain issues of fact concerning whether any negligence on the part of Whitsons and/or the College resulted in plaintiff's accident and, if so, whether such negligence falls with the scope of the indemnity provision of the parties' contract. As a result, Whitsons' request for summary judgment dismissing this claim and the College's request for conditional summary judgment its favor on this claim are both denied (***Alexander v New York City Transit,*** 34 AD3d 312, 824 NYS2d 262 [2006]).

In addition, defendant/third-party plaintiff Molloy College's request for an order precluding plaintiff and third-party defendant from introducing any expert evidence at the trial of this action is denied, at this time. By order, dated March 5, 2007 (Doyle, J.), the Court granted an unopposed motion by defendant/third-party plaintiff to vacate the note of issue and it is anticipated that any unresolved issues regarding the time frames for expert disclosure will be addressed at a compliance conference before the matter is re-certified for trial.

In sum, third-party defendant Whitsons' motion is for summary judgment dismissing the third-party complaint is granted as to the claims for contribution and common-law indemnity and is, otherwise denied. Defendant/third-party plaintiff Molloy College's cross motion is denied in its entirety.

Dated: JUN 2 5 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION