Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

DIANA ARAGUNDI	Index Number 23454 2007
- against -	Motion Date October 14, 2008
TISHMAN REALTY & CONSTRUCTION CO., INC., et al.	Motion Cal. Numbers 3, 4
	Motion Seq. Nos. 4, 5

The following papers numbered 1 to 28 read on this motion by defendant/third-party plaintiff Tishman Realty & Construction Co., Inc, (Tishman Realty) and defendant/second third-party plaintiff Dream Team Associates, LLC (Dream Team) pursuant to CPLR 3212 for summary judgment dismissing the complaint and pursuant to CPLR 3212 for summary judgment against the third-party defendant/second third-party defendant ABM Maintenance (ABM) for summary judgment on its claims for contractual indemnification, common law indemnification and breach of contract for failure to name Tishman Realty and Dream Team as additional insureds; on the motion by third-party defendant/second third-party defendant Graham Restoration Co., Inc. (Graham) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint, the second third-party complaint and all claims and cross claims and pursuant to 22 NYCRR § 130-1.1 for financial sanctions against the defendants/third-party plaintiffs/second third-party plaintiffs Tishman Realty and Dream Team and/or its attorneys of record and for an award for costs, expenses and reasonable attorneys' fees associated with defending the action and making this motion; and on the cross motion by third-party defendant/second third-party defendant ABM pursuant to CPLR 3212 for summary judgment dismissing the third-party and second third-party complaints.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-8
Notice of Cross Motion - Affidavits - Exhibits...	9-12
Answering Affidavits - Exhibits.....	13-22
Reply Affidavits.....	23-28

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

This is an action to recover money damages for injuries allegedly suffered on March 16, 2006. The plaintiff alleges that she fell down the stairwell leading to the subway located at the northeast corner of Eighth Avenue and 42nd Street, New York, New York. The building where the staircase is located is owned by the defendant Dream Team. The plaintiff testified at her examination before trial that as she was walking down the staircase leading to the subway she tripped and fell. The plaintiff testified that as she began to fall she reached out for the handrail to stop her from falling, however, the handrail was loose and she fell down the stairs causing her injuries. The defendants/third-party/second third-party plaintiffs hired the third-party/second third-party defendant ABM for general cleaning and janitorial services at the subject premises, including the staircase. The third-party/second third-party defendant Graham was hired to repair the handrail in the staircase.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Here, the defendants Tishman Realty and Dream Team failed to establish their prima facie entitlement to summary judgment. It is well settled that in order to establish a prima facie case of negligence a plaintiff in a slip and fall case must demonstrate that the defendants either created the hazardous condition which caused the accident or had actual or constructive notice of the condition (see Panetta v Phoenix Beverages, 29 AD3d 659 [2007]; West v DeJesus, 306 AD2d 402 [2003]; Goldman v Waldbaum, 248 AD2d 436 [1998]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient amount of time to allow the defendant or its employees to discover and remedy it (see Scoppettone v ADJ Holding Corp., 41 AD3d 693 [2007]; Green v City of New York, 34 AD3d 528 [2006]; Librandi v Stop & Shop Food Stores, 7 AD3d 679 [2004]). Here, the defendants failed to establish that they lacked constructive notice of a dangerous condition, which in the exercise of due care they could have discovered and remedied (see Miller v Michaels, 56 AD3d 626 [2008]; Smith v Bay Harbour Assoc., L.P., 53 AD3d 539 [2008]; Indence v 225 Union Ave. Corp., 38 AD3d 494 [2007]). Additionally, while defendant Tishman Realty alleges another Tishman entity was the managing agent for defendant Dream Team, and therefore, Tishman Realty cannot be found liable, there is conflicting evidence as to who maintained the stairway which warrants denial of Tishman Realty's motion. There was a plaque affixed to the wall above the stairway which stated that the

stairway and entrance is maintained by Tishman Realty & Const. Co. Therefore, the defendants Tishman Realty and Dream Team's motion for summary judgment is denied.

