Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IA Part 5
Justice

TOMEKA M. MOORE, etc. x

- against -

FRANCE LEASING CORP.

x

Index Number 17350 2004

Motion Date March 24, 2009

Motion Cal. Numbers 15 & 16

Motion Seq. Nos. 9 & 10

The following papers numbered 1 to 33 read on this motion by third-party defendants Mid City Security Service, Inc. (Mid City) for summary judgment dismissing the third-party complaint and all cross claims; and by separate notice of motion by defendant/third-party plaintiffs (La France) for summary judgment dismissing plaintiff's complaint, or, in the alternative, granting summary judgment in La France's favor on the issue of contribution pursuant to its third-party complaint; and on this cross motion by third-party defendants Defender Security Services, Inc. (Defender) for summary judgment dismissing the third-party complaint.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1-10
Notice of Cross Motion - Affidavits - Exhibits	11-14
Answering Affidavits - Exhibits	15-27
Reply Affidavits	28-33

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Plaintiff, as administrator of decedent's estate, seeks to recover damages on behalf of decedent for injuries allegedly sustained on the morning of June 20, 2003 in the stairwell of decedent's apartment building. As alleged in the complaint, decedent was descending the interior stairwell between the ninth and tenth floors when she slipped on a puddle of urine. It is further alleged that decedent died from the injury sustained as a result of this slip-and-fall, when a blood clot formed in her lower leg due to multiple fractures, eventually leading to her fatal bilateral pulmonary thromboemboli. The apartment building where the accident occurred is owned by La France. Mid City provides security services and acts as a quasi-police force throughout the building, and Defender provides unarmed security guards to monitor the lobbies and gate houses.

On a motion for summary judgment in a slip-and-fall action, a defendant must demonstrate, prima facie, that it did not create the condition which caused plaintiff's accident and that it did not have actual or constructive notice thereof (*see Cunningham v Bay Shore Middle School*, 55 AD3d 778 [2008]; *Kaplan v DePetro*, 51 AD3d 730 [2008]; *Miguel v SJS Assoc., LLC*, 40 AD3d 942 [2007]). A defendant has constructive notice of that condition when it is visible and apparent, and has existed for a sufficient length of time before plaintiff's accident, such that defendant had time to discover it and to take remedial measures (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Rubin v Cryder House*, 39 AD3d 840 [2007]; *Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409 [2006]).

In support of its motion, La France submits the deposition testimony of Aaron Goldfried (Goldfried), property manager of the subject building. His responsibilities include responding to tenant complaints and service requests, filling orders, overseeing building maintenance (such as performing periodic inspections himself) and supervising superintendent Rafael Acosta (Acosta) and assistant superintendent Luis Collins (Collins). Goldfried testified that he never received any complaints from a tenant regarding urine, nor had he ever personally observed that kind of issue in the building. Goldfried also stated that stairwells are cleaned on a daily basis, and that it is the responsibility of Acosta, Collins, and the porters, to ensure that said stairwells are maintained in a safe and clean condition.

La France also submits the deposition testimony of Collins. As assistant superintendent, Collins is responsible for building repairs and maintenance, and oversight of thirteen porters. Collins testified that porters clean the stairwells twice per day: once between 9:00 A.M. and 12:00 P.M., and once again between 1:00 P.M. and 4:00 P.M. Collins then performs visual inspections during these times to ensure that the porters are completing their tasks. A night porter works between the hours of 3:00 P.M. and 11:00 P.M., who is responsible for general maintenance. Collins testified that, during the course of the inspections which took place within the year of decedent's accident, he has seen the problem of urine in the stairwells. Collins also stated that he is on standby after business hours for

"emergency night duties," wherein Mid City is required to contact Collins in the event of an emergency. Collins testified that the issue of urine is not considered an "emergency"; thus, he would not receive a call for same. Ordinarily, if there is a complaint about that issue during business hours, or if urine is otherwise observed, it would be cleaned immediately by maintenance staff.

La France also offers the deposition testimony of John Graziano (Graziano), Security Director for Mid City. Graziano explained that Mid City patrols the apartment complex 24 hours per day, and responds to services for tenants and visitors. Patrols include "vertical patrols," which entail traversing all stairwells in the apartment complex. If, during a vertical patrol, a hazardous condition is discovered, the superintendent is notified so that the condition can be remedied. If such a condition is discovered after 11:00 P.M., the Mid City "dispatcher would probably advise the supervisor on duty and then it would be [the super's] call." Sylvester Pruyear (Pruyear) was the Peace Officer on duty who responded after decedent's fall. Pruyear is required to perform a vertical patrol once per day for each staircase, at no particular set time. After responding to decedent's complaint, and after having seen the puddle, Pruyear immediately notified the superintendent of the condition. Pruyear also testified that he had noticed urine on the stairwells in the past.

