[*1]

SCANNED ON 10/15/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Index Number : 113351/2005
BARTUCCI-SAMUEL, JANET
vs
MACKLOWE PROPERTIES
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/27/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, ... on this motion to/for _____

FILED
OCT 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Defendants' motion (sequence 002) and QBS's motion (sequence 003) are consolidated for joint disposition and decided herein.

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants/third-party plaintiffs Macklowe Properties and Fifth Avenue 58/59 Acquisition Co. for summary judgment (CPLR 3212) dismissing the Complaint as asserted against them, or alternatively, for summary judgment against third-party defendant Quality Building Services, Corp. on their third-party claims/cross-claims for common law and contractual indemnity, and breach of contract for failure to procure insurance, is denied; and it is further

ORDERED that the motion by Quality Building Services, Corp. for summary judgment dismissing plaintiff's claims and all cross-claims by defendants is denied; and it is further

ORDERED that defendants/third-party plaintiffs Macklowe Properties and Fifth Avenue 58/59 Acquisition Co. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/14/08

CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

JANET BARTUCCI-SAMUEL,

Index No. 113351/05

Plaintiff,

-against-

DECISION/ORDER

MACKLOWE PROPERTIES AND FIFTH AVENUE 58/59 ACQUISITION CO., LLC, AND QUALITY BUILDING SERVICES CORP.,

Defendants.

----------x

MACKLOWE PROPERTIES AND FIFTH AVENUE 58/59 ACQUISITION CO., LP,

Third-Party Plaintiffs,

Third-Party Index No. 590504/06

-against-

QUALITY BUILDING SERVICES, CORP.,

Third-Party Defendant.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants/third-party plaintiffs Macklowe Properties ("Macklowe") and Fifth Avenue 58/59 Acquisition Co. ("Fifth Avenue") (collectively, "defendants") move for summary judgment (CPLR 3212) dismissing the Complaint as asserted against them, or alternatively, for summary judgment against third-party defendant Quality Building Services, Corp. ("QBS") on their third-party claims/cross-claims for common law and contractual indemnity, and breach of contract for failure to procure insurance.

QBS also moves for summary judgment dismissing plaintiff's claims and all cross-claims by defendants.[1]

Factual Background

On January 26, 2005, plaintiff, Janet Bartucci-Samuel, an employee of Estee Lauder, was walking on her way to work on the lobby level of 767 Fifth Avenue (the "building"), when she slipped and fell, sustaining injuries. Fifth Avenue is the owner and Macklowe is the managing company of the building. Pursuant to a contract effective January 1, 2005 (the "QBS Contract"), QBS was the cleaning contractor hired by Fifth Avenue and Macklowe to provide cleaning services for the building.

Plaintiff's Deposition

At her deposition, plaintiff testified that the weather conditions on the date of the accident were "cold, sloppy and slushy" and the sidewalks outside the building were wet (27:16-18). It had rained earlier that day, probably before she left her house at 7:15 (27:7-10). The lobby floor was "green marble, high gloss" (27-28: 23-25). Although she could not recall whether there were any carpeting or mats placed in the lobby that day, there might have been "a small one by the door, but there was not one on the floor" (28:8-13). Plaintiff did not recall whether there were any additional mats where the accident occurred (28-29: 21-15, 2).

Upon entering the Madison Avenue entranceway of the building, she made one turn and proceeded straight to the elevator banks in the lobby (31). As she proceeded to the elevator that would take her to the 40th floor, on her left was the first set of elevator banks which service the

[1] Defendants' motion (sequence 002) and QBS's motion (sequence 003) are consolidated for joint disposition and decided herein.

15th through 36th floors (32). As she walked past the first set of elevator doors to the second set of elevator doors (36) she fell. There were no mats or carpeting between the first elevator bank and the second (38:5-10).

Plaintiff did not recall whether she saw anything that allegedly caused her to fall prior to her accident (39:5-12). After the accident, plaintiff learned that she fell due to water and ice on the floor (39:13-19), as water was on her coat. Plaintiff did not see water on the floor that morning prior to her fall (40:4-18). Plaintiff could not describe the water because it had been absorbed into her coat (40:19-25), causing her coat to become wet from the hip down to the hem (42:2-19).