The third-party/second third-party defendant Graham Restoration established its prima facie entitlement to summary judgment. The third-party/second third-party defendant Graham submitted an invoice dated May 4, 2006 for emergency repair work for the handrail at the location of the accident. Graham also submitted the deposition testimony of its witness, Joseph Graham. Joseph Graham testified that Graham did not perform any work on the subject handrail prior to the accident. The evidence submitted by Graham Restoration established that the work that Graham did at the accident site occurred after the accident had already taken place. While the third-party/second third-party defendant did not attach an affidavit of its principal as it alleged, the deposition testimony was sufficient to establish its prima facie entitlement to judgment as a matter of law. In opposition the defendants third-party/second third-party plaintiffs failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). While in his deposition testimony, Ken Kramer stated that he was aware of two occasions in which Graham performed repair work there is no evidence that any repair work was performed prior to the accident. Mr. Kramer further testified that he could not recall if the repair work was performed prior to the accident. Additionally, Mr. Kramer testified that he personally conducted a search of invoices of repair work done by Graham on the handrail and could only find one invoice for work done after the accident. The request by the third-party/second third-party defendant Graham for costs, attorneys' fees and sanctions is denied.

The third-party/second third-party defendant ABM also made a prima facie showing of entitlement to summary judgment, as there is no duty owed to a third party stemming from a contractual obligation. In response, the defendants third-party/second third-party
plaintiffs have failed to raise an issue of fact as to whether an exception to this rule applies (see Betancourt v Trump Empire State Partners, 27 AD3d 604 [2006]; Galit v Town of Islip, 19 AD3d 642 [2005]). The third-party/second third-party defendant ABM did not have a comprehensive and exclusive maintenance agreement over the premises intended to displace Tishman Realty's responsibility to maintain te premises in a safe condition (see Espinal v Melville Snow Contrs., 98 NY2d 13 [2002]; Troise v New Water Street Corp., 11 AD3d 529 [2004]). Furthermore, the third-party/second third-party defendant ABM did not assume a duty to exercise reasonable care to prevent foreseeable harm to plaintiff by virtue of its contract. Nor is there any evidence that the plaintiff

detrimentally relied on ABM's performance of its duties (see Church v Callanan Indus., 99 NY2d 104 [2002]). Furthermore, inasmuch as there is no evidence that ABM did any work on the subject handrail prior to the accident, it cannot be shown that the ABM created or increased an unreasonable risk of harm so as to have launched a force or instrument of harm (see Betancourt, 27 AD3d at 605; Boddie v New Plan Realty Trust, 304 AD2d 693 [2003]). Additionally, the claim by Tishman Realty and Dream Team for contractual indemnification against ABM must be dismissed. The language of the contract states that the indemnity provision is triggered if an injury is "caused in whole or in part by any willful or negligent act of omission or breach of this contract." Here, the evidence established that ABM was not negligent with respect to its performance under the contract. While the defendants third-party/second third-party plaintiffs argue that the contract called for ABM to police the area and this policing included making inspections of the handrail, there is no evidence to support this allegation. While a porter for ABM testified that ABM policed the area, this was in furtherance of its duties related to the cleaning services it provided. ABM did not have an obligation to make inspections as to the structural condition of the staircase. Finally, the defendants third-party/second third-party plaintiffs' claim for breach of contract for failure to obtain insurance must be dismissed, as the evidence established that ABM did obtain insurance naming Tishman Realty as an additional insured.

Accordingly, the motion for summary judgment by the defendants Tishman Realty and Dream Team is denied. The branch of the motion by third-party/second third-party defendant Graham for summary judgment dismissing the third-party complaint and second third-party complaint is granted. The branch of the motion by the third-party/second third-party defendant Graham for costs, attorneys' fees and sanctions is denied. The cross motion by the third-party/second third-party defendant ABM for summary judgment dismissing the third-party complaint and second third-party complaint is granted.

Dated: February 6, 2009

AUGUSTUS C. AGATE, J.S.C.