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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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KATHLEEN MARASCIA,

Plaintiff,

Index No. 016262/05

-against-

MERCY MEDICAL CENTER, MERCY MEDICAL CENTER PHYSICIAN-HOSPITAL ALLIANCE, INC., and THE ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE,

Motion Submitted: 8/2/07
Motion Sequence: 001

Defendants.

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The following papers read on this motion:

Notice of Motion.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's Respondent's.....

Defendant seeks an Order granting summary judgment and dismissing the complaint pursuant to CPLR § 3212. According to defendant the plaintiff alleges that she fell over some type of equipment, but there is no evidence of whose equipment it was; the defendant did not have any notice that the equipment was there; and the equipment in the middle of the walkway was open and obvious and plaintiff should have avoided it. Plaintiff opposes.

This action for personal injuries was brought by the plaintiff as a result of a trip and fall that occurred on October 18, 2002, in the St. Joseph's Villa located at 992 North Village Avenue, Rockville Centre, New York, which is on the campus of Mercy Medical Center. Plaintiff was employed with Catholic Health Services at the time of the accident and was present at the St. Joseph's Villa in the course of her employment.

Defendants claim it is unclear exactly what plaintiff claims she tripped on or who left it there. Defendants cite to the fact that the plaintiff calls the item a "utility bag", "repairman's bag", and ""tool belt" in the plaintiff's Bill of Particulars and Response to Combined Demands. They also claim the plaintiff is unable to give specifics as to color, size, material, etc of the item she tripped over. In addition, defendants state the complaint claims a Mercy employee left the "equipment" but in the Bill of Particulars it indicates outside workers hired by Mercy left the equipment.

Defendants claim because of these inconsistencies the plaintiffs claim should fail. Additionally, they assert, defendants are not responsible for the actions of the independent contractors they hire; there was no notice, either actual or constructive, to defendants of the alleged defective condition; and the alleged condition was open and obvious.

Initially, it should be noted that the title of the bag is irrelevant to this court. Whether the item is called a "tool bag", "tool belt", "repairman's bag", "utility bag" , "equipment", or something else does little to discredit the plaintiff, and the suggestion by

the defense that "the plaintiff's action should fail for these inconsistencies alone" is contrary to the law.

In *Backiel v. Citibank,* N.A., 299 AD2d 504, the court stated the general rule that a party who retains an independent contractor is not liable for the negligence of the independent contractor because it has no right to supervise or control the work. For years the courts have recognized exceptions to the independent contractor rule which otherwise would exempt an owner from liability for the negligence of the independent contractor that he hires. The exceptions generally recognized involve situations where the employer (1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows involves special dangers, *see Rosenberg v. Equitable Life Assur. Socy. of U.S.,* 79 NY2d 663.

In the present action, an exception to the general rule exists because this owner has a non-delegable duty to keep the premises safe. When the premises are open to the public, the owner has a non-delegable duty to provide the public with reasonably safe premises. The duty may not be delegated by the owner to an independent contractor. A "landowner has a non-delegable duty to provide the public with a reasonably safe premises"; *Backiel v. Citibank,* at 505. This includes the duty to provide "its employees and the employees of independent contractors with a safe place to work", *id* at 507. The defendants in the present action owed a duty to the plaintiff as an employee of an

independent contractor, to maintain the premises in a reasonably safe condition, and that duty could not be delegated. *See Scott v. Redl*, 43 AD3d 1031.

Although, as a general rule, a property owner is not responsible for conditions created by an independent contractor, *see Kleeman v. Rheingold*, 81 NY2d 270; *Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, the defendant may be held vicariously liable for the negligence of an independent contractor if such negligence violated the defendant's non-delegable duty as the property owner to provide safe ingress and egress *see Rosenberg v. Equitable Life Assur. Socy. of U.S.*, at 668; *Backiel v. Citibank*, at 505; *June v. Zikakis Chevrolet*, 199 AD2d 907; *Thomassen v. J & K Diner*, 152 AD2d 421. Whenever the general public is invited into stores, office buildings, and other places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including safe means of ingress and egress. *see Gallagher v. St. Raymond's R.C. Church*, 21 NY2d 554, 557; *Thomassen v. J & K Diner*; 152 AD2d 421. "[T]o this duty is added the responsibility that the landlord, who employs the contractor to do work in a place where tenants are in the habit of passing, must see that necessary precautions are taken not to endanger the tenants" *Bernstein v. El-Mar Painting & Decorating Co.*, 13 NY2d 1053, 1055; *see Harrington v. 615 W. Corp*, 2 NY2d 476.