The testimony of Dave Rowe (Rowe) is also submitted by La France. Rowe is a tenant in the building who discovered decedent sitting in the subject area after her fall, and spoke to her immediately after the incident. Rowe claims that he, too, slipped on the same puddle the evening before at approximately 11:00 P.M. Thereafter, Rowe notified Defender about the condition and Rowe was told: "we'll get somebody [to] take care of it." Rowe stated that he has complained several times in the past, to both maintenance and Defender, about urine in the stairwells. Mitch Gitter (Gitter) appeared on behalf of Defender. Gitter testified that if a hazardous condition was brought to Defender's attention, a Mid City dispatcher would be notified.

While it appears that La France did not have actual notice of the condition on the stairwell which allegedly caused decedent to fall - as there is no testimony indicating that La France itself was notified of said condition prior to her fall - there is an issue of fact as to whether La France can be charged with constructive notice. First, based on the above submissions, it remains unresolved whether the dangerous condition upon which Rowe slipped the night before decedent's fall was the same condition that caused decedent herself to fall the following morning. Even if La France was not present overnight such that it could have been notified regarding the condition, there is still an issue as to whether the puddle of urine had existed for a sufficient amount of time in the morning before decedent's fall such that it could have been discovered and, thereafter, remedied, by La France (*see Flynn v Fedcap Rehabilitation Servs., Inc.*, 31 AD3d 602 [2006]; *Pearson v Parkside Ltd. Liab. Co.*, 27 AD3d 539 [2006]; *cf. Rivera v 2160 Realty Co.*, LLC, 4 NY3d 837 [2005]). The record

before the court reveals that there is also a discrepancy as to the time the incident occurred, indicating that it could have happened at either approximately 9:00 A.M. or 9:45 A.M.

Second, inasmuch as La France may have established a general protocol with respect to maintenance of the stairwells, it did not submit specific evidence as to when the subject area was last inspected prior to decedent's fall (*see Bruk v Razag, Inc.*, 60 AD3d 715 [2009]; *Soto-Lopez v Board of Mgrs. of Crescent Tower Condominium*, 44 AD3d 846 [2007]; *Williams v JP Morgan Chase & Co.*, 39 AD3d 852 [2007]). When prompted for an answer, neither Goldfried nor Collins could recall if they, or their porters, had inspected the stairwell on that day. Moreover, an issue was raised as to whether La France had actual knowledge of an ongoing and recurrent problem of urine present in the apartment stairwells such that constructive notice of the subject condition may be imputed (*see Perez v Mekulovic*, 13 AD3d 158 [2004] [question of fact as to whether defendants had notice of each specific recurrence of the dangerous condition of urine on the stairs, as complaints were made on numerous occasions about the recurring presence of same]; *see also Kohout v Molloy College*, 61 AD3d 640 [2009]; *Hutchinson v Medical Data Resources, Inc.*, 54 AD3d 362 [2008]; *Sewitch v LaFrese*, 41 AD3d 695 [2007]). The deposition testimony of Collins reveals that La France may have been apprised of this ongoing problem. Rowe also claimed that he had, numerous times in the past, notified maintenance of the dangerous conditions existing in the stairwells.

With respect to the issue of contractual indemnification as it applies to Mid City, inasmuch as it is undisputed that no written contract exists between La France and Mid City, this court is not persuaded that an oral contract to indemnify La France existed. As a preliminary matter, the affidavit of Paul Bozzo, Assistant Secretary of Mid State Management (the managing agent of the subject property), submitted in opposition to Mid City's motion, will not be given consideration by this court as this witness was not disclosed as a notice witness before the note of issue was filed, nor has La France proffered a reasonable excuse for such a delay in disclosing the identity of said witness (*see e.g. Rodriguez v Sung Hi Kim*, 42 AD3d 442 [2007]; *Concetto v Pedalino*, 308 AD2d 470 [2003]; *Ortega v New York City Tr. Auth.*, 262 AD3d 470 [1999]).

Moreover, while it may be true that a contractual relationship exists between the two parties such that Mid City was retained to provide security services (which indisputably included the duty to report hazardous conditions if observed), there is no evidence before this court that would suggest that the parties had the explicit intent for Mid City to indemnify La France for such situations, nor is there evidence of any representation by Mid City to that effect (*see e.g. Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006] [courts will not construe a contract to provide indemnity without an "unmistakable intent" to indemnify]; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] [promise to indemnify should not be found unless it can be clearly implied]; *Eldoh v Astoria Generating*

Co., LP, 57 AD3d 603 [2008]; *Quality King Distribs., Inc. v E & M ESR, Inc.*, 36 AD3d 780 [2007]).