According to plaintiff, there was "slushy ice from boots being tracked in and out" which "trampled bits around" (43:3-7). She also observed "shoe prints, like soggy shoe prints along the way" in the area where she fell (43-44:18-25, 2-4). The footprints were "grayish, clearly street slush" (50-51:25, 2-11). In regards to how long the slush had been there, plaintiff replied "it was morning slush" (51/12-18).

Plaintiff did not see any porters in the lobby that morning before her accident, or any wet floor signs or warning signs in the accident location (126:14-17). Plaintiff never made any complaints about the floor prior to her accident (114-115). However, Estee Lauder made complaints on two instances about the condition of the floor prior to her accident (114-116). However, plaintiff did not know whether the complaints were about the floor itself, the floor being wet, or a combination thereof (119:8-21).

Macklowe's Deposition

Macklowe's General Manager, Roderick K. Johnson (the "building manager"), testified that the green, marble floor was swept and mopped by the cleaning company at night, and periodically honed by another company using a machine (18-19). No wax was used when the floor was honed (20:4-9). QBS supplied its own material and equipment, and during inclement weather, it was QBS's responsibility to check the lobby floor and place mats in the lobby (22:18-23; 45-46). During inclement weather, it was the general practice to put mats down in the lobbies and for a certain portion past the lobby, toward the elevator banks, but not all the way down the corridor (22-25). The mats were owned by the building owner (23:17-20). Generally, during inclement weather, QBS would have a porter with a mop to remove any incidental water spillage from rain, umbrellas, and boots.

Within a three-year period prior to the accident, there had been approximately a dozen complaints regarding the floor in the lobby being slippery or wet (28:12-23). There had been approximately 6-10 slip and fall accidents in the lobby during that time (28-29:24-25). The building manager recalled receiving email messages from Estee Lauder regarding the slippery condition of the floor (31:5-16). The building manager had no personal knowledge as to whether yellow caution signs were present on the day of the accident (37:4-13). Yet, the accident report indicates that there were yellow caution signs out (37:4-13).

QBS's Deposition

Branislavka Ljusic was the project manager/supervisor ("QBS Supervisor"), employed by QBS in charge of ensuring that the employees at the subject building received their duty assignments and taking care of equipment and the property (7:16-19; 8:5-11). QBS was

responsible for daytime polishing, mopping as necessary, removing trash, and putting mats down and mopping the lobby in the building (8-9:24-26, 2-6). QBS was required to supply their own cleaning supplies and Macklowe provided the mats and runners (15:18-25). Porters placed the mats, made of rubber, in front of the revolving doors, side doors, front desk, and the front of the area for sliding access cards (19:14-20); mats were not placed in the elevator banks (24:11-17). In addition to mats, yellow caution signs were placed in front of the door and in the corridor (27:12-13, 17-18). It was custom and practice to put the signs out every time the mats were down (30:2-5). It was part of QBS's policy to put down the signs when there was inclement weather (30:11-15).

The QBS Supervisor had extra porters assigned to the lobby during inclement weather and the porters mopped the water on the floor whenever necessary (39-40:23-25, 2-6). She assigned a minimum of four porters to the lobby (40:7-9), each with a specific area to mop (40:18-20). If there were inclement weather overnight, the night supervisor was responsible for the placement of mats and would assign porters to the lobby to do spot mopping (46:14-17). If no extra porters were assigned, the regular porters understood that the spot mopping duties on those days would take precedence over other duties (51-52:21-25, 2-3). On days when the weather was good, but there was still snow or slush on the ground from poor weather on previous days, the mats and signs would stay in the lobby (54:16-24).

The QBS Supervisor never received any complaints about slippery conditions in the lobby prior to the date of the accident (25:11-19).