The non-delegable duty exception has been applied in cases, such as here, where the owner owes a higher duty of care to particular class of persons because of a special relationship imposed by statute or at common law, *see Sciolaro v. Asch*, 198 NY 77, 83; *Harrington v. 615 W. Corp, supra* at 482. The owner of premises such as these is charged

with a duty to provide its employees and the employees of independent contractors with a safe place to work, *see Garlichs v. Empire State Bldg. Corp.*, 3 NY2d 780, 782. This affirmative responsibility is consistent with an owner's general duty of reasonable care under all the circumstances, *see Basso v. Miller*, 40 NY2d 233.

Defendant seeks summary judgment dismissing the claims against it, contending that plaintiff is unable to prove one or more elements of their claimed cause of action. It argues that a defendant who demonstrates that the plaintiff was unable to sufficiently identify the cause of her accident has met his burden of establishing prima facie entitlement to summary judgement. The defendant contends that the plaintiff has no idea what caused her to fall and suffer injuries and cannot point to any negligence on the part of the defendants as being a proximate cause thereof, and even if the plaintiff's unsubstantiated allegations are accepted as fact, the "hazard" complained of was open and obvious and not inherently dangerous, and thus no hazard at all.

To support its position that the Mercy workers did not use tool bags, belts, or buckets the defendant has provided two affidavits one signed by William Stoddart and the other signed by Albert Hoffman, both men were employed by Mercy as telephone repairmen in October 2002. While the affidavits seem to remove any doubt as to whether the tool bag or belt belonged to the Mercy workers, the affidavits each clearly state, "the workers from a telephone company known as WILTECH were working at Mercy Medical Center and they did use tool bags. They were not employees of Mercy" (Defendant's Exhibit H and Exhibit I). While it is clear the defendants have submitted these affidavits

in an effort to avoid liability for the acts of their employees, Mr. Stoddart and Mr. Hoffman, the affidavits serve a dual purpose. In fact, these affidavits confirm that the Wiltech workers, independent contractors hired by Mercy to preform work at that location, did actually use tool bags. Although defendant has repeatedly claimed they had no notice the equipment was there or being used by workers, the affidavits of their employees Mr. Stoddart and Mr. Hoffman seem to suggest otherwise.

Summary judgment is a drastic remedy which deprives a party to litigate, and his day in Court, and accordingly it should not be granted where there is any doubt as to the existence of a triable issue of fact, *see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223. On a motion for summary judgment the moving party must demonstrate, by evidentiary facts, that he is entitled to judgment as a matter of law, whereupon the burden is shifted to the opponent to show that an issue of fact exists, *see Piccolo v. De Carlo*, 90 AD2d 609. Generally, in a premises liability case, a plaintiff must establish that the defendant either created the defective condition or had actual or constructive notice of the alleged defective condition, *O'Callaghan v. Great Atlantic & Pacific Tea*, 294 AD2d 416; *Labella v. Willis Seafood*, 296 AD2d 382; *Goldman v. Waldbaum, Inc .*, 248 AD2d 436, *aff.* 92 NY2d 805. The present case is distinguishable because the defendant was under a non-delegable duty to provide a safe method of egress and ingress for people invited onto the property. Accordingly, the defendant can potentially be held liable for the negligence of the independent contractors in leaving a tool bag or belt in a passageway and allowing an employee of a subcontractor to trip over it.

A landowner has a duty to maintain its premises in a reasonably safe manner, *see Basso v. Miller*, 40 N.Y.2d 233. However, it has no duty to protect or warn against an open and obvious condition which is not inherently dangerous as a matter of law, *see Morgan v. TJX Companies*, 38 AD3d 508. The question of whether the tool belt bag or bucket placed as it was on the date of this incident is open obvious and not inherently dangerous, is a fact specific question that is properly left for a jury . The record before this court leaves questions of fact that must be presented to a jury. Accordingly defendant's motion for summary judgement is denied. This case will be placed on this court's calendar for a conference December 20, 2007 at 9:30 a.m., Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, NY 11501.

Based on the proof presented, the defendant's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: November 27, 2007

HON. JAMES P. McCORMACK, J.S.C.