SUPREME COURT OF THE STATE OF NEW YORK **Index No.:100018/05**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:001**

SELIM GJONBALAJ *and* BUTA GJONBALAJ,

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

WATER STREET FEE, LLC,
CUSHMAN WAKEFIELD, *and*
RICK'S PAINTING & DECORATING CORP.

Defendants

CUSHMAN WAKEFIELD

Third-Party Plaintiff,

against

RICK'S PAINTING & DECORATING CORP.

Third-Party Defendant,

The following items were considered in the review of these motions for summary judgment and indemnification:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	3, 4
Replying Affidavits	5
Memorandum of Law	2
Exhibits	Attached to Papers

Moving defendants Water Street Fee, LLC ("Water Street") and Cushman & Wakefield ("Cushman") move pursuant to *CPLR §* 3212 for summary judgment dismissing the plaintiff's complaint and also move for indemnification against co-defendant Rick's Painting & Decorating Corp. ("Rick's Painting"). Defendant Water Street's motions are granted. Defendant Cushman's motions are denied in their entirety.

Facts

This action arises out of a slip and fall accident that occurred on May 14, 2004 at approximately 2:20pm outside the building in 77 Water Street, New York, New York. At the time of the accident, plaintiff Selim Gjonbalaj was an employee of the American Building Maintenance contracted by defendant Cushman, a manager of the building. The plaintiff fell over a paver as he had been picking up water with a 'wet vac' from pools that had formed as a result of an overnight rainfall. It is undisputed that prior to the accident Rick's Painting employees used heavy machinery as they painted the building.

Defendant Water Street is the out-of-possession owner of the subject building; Goldman Sachs Group, Inc. ("Goldman Sachs") was the building's tenant at the time of the accident. Article 14 of the Lease Agreement between Water Street and Goldman Sachs provides in part,

> Landlord Not Liable. From and after the Commencement Date Tenant shall be in exclusive control and possession of the Demised Premises as provided herein, and Landlord shall not in any event whatsoever be liable for any injury or damage to any property or to any person happening in, or about the Demised Premises, nor for any injury or damage to any property of Tenant, or of any other person contained therein resulting from any cause or circumstance whatsoever . . . .[1]

The lease agreement also allows the landlord access to the premises. Article 16 reads in part,

> Access to Demised Premises. Tenant shall permit Landlord and its agents and any Leasehold Mortgagee and/or landlord's under any Prior Lease and any mortgagee of the fee and their respective authorized representatives to enter the Demised Premises at all reasonable times and upon reasonable advance notice....[2]

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[1] Moving defendants' exhibit J.

[2] *Id.*

With respect to Water Street's awareness of maintenance and repairs at 77 Water Street, Glen DiBiase, Director of Property Management for Water Street testified:

> Q. Were you ever made aware of painting word done on the building at 77 Water Street in that time period?
> A. No.[3]

Defendant Cushman was contracted by Goldman Sacs to manage the property at 77 Water Street.[4] Brian McCann, Cushman's portfolio manager, stated the following about Cushman's role with respect to the 77 Water Street property:

> Q. What do you remember about [the accident] independently without looking at any records?
> A. My recollection he fell. I thought he fell in the exterior lobby of 77 Water Street. I thought he slipped on wet pavement or the wet lobby floor and hurt himself. I happened to be in the building that day. I didn't see the accident occur, but I was in the building that day, and I heard he had fallen down.[5]
>
> Q. And if in fact there were any defect in the walking surfaces created by Rick's or anyone else on May 14, 2004, it would be Cushman and Wakefield's responsibility to correct that situation; is that correct?
> [Ms. Brescia: Objection to form. You can answer]
> A. It would be our ultimate responsibility to have it corrected. If it was done by Rick's we would ask them to have - - to either pay for them to do the repair or we would make the correction ourselves.[6]
>
> Q. Did you visit 77 Water Street with any frequency?
> A. I did.
> Q. And tell us what frequency?
> A. Probably on average once every two weeks.[7]

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[3] Testimony of Glenn J. DiBiase, January 20, 2006, 18-19.

[4] Testimony of Brian McCann, May 3, 2007, 13.

[5] *Id.* at 7.

[6] *Id.* at 61.

[7] *Id.* at 11.