Defendants' Motion

Defendants argue that the testimony establishes that these defendants did not have any notice of the specific wetness which plaintiff claims caused her to fall. There is no evidence that defendants created this condition or that anyone had made any complaints about this specific condition on that specific day, prior to the accident. Further, that a defendant had a prior general awareness that a similar condition occasionally existed at an accident site, does not establish the constructive notice requirement. In the absence of proof as to how long the condition was on the floor, constructive notice cannot be found. Although defendants had a duty of reasonable care to maintain the premises, defendants contracted with QBS to provide cleaning services at the premises and QBS was responsible to ensure that the mats and signs were out if the weather conditions required it, and that a porter be assigned accordingly. The lobby was completely covered with mats, which ran down the corridor towards the elevators. Further, a property owner is not obligated to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked in precipitation. Further, the fact that a floor is slippery by reason of its smoothness or polish, in the absence of a negligent application of wax or polish, does not give rise to a cause of action or an inference of negligence. And, notice of condition, *i.e.*, alleged slipperiness, where there is no cause of action, is irrelevant. Prior accidents regarding any alleged wetness on the floor, is also irrelevant because defendants did not have notice of the specific condition which caused plaintiff's accident, and a mere general awareness that water will be tracked in on wet days is insufficient. Defendants acted reasonably in hiring QBS to clean and maintain the premises.

If the Court denies dismissal of plaintiff's complaint, then the Court should grant defendants' motion against QBS for common law and contractual indemnification. Both the QBS Contract and the testimony establish that QBS was charged with maintenance and cleaning of the lobby and corridor area. Paragraph 13 of the QBS Contract expressly requires QBS to "indemnify and save Macklowe and its principals . . . harmless against and from any and all liabilities and claims of loss, damage and/or injury to person . . . arising from or in any way connected with the services and obligations to be performed hereunder. . . ." Since the testimony shows that QBS had complete responsibility for the cleaning and maintaining the lobby and the area where the accident occurred, if there were any negligence with respect to the happening of the plaintiff's accident, it would have to be that of QBS. Therefore, defendants are entitled to common law and contractual indemnification from QBS.

With regard to the claim for breach of contract for failure to procure insurance, section 4 of the QBS Contract requires that QBS list defendants as additional insureds on commercial, general and umbrella liability policies. If defendants complied with section 4, defendants are entitled to defense and indemnification as additional insureds under said policy. If QBS has not, then defendants are entitled to summary judgment on their claim for breach of contract.

QBS also seeks summary dismissal of all claims, arguing that plaintiff failed to establish that QBS had actual or constructive notice of the condition that caused her injuries, given that (1) plaintiff cannot describe the condition that allegedly caused her incident because she did not see the condition before she fell and cannot remember looking at the spot after she fell, (2) she has no idea how long the alleged wet condition existed, (3) she failed to describe the size or

dimensions of the condition. Nor is there any evidence that QBS created the transient condition or owed a duty of care to the plaintiff.

Opposition

In opposition, plaintiff contends that the testimony of the plaintiff, building manager and QBS Supervisor indicates that there were no mats or carpet in the corridor or in the vicinity of the elevator banks (Plaintiff 38:11). The building manager testified that the area of the elevator banks was not matted in inclement weather (Johnson 39:8). The QBS Supervisor also confirmed that the elevator banks were not covered by mats (Ljusic 24:11-17). The QBS Supervisor also testified in a prior case involving a slip and fall in the same lobby, and plaintiff submits the affidavit of a notice witness, Bobbi Citrin ("Citrin"), from that action. The affidavit of Citrin indicates that the floors of the lobby became wet and slippery during inclement weather, and that there were no warning signs to alert people of the condition. Citrin also stated that numerous people slipped and fell on the lobby floor, and that he complained about the slippery condition to building management employees, who responded that he should pick up his feet when he walks.

Plaintiff also stated that she fell on water and "grayish" "street slush" and "gushy" ice on the floor (Plaintiff 39:13-19; 50-51). According to plaintiff, water "definitely exacerbated" the condition (Plaintiff 50-51, 123). Plaintiff further stated that, "every day we would see somebody fall. Many of us would do the two-step trying to keep balance on that floor" (Plaintiff 115:7-12).

