[* 1]

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

PRESENT: GISCHE Justice PART 10

BELFIORE, SHAUNA

INDEX NO. 115812/05

v

MOTION DATE

304 PARK AVENUE SOUTH, LLC

MOTION SEQ. NO. 05

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

Dated: 11/19/08

JUDITH J. GISCHE, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

IF DISPOSITION IS NON-FINAL, IS HEREBY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

SHAWN BELFIORE,

Plaintiff,

-against-

304 PARK AVENUE SOUTH, LLC and WALTER & SAMUELS, INC.,

Defendants.

----------x

Index No.: 115872/05
Seq. No. : 004, 005, 006

Present:
Hon. Judith J. Gische
J.S.C.

304 PARK AVENUE SOUTH, LLC and WALTER, & SAMUELS, INC.,

Third-Party Plaintiff,

-against-

E.C.C. INDUSTRIES, INC.,

Third-Party Defendants.

----------x

Index No.: 590442/06

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers - 004 **Numbered**

ECC n/m (CPLR § 3212) w/ JLZ affirm, JM, GD affids, exhs 1
304 Park JDF affirm in opp, exhs 2
Pltf PPT affirm in opp, exhs 3
ECC reply w/ LMC affirm 4
ECC reply w/ LMC affirm 5
Pltf SMS affid 6
DVD - Security Video 7

Papers - 005 **Numbered**

304 Park OSC (CPLR § 3212) w/ JDF affirm, exhs 1
Pltf's PPT affirm in opp, exhs 2
Pltf's PPT supp affirm in opp, exhs 3
ECC LMC affirm in partial opp, exhs 4
304 Park reply affirm (JDF) 5
304 Park reply affirm (JDF) 6

Papers - 006 **Numbered**

Pltf's OSC w/ exhs 1

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by plaintiff Shawn Belfiore ("Belfiore" or plaintiff) arising from a slip and fall allegedly caused as a result of defendants' negligence. Third-party defendant E.C.C. Industries, Inc. ("contractor") now moves for summary judgment dismissing both plaintiff's complaint and the third-party complaint (motion sequence number 004). Defendants 304 Park Avenue South, LLC ("owner") and Walter & Samuels, Inc. ("managing agent") also move for summary judgment dismissing plaintiff's complaint, and for summary judgment on the third party-complaint against the contractor (motion sequence number 005). Plaintiff also moves for: an order directing the filing of plaintiff's affirmation in opposition to ECC's motion filed *nunc pro tunc*, and for an order in limine precluding defendants from advancing certain arguments at the time of trial (motion sequence number 006) and striking the answer. Each of these motions have been opposed by the respective non-movants. These motions were consolidated for consideration by the court's order dated 10/16/08.

Issue has been joined and since the motions seeking summary judgment were brought timely after the note of issue was filed, they will be considered on their respective merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

On September 7, 2004, at approximately 7 a.m., a porter named Gonzalo Durana ("Durana"), employed by the contractor and working at the building, cleaned the sidewalk in front of the building located at 304 Park Avenue South, New York, New York (the

additional mats in the lobby area.

Plaintiff has also submitted an affidavit by Scot M. Silberman, P.E., who is a professional engineer licensed by New York. Mr. Silberman maintains that based upon the video tape surveillance, the facts of this case, and a personal inspection of the building on December 28, 2006, the defendants breached industry standards of safe building maintenance by failing to place runner mats in the lobby entrance in contemporaneously with the sidewalk cleaning.

Mr. Silberman opines in the affidavit and in a separate report dated February 3, 2007, that the Static Coefficient of Friction ("SCOF") is a value commonly used to indicate the slip resistivity of a surface and that any value less than 0.5 would indicate a slippery walking surface. Mr. Silberman states that the lobby floor when dry had SCOF values of 0.41 to 0.48, and when wet, the result decreased to 0.33. Based on Mr. Silberman's analysis of the slip resistivity of the lobby floor, Mr. Silberman concluded that:

> In it's dry condition, this flooring does not provide the required slip resistance. The current condition is adversely affected when the surface of this flooring material or the soles of a pedestrian's shoes become wet and the slip resistivity is greatly reduced.