Nick Grasso, former Chief Engineer for Cushman, recounted the following about the paver conditions:

> Q. What was the problem that was occurring with those pavers?
> A. They would get out of place.
> Q. And how often was that happening between 2001, when you first started working there, and May 14, 2004?
> A. It would depend on the weather. If you had a bad storm, they'd be out of place. It was nice out, they'd stay nice.[8]
>
> Q. Could you just tell us a little bit more about what you meant about pavers already being repaired that day? What do you recall? When was the order put in and who was doing the work?
> A. I couldn't put the timing on it, but it was the regular maintenance that the pavers be reset at that property because they would shift and move, and it was part of our regular maintenance.[9]
>
> Q. Now, how often would those pavers become uneven?
> A. I would say quarterly.[10]
>
> Q. Before May, Selim's trip and fall accident occurred, how many pavers were not level that were supposed to have been repaired that day?
> A. I don't know.
> Q. Was it more than 50?
> A. I would say 50 to a hundred.[11]
>
> Q. Had anyone, as far as you know, had anyone ever had an accident at 77 Water Street on those pavers before Selim?
> A. I've heard of occasion, yeah.[12]

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[8] Testimony of Nick Grasso, May 27, 2008, 25-26

[9] *Id.* at 41.

[10] *Id.* at 26-27.

[11] *Id.* at 28.

[12] *Id.* at 30.

Discussion

Water Street moves for summary judgment on the basis that it was an out-of-possession landlord and therefore not subject to the day-to-day maintenance and control of the subject premises. Cushman makes this same motion by arguing that it did not create nor had actual or constructive notice of the alleged hazardous condition. Additionally, the movants maintain that Rick's Painting created the alleged defective condition entitling them to common law indemnification against Rick's Painting.

Summary Judgment

The burden of a court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.[13] As such, summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.[14] To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tendering evidentiary proof in admissible form.[15] Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[16] To defeat a motion for summary judgment, the opponent must also produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, and mere conclusions,

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[13] *Dyckman v. Barrett*, 187 AD2d 553, [2d Dept 1992].

[14] *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

[15] *Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446, [1st Dept 1992].

[16] *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

expressions of hope, or unsubstantiated allegations or assertions are insufficient.[17] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[18]

I. Water Street As an Out-of-Possession Landlord

It is well settled that an out-of-possession landlord is generally not liable for injuries that occurred within the premises unless the landlord continued to have control over the premises or is contractually responsible to repair an unsafe condition therein.[19] An out-of-possession landlord, however, may be found liable when he or she "reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair *and* a specific statutory violation exists"[20] [emphasis added]. The Appellate Division, Second Department has emphasized that the mere right to reenter for inspection purposes is insufficient absent a statutory duty.[21] An out-of-possession landlord may also be subject to liability where prior to the transfer of possession, the landlord created or maintained the dangerous condition that caused the plaintiff's injuries and the new landlord had no reasonable time to discover the unknown condition or remedy the condition once it became known.[22] Under these circumstances, the landlord is deemed to have constructive notice of the unsafe condition.

As evidenced by the lease agreement, the defendant Water Street divested itself of the daily maintenance, upkeep, and repair of the building, surrendering its rights and responsibilities

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[17] *Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446, [1st Dept 1992].

[18] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

[19] *Schreiber v. Goldein Realty Corp.*, 251 AD2d 315 [2d Dept 1998].

[20] *Briggs v. Country Wide Realty Equities*, 276 AD2d 456 [2d Dept 2000]; *Thompson v. Port Authority*, 305 AD2d 581 [2d Dept 2003]; *Vasquez v. The Rector*, 40 AD3d 264 [2007].

[21] *Angwin v. SRF Partnership*, 285 AD2d 570 [2d Dept 2001].

[22] *Matthew w. Tobias*, 260 AD2d 608 [2d Dept 1999].

concerning the premises to Tenant Goldman Sachs. Consequently, Water Street cannot be liable for injuries sustained at the leased premises because it had no control of the premises nor did it contractually obligate itself to maintain or repair the building. Although the agreement also holds that Water Street reserved the right to reenter - subject to specific types of inspection - the plaintiff does not introduce any evidence showing that the dislocated pavers constitute a statutory violation as it is required to hold the out-of-possession landowner liable.

The plaintiff's next argument is that given that the pavers were a repetitive problem, their dislocation constitutes a structural defect, making the defendant landowner liable. In order to be subject to liability based on a structural defect, the defect must also constitute a statutory breach. The plaintiffs do not point to a single statute that would hold Water Street liable for an alleged structural defect. Lastly, the plaintiffs allege that the dangerous condition, i.e. the dislocated pavers, was a problem that existed long before Goldman Sachs became a tenant. Nevertheless, the plaintiffs do not offer any evidence of such contention and mere allegations are not enough to suppress a motion for summary judgment. After examining various possibilities that would hold Water Street liable, this court concludes that as an out-of-possession landowner, Water Street did not owe any duty to the plaintiffs because it does not have any control over the premises and there is no evidence of a statutory breach.