Plaintiff also points out that the nurse on site in the building, Eileen Sheehy (the "nurse"), testified that according to her notes, plaintiff came to see her on the date of the incident and stated that plaintiff fell on the wet floor (Sheehy 8:2-14). The nurse also testified that the lobby floor was "always slippery . . . when there's a little bit of rain or moisture . . ." (Sheehy 9:5-8).

The incident report signed by the building manager indicated that the floor in the area of the accident was wet and that QBS was instructed to "clean up scattered wet spots" (Johnson 39:18).

In further opposition, plaintiff submits an affidavit from Estee Lauder's Vice President of Real Estate, Gerald Gibian, wherein he states that on many occasions before the date of the accident, he noticed on days of inclement weather that the floor of the lobby became wet and slippery from shoes and dripping umbrellas, and that water accumulated in various areas not covered by mats. There were no wet floor signs or warnings in the corridors or elevator banks. He also knew of numerous people who slipped and fell on the lobby floor and that he complained about this condition to Macklowe and the building manager about the slippery, wet condition, the absence of mats, and the numerous accidents that had previously occurred.

Therefore, plaintiff argues, it is clear that water, ice and slush caused plaintiff's accident, the condition which caused her accident was a known hazard, and that defendants were on notice of the recurrent wet, slippery, and slushy condition of the floor. It is also established that defendants failed to provide any mats or warning signs in the elevator banks on rainy days prior to the date of the accident, resulting in numerous slip and fall accidents in the lobby. Evidence of the ongoing and recurring dangerous condition in the area of plaintiff's accident, which was routinely left unaddressed, is sufficient to establish notice. The prior complaints about the condition and accidents prior to the date of the accident establish that defendants had actual knowledge of this recurring dangerous condition, and defendants should be charged with constructive notice of each and every reoccurrence of this condition.

Reply

Defendants argue that plaintiff does not allege that the floor is inherently slippery, and there is no evidence that plaintiff did not fall as a result of her own feet being wet. There is no evidence that the slush and ice she saw after her accident was even present before she fell. Further, plaintiff concedes that defendants have no duty to cover all of their floor with mats. In any event, the accident report clearly states that yellow caution signs and rain mats were out. Even assuming defendants were aware that the water on the lobby floor was a recurring condition, proof that defendants were aware of this general condition is insufficient to establish constructive notice of the particular water condition that caused plaintiff to slip and fall.

QBS points out that plaintiff admits that she never saw the specific condition that caused her to fall, either before or after the accident, and she never provided any information about the size, dimensions and nature of the condition or length of time the condition was present. Plaintiff's descriptions about her general observations of the ice on the floor of the lobby on the date of the incident were not of the actual incident site, but were of other portions of the lobby. Further, plaintiff's testimony about the slipperiness of the floor was in the context of whether the slipperiness of the marble floor itself played a role in her accident. And, whether mats and caution signs were present is irrelevant in the absence of actual or constructive notice of the dangerous condition.

Additionally, to the extent the high-gloss nature of the floor became more slippery when wet, and an inherent slipperiness of the floor is attributable to defendants. The floor was installed long before QBS became the cleaning contractor, and QBS had nothing to do with its installation. To the extent that the absence of mats by the elevator lobby caused plaintiff's

accident, the building manager testified that defendants determined the exact location where QBS should lay the mats in the lobby, and QBS had no leeway to change defendants' specifications for laying mats in the lobby.

Nor is there any evidence that QBS had knowledge of the prior slip and fall accidents or complaints about the slippery condition of the floor. There is also no proof that the prior accidents took place near the elevator banks. Thus, there is no evidence of a recurring condition by the elevator banks.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be

supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

In order for defendants to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have

been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]).

Alternatively, a defendant/property owner may have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

With respect to the references to the slipperiness of the marble floor in and of itself, no cause of action for negligence can properly be maintained regarding any "inherently slippery" condition of the floor (*Waiters v Northern Trust Co. of New York*, 29 AD3d 325, 816 NYS2d 18

[1st Dept 2006] citing *Kruimer v Natl. Cleaning Contr., Inc.*, 256 AD2d 1, 680 NYS2d 511 [1998]; *Duffy v Universal Maintenance Corp.*, 227 AD2d 238, 239, 642 NYS2d 282 [1996]; *see also Murphy v Conner*, 84 N.Y.2d 969, 971-972, 622 NYS2d 494, 646 N.E.2d 796 [1994]).