Mr. Silberman states that the defendants' maintenance of the lobby floor on the date of plaintiff's accident violates the following Industry standards: the American Society for Testing Materials ("ASTM") §§ F609-96 and F163, the National Safety Council Data Sheet 1495-86 and the American National Standard § A1264.2-2001.

John Zhivanaj ("Zhivanaj"), a superintendent at the building employed by the managing agent, testified at his first deposition that he supervised the contractor's

employees. Specifically, he supervised a porter whom he directed to hose the sidewalk in front of the building approximately three times a week. With respect to routine building maintenance, Zhivanaj testified as follows:

Q. Aside from that built-in or inlaid mat, are mats ever laid in the vestibule area or lobby area at any time during the day?

A. Mats are laid down when it's raining.

Q. Any other time?

A. No.

Q. What about snow or any type of wet weather?

A. Yes.

Q. Is it fair to say that any time the weather is wet outside you would put mats down in the lobby?

A. When it's snowy and when it's rainy we put the mats down.

Q. Okay. I don't think I asked you this, but what are your general hours and days of work?

A. Monday through Friday, 7:00 a.m. to 5:00 p.m.

Q. And when you first arrived at the building, did you make a determination as to when mats should be put down in the lobby or vestibule areas?

A. No, the porter puts them down automatically when it's raining or when there's snow out on the street.

Q. When Mr. Durano (sic) first became employed at the building, did you pass him those instructions for to (sic) him to put mats down when it was raining or there was snow on the street?

A. No.

Q. Did he know to do that automatically when he

came?

A. Yes, he did know.

Zhivanaj maintained that he would "check" to see if the mats were put down and stated that mats were not put down on sunny days. Zhivanaj also testified that the "whole staff" at the building worked for the contractor and that the contractor paid these employees' their salaries.

At the time of plaintiff's accident, the contractor provided maintenance and cleaning services at the building to the owner and the managing agent, pursuant to a written contract, signed to on February 10, 1997. One provision in the contract required the contractor to "thoroughly hose down daily all sidewalk and loading dock ramp areas, weather and water regulations permitting." In addition, the contractor was to "lay down and remove lobby runners as necessary." John McQuade ("McQuade"), Vice President of the contractor, testified at his deposition as follows:

Q. Sir, am I correct that Mr. Gonzalo[1], Mr. Seda, and Mr. Ortega the day time employees [the contractor's employees] would have been supervised in the day-to-day activities by the building superintendent at the building?

A. Yes.

...

Q. To your knowledge, [did the contractor] ever train (sic) either Mr. Gonzalo, Mr. Etienne, Mr. Seda, or Mr. Ortega as to policy and procedure, either be putting down running mats in the lobby of the [building]?

---

[1]It appears to the court that McQuade merely misstated the name of one of the porters, i.e. Mr. Gonzalo Durana, rather than Mr. Gonzalo. Otherwise, there is no dispute that these two names refer to the same person, Gonzalo Durana, the porter employed by the contractor who was present in the lobby at the time of plaintiff's accident.

Q. If it was not the normal situation where there was heavy rain outside or some other situation which calls for the placement of running mats in the lobby, and if the superintendent told your employees to put running mats down in the lobby because of these other conditions, would your employees have an obligation to follow the instructions of the superintendent?

A. Yes.

...

Q. Sir, just to go back of a couple of things. On page 14, counsel just read to you a section of the contract indicating that your employees were as part of their job responsibilities were required to physically put down the mats when necessary?

A. Yes, sir.

Q. Am I also correct that on other occasions the superintendent of the building will also have the ability to make a determination whether putting down mats are necessary?

A. Yes sir.

Q. If the superintendent made a determination that putting down running mats were necessary, is it fair to say that sometimes your employees would be required to follow the instructions in that regard to put down the mats.

A. Yes, sir.

Summary judgment on the complaint

The contractor argues that it did not owe a duty to plaintiff, and alternatively, if it did owe a duty to plaintiff, it did not breach said duty because: [1] there is no proof that the "hosing activity" was performed negligently; and [2] "hosing a sidewalk is generally not a dangerous activity and does not create a dangerous condition as a matter of law." The contractor also contends that it was not negligent because the proximate cause of

plaintiff's fall was the alleged slippery lobby floor and, alternatively, the porter, Gonzalo Durana, was a "special employee" of the managing agent, and thus, the contractor should not be held vicariously liable for Durano's purported negligence.