Defender has also established, prima facie, that no indemnification contract existed between itself and La France. The only proffered contract is between Defender and Mid State Management, in which there exists an indemnification clause. In opposition, La France contends, inter alia, that it is the intended beneficiary to this contract, such that it is entitled to contractual indemnification from Defender. This court finds that there is, at least, an issue of fact as to whether La France is a party for whose benefit the Defender/Mid State Management contract was made, based on the surrounding circumstances - including the parties' respective roles - as discussed in detail above (*see e.g. Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 43 [1985]; *Aievoli v Farley*, 223 AD2d 613 [1996]). The subject contract was made for the protection of the subject property, which is owned by La France. As such, enforcement of the indemnification agreement, if applicable to the facts of this case, would be directly, rather than incidentally, beneficial to the owner of the building (*see generally Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]; 22 NY Jur 2d, Contracts § 311 [highlighting that "[t]hird-party beneficiaries who have been able to maintain suit on contracts alleged to be for their benefit include ... suing to recover on a contract embracing the rendition of a service, which, though ordered and paid for by one person, was either wholly or in part for the benefit of another"]). Thus, summary judgment in Defender's favor is not warranted for this particular cause of action.

With respect to the issue of common-law indemnification as it exists against both Defender and Mid City, "[t]he principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505 [2008]; *see also George v Marshalls of MA, Inc.*, 61 AD3d 925 [2009]). Thus, the claim is warranted only where an alleged indemnitee's role in causing plaintiff's injury is "solely passive, and thus its liability is purely vicarious" (*Balladares v Southgate Owners Corp.*, 40 AD3d 667 [2007]; *see also Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643 [1988]; *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792 [2007]; *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75 [1999]).

It is clear, pursuant to the above analysis, that a claim for common-law indemnification cannot be sustained against third-party defendants simply because La France's potential obligations to plaintiff would not be purely vicarious; rather, La France may ultimately be independently negligent, and cannot seek common-law indemnification as a result (*see Adler v Columbia Sav. & Loan Assn.*, 26 AD3d 349 [2006]; *Kagan v Jacobs*, 260 AD2d 442 [1999]). La France's attempt, in opposition, to shift responsibility to either Defender or Mid City, is unavailing. First, it is undisputed that La France has a distinct

obligation to perform maintenance services throughout the building and to correct hazardous conditions. Thus, at the very least, even assuming that some duty was breached by Mid City and Defender, there is evidence that plaintiff's accident "was not due solely to [their] negligent performance or nonperformance of an act solely within [their] province" (*Roach v AVR Realty Co.*, LLC, 41 AD3d 821 [2007]; *see also Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073 [2007]; *Corley v Country Squire Apts., Inc.*, 32 AD3d 978 [2006]). Second, Collins' own deposition testimony reveals that, even if urine was reported to or observed by third-party defendants, said condition should not have been reported to La France during off-duty hours because La France did not consider it to be an emergency. Finally, Collin's affidavit submitted for the purpose of alleging that, "[w]hether a condition rises to the level of 'hazardous' such that it should be reported to me is left to the discretion of Mid City Security and Defender Security Services" is clearly submitted in an attempt to reconcile his earlier deposition testimony and to create a feigned issue of fact, and is, consequently, insufficient (*see Kaplan*, 51 AD3d at 731; *Marchese v Skenderi*, 51 AD3d 642 [2008]; *Ruck v Levittown Norse Assoc., LLC*, 27 AD3d 444 [2006]).

With respect to the issue of contribution, this court finds that no movant is entitled to judgment as a matter of law. While it has been established that La France did not consider the issue of urine to be an after-hour emergency which required notification, there is, at least, an issue of fact as to whether Mid City or Defender had an obligation to report the existence of urine to La France on the morning of decedent's accident such that the dangerous condition could have been remedied. This is based upon Rowe's testimony in which Rowe stated that he notified Defender of an allegedly dangerous condition on the stairwell the evening before decedent's accident and was assured that it would be rectified. Of course, whether the condition that Rowe reported was, in fact, the same condition that allegedly caused decedent's fall, also remains unresolved; for this reason, summary judgment cannot be awarded in favor of any moving party.

Accordingly, La France's motion for summary judgment is hereby denied. The portion of Mid City's motion for summary judgment dismissing the third-party action for contractual indemnification is granted; that portion of Defender's cross motion for summary judgment dismissing the third-party action for the same issue is denied. The respective motion and cross motion by Mid City and Defender for summary judgment dismissing the third-party action for common-law indemnification are granted. The remaining portions of said motion and cross motion are denied.

Dated: June 10, 2009

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J.S.C.