

**Caristo v Tysens Apts., LLC**

2007 NY Slip Op 32663(U)

August 22, 2007

Supreme Court, Richmond County

Docket Number: 0102764/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**DCM PART 3**

**CAROL CARISTO,**

*Plaintiff(s),*

*-against-*

**TYSENS APARTMENTS, LLC. and COINMACH  
CORPORATION,**

*Defendants.*

-----x

**TYSENS APARTMENTS, LLC,**

*Third-Party Plaintiff(s),*

*-against-*

**COINMACH LAUNDRY CORPORATION,**

*Third-Party Defendant.*

-----x

The following papers numbered 1 to 5 were submitted on these motions the 29<sup>th</sup> day of June, 2007 :

Notice of Motion with Supporting Papers  
and Exhibits  
(dated April 9, 2007).....1

Notice of Cross Motion with Supporting Papers  
and Exhibits  
(dated May 17, 2007).....2

Affirmation of No Position in Regard to  
Defendant Tysens’ Motion against Defendant  
Coinmach  
(dated June 18, 2007).....3

Affirmation in Partial Opposition to the  
Cross Motion of Defendant Coinmach Corporation  
(dated June 18, 2007).....4

Affirmation in Opposition and in Reply  
(dated June 22, 2007).....5

Upon the foregoing papers, the motion (No. 1266) of defendant/third-party plaintiff Tysens Apartments, LLC (hereafter”Tysens”) for an order of indemnification against third-party defendant Coinmach Laundry Corporation (hereafter “Coinmach”) is denied as premature; the cross motion

(No.1516) by defendant/third-party defendant Coinmach for summary judgment dismissing the complaint as against it is granted.

This action for personal injuries arises out of plaintiffs' alleged slip and fall on a wet floor in the laundry room of an apartment building owned by defendant Tysens on August 10, 2005. Previously, on September 14, 1999, Tysens had entered into a laundry concession agreement with co-defendant, Coinmach granting it the "exclusive privilege of installing, operating and maintaining coin metered laundry equipment on the premises" ( *see* Tysens' Exhibit "I"). Plaintiff testified that two to three months before her accident, she saw water on the floor of the laundry room trickling out from under a machine, and that she reported the incident to "Jose", the building maintenance man, but no one else. Plaintiff also testified that she noticed clear water coming from underneath the same machine after she fell (*see* Coinmach's Exhibit "D" pp 11-15). Jackie Marsala, maintenance manager for the building, testified that if a leaking condition existed in the laundry room, it would have been reported to him by either a tenant or the maintenance man, and he would have shut down the machine and called Coinmach to send out a repair person. Mr. Marsala also stated that prior to August 10, 2005, neither Jose nor any other maintenance person had informed him about a leaking washing machine. Accordingly, Coinmach had not been called. In addition, the witness saw no leakage either prior to plaintiff's fall or afterwards, when he inspected the laundry room (*see* Coinmach's Exhibit "E" pp 13-21). Finally, David Unger, a service manager for Coinmach, has submitted an affidavit stating that on August 3, 2005, a Coinmach technician was present to clean a dryer in the same building; that there was no mention of any leaking washing machine at the location; that Coinmach was never notified of any leak; and that subsequent to plaintiff's fall, a Coinmach technician examined the machines and found no leak (*see* Coinmach's Exhibit "H").

Coinmach's cross motion for summary judgment is granted. The imposition of liability in a slip-and-fall case requires evidence that the defendant created the dangerous condition which caused the accident, or had actual or constructive notice of that condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *Dulgov v City of New York*, 33 AD3d 584; *Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409). To constitute constructive notice, a defective condition must be visible and apparent, and must exist for a sufficient period of time before the accident for a defendant to discover and correct it (*see Gordon v American Museum of Natural History*, 67 NY2d at 837; *Monte v T.J. Maxx*, 293 AD2d 722).

Here, Coinmach satisfied its initial burden of showing it that neither created nor had actual or constructive notice of the allegedly dangerous condition through, *e.g.*, the deposition testimony of plaintiff and the building's maintenance manager (*see Lipsky v Firebaugh Realty Corp.*, 26 AD3d 313;

*Love v Home Depot, U.S.A.*, 5 AD3d 636). In opposition to this *prima facie* showing, plaintiff has submitted no evidence that Coinmach employees created the leak or that Coinmach had actual or constructive notice of the alleged hazardous condition (*see Lipsky v Firebaugh Realty Corp.*, 26 AD3d at 314; *Love v Home Depot U.S.A., Inc.*, 5 AD3d at 636-637; *Monte v T.J. Maxx*, 293 AD2d at 723). Accordingly, the complaint against Coinmach must be severed and dismissed.

In moving, in effect, for summary judgment in its third-party action for indemnification, Tysens relies, in part, on the indemnification clause contained in its Laundry Concession Agreement with Coinmach. That contract provides, in pertinent part,

“The Licensee Coinmach...[will] indemnify and hold Licensor and the owner of the premises [Tysens] harmless from any and all claims for personal injuries or other damages arising out of the use of said laundry equipment”

In opposition, Coinmach argues that the above indemnification provision is void pursuant to General Obligations Law §5-322.1, which provides, *inter alia*, that any agreement "purporting to indemnify or hold harmless the promisee against liability for damage ... caused by or resulting from the negligence of the promisee ... is against public policy and is void and unenforceable" (General Obligations Law § 5-322.1 [1]).

At bar, plaintiff's deposition testimony is sufficient to raise a triable issue of fact as to Tysens' negligence in failing to respond in a timely fashion to the complaint of water on the floor of the laundry room. Accordingly, it cannot yet be determined whether General Obligations Law §5-322.1 will operate as a bar to Tysens' claim for contractual indemnification. Thus, the motion is premature (*see Gil v. Manufacturers Hanover Trust Co.*, 39 AD3d 703)

Common-law indemnification is predicated on the principle of "vicarious liability without actual fault...[Hence,] a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895, *lv denied* 1 NY3d 504). Here, since questions of fact remain as to Tysens' responsibility, if any, for plaintiff's injury, its right to summary judgment on its claim for common-law indemnification cannot be determined at this juncture. Neither has Tysens been able to establish a *prima facie* case of negligence on the part of Coinmach.

Accordingly, it is hereby:

**ORDERED**, that the motion by defendant/third-party plaintiff Tysens Apartments, LLC for summary judgment in its third-party action for contractual and/or common law indemnification as against defendant/third-party defendant Coinmach Laundry Corporation is denied; and it is further

**ORDERED**, that the cross motion for summary judgment by defendant/third-party defendant Coinmach Laundry Corporation is granted, and the complaint as against this defendant is severed and dismissed; and it is further

**ORDERED**, that the Clerk shall enter judgment accordingly.

All parties shall appear at 9:30 a.m. in DCM Part 3 on September 6, 2007 for a status conference.

ENTER,

DATED: August 22, 2007

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Joseph J. Maltese  
Justice of the Supreme Court