The owner and the managing agent argue that they are entitled to summary judgment because plaintiff is "unable to specify the origin of the water that she tracked in on her shoes." Alternatively, these defendants claim that even assuming the water on plaintiff's shoes originated from the contractor's cleaning of the sidewalk, these defendants cannot be held liable for the acts of the contractor. Finally, the owner and managing agent claim that plaintiff is unable to demonstrate notice of a dangerous condition.

Discussion

The moving party seeking summary judgment has the initial burden of proving its *prima facie* case. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment, as a matter of law, will the burden then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). Granting a motion for summary judgment is the functional equivalent of a trial, therefore, it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

At the outset, the court grants plaintiff's request to have its opposition to the contractor's motion for summary judgment deemed timely filed *nunc pro tunc*. It appears

that plaintiff failed to timely file her opposition due to a calendering error and a misunderstanding with respect to the motion submissions part's protocol with respect to the submission of motions. Due to the drastic relief sought by the contractor in the form of summary judgment and the lack of any prejudice to the other parties, the court will grant plaintiff's request and consider her opposition.

The contractor argues it did not owe a contractual duty to plaintiff. A necessary element of a negligence action is a legal duty to the injured party. "In the absence of a duty, there is no breach and without a breach, there is no liability." Pulka v. Edelman, 40 NY2d 781 *rearg den* 41 NY2d 901 (1977). A defendant is not liable in negligence unless it has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff. Lippman v. Island Helicopter Corp., 248 AD2d 596 (2d Dept 1998); see also Espinal v. Melville Snow Contractors, Inc., 467 NY2d 136 (2002).

The existence of a duty of care is usually a question of law for the court. Palka v. Servicemaster Mgmt. Serv. Corp., 83 NY2d 579 (1994). Once the court has determined the existence of a duty of care, it is then the factfinder's job to determine whether the duty was breached and, if so, whether the breach was the proximate cause of plaintiff's injury. Id.

Where, as here, a contractor has a contractual duty to provide cleaning and maintenance services under a service agreement, that contractual duty does not give rise to a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 (2002). Therefore, the court rejects plaintiff's contention that the contractor was in privity with her because the contractor was required to clean the tenant's spaces. However, there are three exceptions where a contractor may be

held liable to persons outside the contract because it has assumed a duty of care to those persons. Espinal, *supra* (citing Palka v. Service Master Mgt. Svcs. Corp., 83 NY2d 579 [1990]). The exceptions are where: [1] the contractor "launches a force or instrument of harm," by first undertaking a task, but then negligently creating or exacerbating a dangerous condition resulting in an injury; [2] the performance of contractual obligations has induced detrimental reliance on continued performance of those obligations; and [3] the contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. Espinal v. Melville Snow Contractors, Inc., *supra*.

Force of harm

Plaintiff argues that the "force of harm" prong applies here because the contractor negligently failed to put down mats in the lobby during and/or after washing the sidewalk, thereby creating a dangerous condition and/or exacerbating said condition resulting in plaintiff's injury. There is no dispute that the contractor washed the sidewalk approximately one hour before plaintiff's accident and that the contractor failed to put mats down in the lobby. Plaintiff has presented evidence demonstrating that she tracked water from the sidewalk into the building which caused her to slip and fall on the bare lobby floor. This evidence supports plaintiff's claim in her bill of particulars that the contractor created the dangerous condition by "failing to place runner mats or other safe surfaces on the floor." It is also undisputed that mats were put down whenever there was precipitation outside, yet, the contractor's washing of the sidewalk did not merit similar treatment.

Having undertaken the act of washing the sidewalk, the contractor was obligated

to exercise reasonable care in doing so, and can be held liable in negligence if plaintiff can prove that its acts created or increased the alleged slipping hazard in the lobby (Espinal, *supra*; Genen v. Metro-North Commuter R.R., 261 AD2d 211 [1 Dept. 1999]). Here, there is a triable issue of fact as to whether the contractor failed to exercise due care by neglecting to put down mats in the lobby which precludes summary judgment for the contractor.

Although the contractor maintains that "[t]here is no requirement that all floors be covered with mats even during rainy weather", this is a red herring. The contract required the contractor to put down mats "as necessary", and it is unclear whether mats were necessary as was contemplated by the parties in the contract. Assuming *arguendo* that mats were not necessary, the contractor's failure to put down mats under these facts nonetheless creates a question of fact for a jury to determine whether this omission was a departure from the standard of reasonable care, regardless of any contractual requirement to do so.