II. Cushman's knowledge of the dangerous condition

While it is undisputed that Cushman did not create the defective condition; questions of fact arise regarding Cushman's actual and constructive notice of the pavers' dislocation. In a summary judgment motion for a "premises" case, the moving defendant has "the initial burden of establishing the lack of actual or constructive notice."[23]

If a party has a duty to inspect, and should it have fulfilled that duty discovered the

[23] *Park v. Caesar Chemists*, 245 AD2d 425 [2d Dept 1997].

dangerous condition, the opportunity for knowledge stands for actual notice.[24]

Abundant evidence, coming from Cushman's testimony, demonstrates that it had both actual and constructive notice of the alleged defective condition. Brian McCann, Cushman's portfolio manager, declared that Cushman was in charge of correcting any defects, whether they were created by Cushman or anyone else. In fact, McCann stated that he had been in the building the day of the subject accident and would visit the premises at least once every two weeks. Nick Grasso, former Chief Engineer for Cushman, said that he knew the pavers were supposed to be repaired the day of the accident. Cushman had a duty to inspect and repair the premises of the building, giving rise to actual knowledge of the defective condition. In sum, there is a strong argument that had Cushman fulfilled its duty to inspect and fix the dislocated pavers, it would have discovered that the pavers were a threat to the plaintiff and anyone else who walked on them. Cushman therefore had a duty to know and actually knew that the pavers may be dislocated the day of the accident.

Constructive notice is found when a defect has been visible and apparent for a sufficient amount of time to allow the defendant to see it.[25] New York Courts have established that a "plaintiff's burden of establishing constructive notice may be met by evidence of an ongoing and recurring dangerous conditions in the area of the slip and fall."[26] When a landowner knows about the tendency of occurrence of a particular condition, "he is charged with constructive notice of each specific recurrence of that condition."[27] Ample evidence demonstrates that Cushman also had constructive notice of the dislocated pavers and their potential danger. Nick Grasso testified that the pavers would get out of place, mostly after a storm. Since the plaintiff was cleaning the

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[24] *Kunz v. City of Troy*, 104 NY 344 [1887].

[25] *Kehoe v. Incorporated Village of Valley Stream*, 44 NY2d 704 [1978]; *Batton v. Elghanayan*, 43 NY2d 898 [1978].

[26] *Weisenthal v. Pickman*, 153 AD2d 849 [2d Dept].

[27] *Id.*

sidewalk from water that had accumulated after a rainfall, it was highly probable that the pavers would be moved and that Cushman could have contemplated such occurrence. Grasso also maintained that he had heard of prior accidents occurring on the pavers. There is no doubt that the condition of the pavers had been visible and apparent to Cushman. As such, multiple issues of fact point to Cushman's constructive notice of the defect that may have caused the plaintiff's accident.

Indemnification

Summary judgment on a claim for common law indemnity "is appropriate only where there are no issues of material fact concerning the precise degree of fact attributable to each party involved."[28] The party seeking indemnity must prove that (1) it was not guilty of any negligence and (2) the proposed indemnitor was guilty of some negligence that caused the accident where the indemnitee may be held liable.[29]

Moving defendants argue that they are entitled to common law indemnity because co-defendant Rick's Painting solely created the alleged defective condition since it had been working at the premises prior to the accident. They specifically attribute the pavers' dislocation to the hydraulic lift used by Rick's Painting.

In opposition to the moving defendants' second motion, Rick's Painting contends that Cushman had notice of the pavers' frequent dislocation, had a duty to repair such condition, and advise Rick's Painting of the same. Furthermore, Rick's Painting points out, Cushman has failed to demonstrate the lack of a defect in the premises before Rick's Painting's performance therein. As Cushman's employees have admitted, the dislodging of the pavers had been a frequent

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[28] *Coque v. Wildflower Estates Developers, Inc.*, 31 AD3d 484 [2d Dept 2006], quoting *LaLima v. Epstein*, 143 AD2d 886 [1988].

[29] *Correia v. Professional Data Management, Inc.*, 259 AD2d 60 [1st Dept.]

problem. Grasso had even testified that an accident had occurred by the subject site before, at least raising an issue that the dislocation of the pavers would have the likelihood of causing more accidents. There are multiple issues of fact indicating that Cushman is a least partly liable. As these issues have yet to be resolved, the court cannot grant common law indemnity to Cushman at this point.

Conclusion

Summary judgment is a drastic remedy that strips a litigant of his or her day in court. Thus, courts should exercise great caution in granting such motions. This court finds that there are multiple issues of facts indicating that Cushman may have been aware of the allegedly defective condition and that it should have taken steps to remedy it before the plaintiff's fall. Hence, this court cannot grant summary judgment or common law indemnity in favor of Cushman and against Rick's Painting.

Accordingly, it is hereby:

ORDERED, that defendant Water Street Fee LLC's motions for summary judgment and common law indemnity are granted in their entirety; it is further

ORDERED, that defendant Cushman & Wakefield's motion for summary judgment dismissing the plaintiff's complaint and common law indemnity against Rick's Painting & Decorating Corp. are denied in their entirety; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3 for a Pre-Trial Conference on July 6, 2009.

ENTER,

DATED: May 20, 2009

Joseph J. Maltese
Justice of the Supreme Court