As to the water or slushy ice that allegedly caused plaintiff's fall, the Court notes that contrary to QBS's contention, it cannot be said that there was no evidence of water or slushy ice on the floor near plaintiff's accident. Viewing the testimony of the plaintiff in the light most favorable to her, she stated that the saw water and ice in the area of her fall, albeit after she fell. That she did not see it immediately prior to her fall does not establish that the water condition was not present at the time of her fall.

There is no indication that defendants and QBS had actual notice of the specific water/ice condition on the floor of the lobby between the first set of elevators and the second set of elevators that caused plaintiff's fall.

Nor is there sufficient evidence from which a jury may conclude that defendants and QBS had constructive notice of the water, slushy ice condition between the first and second set of elevators. On this point, *Gibbs v Port Authority of New York* (17 AD3d 252, 794 NYS2d 320 [1st Dept 2005]), on which QBS relies, is instructive.

In *Gibbs*, plaintiff and several acquaintances reported to the employees' entrance of MSG at approximately 7:45 A.M. and waited for 30 minutes outside in the rain to enter the building. Once inside, plaintiff proceeded through a set of doors, into a hallway. As plaintiff waited to check in, she noticed a "lot of water" on the floor, which "must have been scattered [there] from the umbrella[s] and people [who] were walking in." She observed at least two persons on the line slip, prompting her to wonder "why nobody was cleaning it up." Recalling "the whole area [as]

covered with water," she then slipped and fell herself. MSG moved for summary dismissal on the ground that defendant did not create or have actual or constructive notice of the allegedly dangerous condition. The motion was denied on the ground that issues of fact existed as to how long the water was on the floor and whose responsibility it was to clean it. However, the First Department reversed, holding that there was no proof as to how long the water was on the floor. Although plaintiff testified that at least two other persons slipped before her, she admitted that she did not know how long the water was on the floor. Nor was there any evidence that any MSG employees were in the immediate vicinity where plaintiff fell before the accident. Citing *Keum Choi*, (*infra* at page 16) the First Department held that "Given 'the total lack of evidence on the issue of the length of time the [condition] was present' there is no evidence from which a jury could infer that such condition existed for a sufficient period to allow MSG or its employees to discover and remedy it." In addition, because the evidence strongly suggested that any water on the floor had been tracked into the building by the persons immediately preceding plaintiff on the line, or the umbrellas they were carrying, no inference of constructive notice arose. The Court also stated that MSG did not have an obligation to provide a constant remedy to the problem of water being tracked into a building in rainy weather.

Like the plaintiff in *Gibbs*, plaintiff herein testified that it was raining before she left her house to go to work at 7:15 a.m. When describing the weather conditions, plaintiff stated that it was "cold, sloppy and slushy" (27). The sidewalks outside were wet (27). While plaintiff testified that she learned that "water and ice" on the floor caused her fall, she "didn't see it before" she fell; it was on her coat (39). She did not see the water that morning before she fell (40), but noticed it on the floor after she fell (40). When asked if she were able to describe the

size of the water on the floor, she stated, "No, because by then it was absorbed into my coat." (40). She did not remember the size of the water (42), except that " the side of [her] coat was wet from almost the hip down to the hem along the leg line when I fell." The "ice" was slush from boots being tracked in and out through the lobby of the building , resembling "soggy shoe prints" and "[i]n the area where I fell . . .". She later described the ice as "greyish" and that is was "clearly street slush." The record also indicates, as did the record in *Gibbs*, that there were no porters or superintendents addressing the water, "gushy" ice condition of the floor prior to fall that morning.