Plaintiff's alternative theories of liability against the contractor, however, are unavailing. Plaintiff argues that the contractor's performance of its contractual obligations, to wit, cleaning the sidewalk, has induced detrimental reliance on continued performance of those obligations. This argument fails because plaintiff worked at the building for several years and the contractor never put down mats when it cleaned the sidewalk, which it did numerous times each week during plaintiff's tenure. Therefore, plaintiff cannot demonstrate detrimental reliance on an act which had never occurred prior to the accident.

Plaintiff also contends that the subject contract was so broad that the contractor

assumed the owner and managing agent's duty to maintain a safe premises. In deciding whether the contractor assumed duties so broad that it displaced the owner and the managing agent's duty to maintain a safe premises, the court first turns to the contract. It provides that "[t]he contractor shall furnish at its sole cost all labor and materials required to maintain an optimum condition of cleanliness in both the building and the surrounding sidewalk areas."

Based on the plain language of the contract, the contractor did not assume the owner and the managing agent's duty to maintain a safe premises because it was only responsible for cleaning services at the building, and not building maintenance (*cf.* Palka, *supra*). For example, the "Staffing" portion of the contract requires a "light duty cleaner", a "heavy duty cleaner" and a "day porter". These are not the type of persons typically employed for purposes of building maintenance. The "Charges" portion of the contract specifies charges for "Janitorial Services", "Lavatory Supplies/Plastic", "Window Cleaning", and "Pest Control". These are cleaning services, rather than building maintenance services.

The contractor's remaining arguments do not affect the court's decision. Specifically, the contractor has failed to show that, as a matter of law, its acts and/or omissions did not proximately cause plaintiff's accident. The contractor's further argument that "the hosing was not performed negligently" is irrelevant because plaintiff has not taken issue with the manner in which the sidewalk washing itself was conducted, but rather, the contractor's failure to put down mats in conjunction therewith. The contractor's assertion that "wetness on [the] sidewalk is not a dangerous condition" (emphasis removed) is inapplicable. The dangerous condition alleged here is the bare

slippery floor adjacent to a wet sidewalk, rather than the wet sidewalk itself. Nor has the contractor established that Durana was a "special employee" and that therefore, the contractor should not be held vicariously liable (this issue is further addressed herein, see *infra* p. 19).

Accordingly, the contractor's motion for summary judgment on the complaint is denied.

Third Party Beneficiary

Plaintiff also argues that even though she is not a party to the contract between the owner, managing agent and contractor, she is the third party beneficiary of it. To establish a *prima facie* claim as a third party beneficiary, the following elements must be present: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for her benefit and (3) that the benefit to her is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate her if the benefit is lost." State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 (2000); Edge Management Consulting, Inc. v. Blank, 25 AD3d 364 (1st Dept 2006). The service agreement is for the benefit of the property owner and managing agent, who must maintain a safe premises. At best, plaintiff is an incidental beneficiary of the service agreement, but not a third party beneficiary.

The owner and the managing agent's motion for summary judgment on the complaint, however, must be denied. Although these defendants argue that plaintiff cannot demonstrate that the water on her shoes originated from the contractor's cleaning activities, they have failed to submit any evidence that the water which plaintiff tracked in

came from any other source. Moreover, plaintiff has raised a factual dispute on this issue vis-a-vis: [1] her own testimony; [2] the video footage from the lobby surveillance camera which shows that the sidewalk outside the lobby entrance was wet and that there was water accumulation in a small alcove between the sidewalk and the lobby, as well as the lobby itself; [3] the fact that there is no dispute it did not rain for at least eight hours prior to plaintiff's accident; [4] the sidewalk was washed at approximately 7 a.m. by Durana; and [5] plaintiff's expert's opinion that the only mat in the lobby was insufficient to dry off plaintiff's shoes, if they were wet. The source of the water can be established through circumstantial evidence (Bardi v. City of New York, 293 AD2d 505 [2d Dept 2002]).

Numerous other issues of fact also preclude summary judgment. There is an issue of fact as to whether the defendants affirmatively created the allegedly defective condition (Durana may have been a special employee of these defendants via, *inter alia*, Zhivaraj's superivision, see *infra* p. 19). If a reasonable fact-finder concludes that the owner and managing agent did not create said condition, then there is the further factual dispute as to whether the owner and the managing agent were on notice of the alleged dangerous condition. Although Durana, the porter on duty at the time of plaintiff's accident, states in an affidavit that the sidewalk dries within 10 to 20 minutes and that he does not "use as much water as there would be if it was raining", there is no dispute that mats were customarily put down whenever it precipitated outside the building and that no mats were down on the morning of plaintiff's accident. Based on this record, there is sufficient evidence from which a jury could conclude that these defendants had actual and/or constructive notice of the wet condition outside the building giving rise to the alleged dangerous condition with respect to the bare lobby floor.

The owner and managing agent raise several arguments which are meritless. The court outright rejects defendants' argument that plaintiff's opposition is unsupported by admissible evidence. The video tape of the accident and the deposition transcripts do not amount to "conclusory and unsubstantiated assertions", as these defendants maintain. In addition, Plaintiff's testimony that there was no standing water or puddles on the sidewalk, at most, only raises issues of fact on the issue of notice. Moreover, plaintiff's specifically testified that she observed the sidewalk outside the building was in a wet condition.

Similarly, although these defendants maintain that they did not have a "duty to place mats in the lobby when the sidewalk [was] being hosed", this argument is unavailing. These defendants have a non-delegable duty to maintain the building in a safe manner, and therefore cannot avoid liability on this ground alone. Plaintiff's expert's opinion that these defendants departed from ANSI standards may constitute some evidence of negligence (Barzahi v. Maislin Transport, 115 AD2d 679 [2d Dept 1985]).

The court also rejects defendants' claim that it has established that it did not violate its duty of care to the plaintiff. Plaintiff claims that these defendants violated the following industry standards.

> ASTM § F 1637 (5.4.1)
>
> ...mats, runners, or other means or ensuring that building entrances and interior walkways are kept dry shall be provided, as needed, during inclement weather.
>
> ATSM § F 1637 (5.4.2)
>
> ...mats should be provided to minimize foreign particles that may become dangerous to pedestrians particularly on hard smooth floors from being tracked on floors.

ASTM § F 1637 (5.4.3)

Mats or runners should be provided at other wet or contaminated locations, particularly at known transitions from dry locations. Mats at building entrances also may be used to control the spread of precipitation onto floor surfaces, reducing the likelihood of the floors becoming slippery.

ASTM § F 1637 (5.4.4)

Mats shall be of sufficient design, area, and placement to control tracking of contaminants into buildings. Safe practice requires that mats be installed and maintained to avoid tracking water off last mat onto floor surfaces.

ANSS A1264.2-2001

...mats or runners may be required during wet or inclemental weather conditions.

Contrary to defendants assertion, violations of the aforementioned industrial standards can in fact constitute evidence of some negligence sufficient to raise a genuine issue of material fact to submit to a jury. This is not a case where the defendants merely failed to put mats down during ongoing inclement weather, but rather, a failure to put mats down on an allegedly dangerous floor during a scheduled routine sidewalk washing. Therefore, defendants reliance on Gibbs v. Port Authority of New York, 17 AD3d 252 [1st Dept 2002] and Negron v. St. Patrick's Nursing Home, 248 AD2d 687 [2d Dept 1998] is misplaced.

There is also a material dispute of fact as to whether the contractor's cleaning of the sidewalk created a dangerous condition in the lobby. Plaintiff's expert maintains that the lobby floor had an unsafe SCOF when dry, which became even more unsafe when the floor was wet. The surveillance tape shows that approximately five minutes after plaintiff's accident, another woman fell in the same area in a similar manner as plaintiff.

Plaintiff has made a sufficient showing on the issue of whether a dangerous condition existed for this question of fact to go to a jury. Defendants' contention that a wet sidewalk does not constitute a dangerous condition is a red herring because plaintiff does not allege that the wet sidewalk was a dangerous condition - plaintiff slipped and fell on the allegedly dangerous lobby floor which did not have proper mats, due to water she tracked in from the wet sidewalk.