Thus, given that plaintiff did not see the water or ice before she fell, and there is no evidence of how long such condition existed, no inference can be drawn that defendants and QBS had constructive notice of a dangerously wet floor (*Shernicoff v 1700 Broadway Co.*, 304 AD2d 409, 757 NYS2d 552 [1st Dept 2003] [claims that it was raining for an hour when plaintiff arrived at defendants' building and that he slipped on droplets of water on the floor from people, including himself, carrying umbrellas and tracking in the rain, fail to show that the allegedly dangerous wet condition was visible and apparent for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it]; *see also Garcia v Delgado Travel Agency Inc.*, 4 AD3d 204, 771 NYS2d 646 [1st Dept 2004] [the fact that it was raining and water was being tracked in does not constitute notice of a dangerous situation warranting more than laying floor mats]).

Similarly, *Keum Choi v Olympia & York Water Street Co.* (278 AD2d 106, 718 NYS2d 42 [1st Dept 2000]), on which QBS also relies is instructive. In *Keum Choi*, plaintiff slipped and fell while approaching the elevator in a building in which he was employed. Plaintiff could not

remember whether he saw water on the floor where he fell. Plaintiff "inferred his fall was caused by water on the floor since it had rained for an hour that morning, he could see footprints on the floor and his clothing and hand were wet after his fall." Plaintiff also testified that there were no mats on the day he fell, or signs indicating the floor was wet. The First Department found that the evidence did not support a finding of constructive notice of the condition or that the condition was recurring. The First Department reasoned that *even assuming the water was visible*, there was no evidence from which a jury could conclude that such condition existed for a sufficient period of time to allow defendants to have discovered and remedied it; it was possible that any water on the floor had been tracked into the building by individuals immediately preceding plaintiff.

Although *Keum Choi* is silent as to whether plaintiff therein ever described the condition that caused him to fall as slushy and grey, the record indicates that the water and ice on the floor in the area in which plaintiff fell had been tracked into the building by the persons immediately preceding plaintiff. And there is no evidence to support an inference of how long such water and slush existed at the accident site prior to plaintiff's fall. Therefore, defendants and QBS established that there is no evidence from which a fact finder may infer that defendants' and QBS had constructive notice of the water/ice condition in the elevator banks which allegedly caused plaintiff's injures, and plaintiff failed to raise an issue of fact as to this issue.

Turning to whether the water/ice condition in the elevator banks was an ongoing and recurring condition that was routinely left unaddressed by defendants and QBS, where a property owner has actual knowledge of the tendency of a particular dangerous condition to recur, he or she is charged with constructive notice of each specific recurrence of that condition (*Solazzo v*

New York City Transit Auth., 21 AD3d 735, 800 NYS2d 698 [1st Dept 2005] *citing Weisenthal v Pickman*, 153 AD2d 849, 851, 545 NYS2d 369 [1989]). "Since it may reasonably be inferred that a property owner has actual knowledge of a dangerous condition that is recurrent in inclement weather 'it is not necessary that plaintiff prove that the defendant had actual knowledge of the accumulation of rain water on the date of her accident, but merely that the condition was recurring over a period of time with each successive rainfall, thereby putting the defendant on constructive notice of the condition'" (*Solozzo v New York City Transit Auth. supra*).

Reading the testimony of all parties in the light most favorable to the plaintiff, the record indicates that plaintiff's accident occurred in the morning, after it had been raining that morning, and that whenever there was inclement weather, puddles accumulated on the floor of the lobby near the elevator banks where she fell. Also, there is evidence that the floor in the area where plaintiff fell was actually slippery before plaintiff's fall (*cf. O'Rourke v Williamson, Picket, Gross, Inc.*, 260 AD2d 260, 688 NYS2d 528 [1st Dept 1999]). Further, on previous days of inclement weather, mats had been placed on certain portions of the lobby floor by porters employed by QBS and with mats provided by defendants, but not in the area where plaintiff fell. And, defendants received approximately a dozen complaints regarding the floor in the lobby being slippery or wet within a three-year period prior to the accident. Although defendants correctly note that they are under no obligation to cover the entire floor with mats and to continuously mop up all tracked-in, (*Garcia v Delgado Travel Agency Inc.*, 4 AD3d 204, 771 NYS2d 646 [1st Dept 2004]), there is evidence from which a fact finder may conclude that defendants failed to use reasonable care to remedy the particular recurring condition that occurred during inclement weather conditions in the area of plaintiff's fall (*Solazzo v New York*

City Transit Auth., 11 AD3d 735, 800 NYS2d 698 [1st Dept 2005] *citing Pignatelli v Gimbel Bros.*, 285 AD 625, 626-627, 140 NYS2d 23 [1955], *affd.* 309 NY 901 [1955]; *see also Migli v Davenport,* 249 AD2d 932, 672 NYS2d 551 [1998]).