The owner and managing agent's last remaining argument that they cannot be held liable for the acts of the contractor also fails. The First Department case relied upon them, Rodriguez v. C.F. Lex Associates, is inapplicable because plaintiff has not alleged that she slipped on the wet sidewalk, but rather, the lobby floor which was unsafe due to the defendants' failure to properly supervise, control and/or direct the contractor's employees to put down mats in the lobby contemporaneously with the sidewalk washing activities.

Accordingly, the owner and managing agent's motion for summary judgment dismissing plaintiff's complaint is denied.

Summary judgment on the third party complaint

The owner and the managing agent, as well as the contractor, each move for summary judgment on the third party complaint seeking contractual and common law indemnification.. A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances (Barnes v. New York City Housing Authority, 43 AD3d 842 [2d Dept 2007]). The

The owner and managing agent argue that they are entitled to contractual

indemnification from the contractor. The contract states in pertinent part:

> Indemnification
>
> To the fullest extent permitted by law, the CONTRACTOR shall indemnify and hold harmless the OWNER of premises covered by this contract and [the managing agent], as AGENTS for OWNER, and their agents and employees from and against all claims, damages, losses and expenses, including, but not limited to, attorney's fees arising out of or resulting from the performance of this work, provided that any such claim, damage loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and (2) **is caused in whole or part by any negligent act or omission of the CONTRACTOR, and SUBCONTRACTOR, anyone directly or indirectly employed by any of them or anyone for whose acts an (sic) of them may be liable, regardless of whether or not it is caused in part by a part indemnified hereunder.** Such obligation shall not be construed to negate, abridge or otherwise reduce any obligation of indemnity which would other wise exist as to any party or person described in this paragraph (emphasis added).

An issue of fact as to whether the contractor was negligent precludes a finding of summary judgment. Specifically, while the contract provides that the contractor is required to "lay down and remove lobby runners as necessary", the owner and managing agent have failed to establish that the contractor's failure to lay down mats after washing the sidewalk on the date of plaintiff's accident was negligent. Even if laying down mats after cleaning the sidewalk was considered "necessary" within the meaning of the contract, this would simply support a finding that the contractor breached the contract, as opposed to a finding of negligence on the part of the contractor which would trigger its obligation to indemnify and hold harmless the owner and the managing agent. Similarly, the contractor has failed to prove freedom from

negligence. That the floors may have been slippery to a degree considered unsafe and/or dangerous does not establish that the contractor performed its work in a manner which did not breach its duty of care to the owner and managing agent.

There is also a dispute of fact as to whether Gonzalo Durana was a special employee of the managing agent. Although Zhivanaj, the superintendent, initially testified at his first deposition that he did in fact supervise the contractor's employees, including Durana, at his latter deposition, Zhivanaj retracted that statement. On this issue, Zhivanaj specifically stated:

> Q. Do you talk to [the contractor's employees] on a daily basis?
>
> A. Yes, I do.
>
> Q. Can you just explain to me what you mean by that, how is it that you talk to them on a daily basis?
>
> A. Talk to them about current events.
>
> Q. Do you ever talk to them about their job duties?
>
> A. Job duties or job performance, no.
>
> Q. Have you ever talked to any of those people that you mentioned about their job duties?
>
> A. No.
>
> Q. Do you ever check the work of any of those people that you just mentioned?
>
> A. Yes.
>
> Q. How often do you check their work?
>
> A. Ever (sic) so often.

McQuade testified at his deposition that the contractor did not necessarily employ

the building workers, but rather, was a payroll company. Therefore, the contractor maintains that it cannot be held liable on a theory of *respondeat superior* for the acts of Durana because it did not supervise, direct or control his work. McQuade stated:

> Q. Sir, am I correct that Mr. Gonzalo, Mr. Seda, and Mr. Ortega the day time employees [the contractor's employees] would have been supervised in the day-to-day activities by the building superintendent at the building?
>
> A. Yes.
>
> ...
>
> Q. To your knowledge, [the contractor] ever trained (sic) either Mr. Gonzalo, Mr. Etienne, Mr. Seda, or Mr. Ortega as to policy and procedure, either be putting down running mats in the lobby of the [building]?
>
> Q. If it was not the normal situation where there was heavy rain outside or some other situation which calls for the placement of running mats in the lobby, and if the superintendent told your employees to put running mats down in the lobby because of these other conditions, would your employees have an obligation to follow the instructions of the superintendent?
>
> A. Yes.
>
> ...
>
> Q. Sir, just to go back of a couple of things. On page 14, counsel just read to you a section of the contract indicating that your employees were as part of their job responsibilities were required to physically put down the mats when necessary?
>
> A. Yes, sir.
>
> Q. Am I also correct that on other occasions the superintendent of the building will also have the ability to make a determination whether putting down mats are necessary?

A. Yes sir.

Q. If the superintendent made a determination that putting down running mats were necessary, is it fair to say that sometimes your employees would be required to follow the instructions in that regard to put down the mats.

A. Yes, sir.

In addition, Mark Torre, property manager for the managing agent, testified that Zhivanaj supervised and exercised control over the work performed by the contractor. Based on the foregoing, there is an issue of fact as to whether Durana was a special employee of the managing agent, thereby precluding a finding of negligence against the contractor.

The owner and managing agent are entitled to common law indemnification from the contractor only if they are free from negligence and therefore, are only vicariously liable (Krawczyk v. Ehrenfeld, 277 AD2d 205). The aforementioned issues of fact remain to be decided at trial. Accordingly, the motions for summary judgment on the complaint are denied.

The motion to preclude

Plaintiff seek to preclude the defendants from "introducing evidence relating to constructive notice, actual notice, and causal connection between the hosing operation and the accumulation of water on the sidewalk and at the front door" and to strike defendants answer. This application is based upon the fact that the defendants produced a video tape which ran from 8:06 a.m. to 8:26 a.m. while maintaining that this is the only video tape that exists. Plaintiff speculates that the video tape from 7:30 a.m. to 8:06 a.m. is missing because it was "apparently... destroyed after the accident by the defendants." Plaintiff argues that the defendants "should not profit from the destruction of the evidence

tending to prove their own negligence, by receiving a better deal with a 'mere negative inference' rather than issue preclusion."

The preliminary conference order dated February 23, 2006 stated in pertinent part that defendants were to "provide duplicate copies of all surveillance tapes in lobby for 7:30 a.m. to 8:30 a.m." In response, defendants' counsel produced a DVD from the lobby surveillance camera which showed the plaintiff's accident. The video tape began less than one minute before plaintiff entered the lobby and fell. Plaintiff then made a motion to compel the production of the full one hour of video that was requested. In an affidavit in opposition to that motion, counsel for the owner and managing agent explained that the video from the security camera was automatically recorded over (looped) a short time after plaintiff's accident, but that the video of the accident had actually been saved.

The court granted plaintiff's motion to compel to the extent that it held as follows:

> ...plaintiff is entitled to make an inquiry of somebody produced by the defendant, who is knowledgeable about the surveillance system, who can either confirm or disaffirm the way that it works.
>
> The defendant believes that the person who is knowledgeable is the superintendent, but isn't sure.
>
> Accordingly, the Court is going to require that the defendant produce either the super, if he is knowledgeable or, if he is not knowledgeable, somebody with knowledge of the surveillance system who can either confirm or disaffirm the information that has been provided by defendant's counsel here during the oral argument of this matter and/or information concerning the workings of the surveillance system.
>
> In addition, the defendant will be required to otherwise produce, for deposition, the person or personnel who was stationed in the lobby on the date and time of the accident.

In compliance with that order, defendants produced Zhivanaj for deposition. He

testified that there is one video camera in the vestibule which is connected to a hard drive in his office at the building. He looked at the video on September 13, 2004 saved the portion of it which showed plaintiff's accident and kept recording the surveillance video until there was no more space on the DVD.

Plaintiff's application must be denied. Defendants have come forward with a reasonable explanation for the absence of the requested video. According to defendants, plaintiff's request for video prior to the accident was not made until after the video had been recorded over. Moreover, plaintiff has not offered any evidence that the defendants intentionally or negligently destroyed the video recording. Where evidence has been disposed of and there is no indication that the defendant had any knowledge of its evidentiary value, spoliation sanctions are not warranted (Herbert v. City of New York, 12 AD3d 209 [1st Dept 2004]). There was no reason for the defendants to have known that notice would be a legal issue in this case, requiring them to save a tape with more than the actual accident.

In any event, plaintiff has failed to show that the missing portion of the video sought was central to her case, to wit, she has raised triable issues of material fact on the issue of notice sufficient to defeat summary judgment, without the video.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
November 19, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.