That QBS's Supervisor testified that QBS was unaware of any complaints concerning a slippery condition of the floor in the area of the elevator banks does not defeat plaintiff's showing of a recurring, water and slushy ice condition. As articulated in *David v New York City Housing Auth.* (284 AD2d 169, 727 NYS2d 404 [1st Dept 2001]), it is not necessary that plaintiff prove that the defendant had actual knowledge of the accumulation of rain water on the date of her accident, but merely that the condition was reoccurring over a period of time with each successive rainfall.

Therefore, in light of the above, defendants are not entitled to summary judgment dismissing plaintiff's complaint as asserted against them.

As to the branch of defendants' motion for summary judgment against QBS on their third-party claims and cross-claims for common law and contractual indemnity, it is uncontested that the QBS contract requires QBS to maintain and clean the lobby, including placing mats and providing spot mopping during inclement weather. It is also uncontested that the QBS Contract required QBS to indemnify the defendants from injuries to persons "arising from or in any way connected with the services and obligations to be performed hereunder . . . , but only to the extent same are caused by negligence . . . of QBS." However, QBS's papers indicate that it had no control over the locations at which the mats were to be placed in the lobby. Thus, to the degree that plaintiff's claims rest on the alleged failure to provide mats by the elevator banks in the lobby, it cannot be said that plaintiff's injuries were caused by QBS's failure to maintain the

lobby. Therefore, common law and contractual indemnification in favor of defendants and against QBS is unwarranted at this juncture.

As to the branch of defendants' motion for summary judgment against QBS for breach of contract for failure to procure insurance, it is uncontested that QBS's contract requires QBS to:

> list the following entities as additional insured [sic] on Commercial General and Umbrella Liability policies and indicate same on Acord Form #25s Certificate that it provides: Fifth Avenue 58/59 Acquisition Co. LP, . . .Macklowe Management Co., Inc.,, Macklow Management Co., Inc. . . .

It is uncontested that QBS, therefore, is required to name defendants as additional insureds on Commercial General and Umbrella Liability policies. However, defendants, as the movants, fail to establish that (1) QBS did or did not obtain commercial general and umbrella policies, and (2) that QBS failed to name defendants on any such policies. It is well settled that in order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept 2000] *citing Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985, 599 NYS2d 526; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316).

The failure of defendants to establish its right to summary judgment as a matter of law requires denial of the motion in this regard, regardless of the sufficiency of QBS's papers (*see*

Diaz v Nunez, 5 AD3d 302 [1st Dept 2004]). Therefore, summary judgment on defendants' claim for breach of agreement to procure insurance is denied, at this juncture.

The Court also notes that QBS failed to establish entitlement to dismissal of defendants' cross-claims for indemnification and breach of agreement. QBS's papers are silent as to defendants' claims against it. Therefore, the branch of QBS's motion for dismissal of all cross-claims by defendants is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants/third-party plaintiffs Macklowe Properties and Fifth Avenue 58/59 Acquisition Co. for summary judgment (CPLR 3212) dismissing the Complaint as asserted against them, or alternatively, for summary judgment against third-party defendant Quality Building Services, Corp. on their third-party claims/cross-claims for common law and contractual indemnity, and breach of contract for failure to procure insurance, is denied; and it is further

ORDERED that the motion by Quality Building Services, Corp. for summary judgment dismissing plaintiff's claims and all cross-claims by defendants is denied; and it is further

ORDERED that defendants/third-party plaintiffs Macklowe Properties and Fifth Avenue 58/59 Acquisition Co. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 14, 2008

Hon. Carol Robinson Edmead, J.S.C.

FILED
OCT 15 2008
COUNTY CLERK'S OFFICE
NEW YORK