Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Edna Bennet,

Plaintiff,

- against -

LSS Leasing Limited Liability Company, Lefrak Management Corp., Lefrak Organization Inc. and AC Floors Corp.,

Defendants.

----------X

LSS Leasing Limited Liability Company,

Third-Party Plaintiff,

- against -

The City of New York and the New York Department of Environmental Protection,

Third-Party Defendants.

----------X

Index Number: 4232/09

Motion Date: 1/11/11

Motion Cal. Number: 5

Motion Seq. No.: 3

The following papers numbered 1 to 14 read on this motion by defendants, LSS Leasing Limited Liability Company, Lefrak Management Corp. (LMC), and Lefrak Organization, Inc. (LOI), for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-5
Memorandum of Law.....	6-7
Affirmation in Opposition-Exhibits.....	8-10
Reply.....	11-12
Reply Memorandum of Law.....	13-14

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by LSS, LMC and LOI for summary judgment dismissing the complaint and all cross-claims against them is granted.

Plaintiff, an employee of the New York City Department of Environmental Protection (DEP), allegedly sustained injuries as a result of tripping and falling over plastic carpet mats that had been stacked near a copy machine that plaintiff was using on March 14, 2006 on the 17th floor of the premises 59-17 Junction Blvd in Queens County. LSS is the owner and landlord of the building and the DEP leases several floors in the building, including the 17th floor. LSS hired Canfield Construction Corp., a non-party, as general contractor to perform renovations to the building, which included replacing the carpeting on the 17th floor. LOI acted as LSS' agent to coordinate the renovation project on behalf of LSS. The managing agent of the building was Mid-State Management, a non-party. The carpet replacement required the DEP to remove the furniture, filing cabinets and floor mats in the area where the carpeting was to be done on the 17th floor.

The evidence, on this record, is that Canfield subcontracted the work to Commercial Flooring Specialists (CFS), a non-party, which, in turn, sub-subcontracted the work to defendant AC Floors, Corp. The unrebutted evidence is that AC performed all the carpeting work and removed and stacked the subject mats. Plaintiff testified in her deposition that her working hours are 9:00 A.M. to 5:00 P.M. She arrived at work on the date of the accident at approximately 7:00 A.M., had breakfast at the coffee shop with co-workers, then went up to the office on the 17th floor at 8:30 A.M. and started working at 9:00 A.M. She found her chair and floor mat removed from her workstation. She noticed approximately 25 floor mats stacked six inches high in front of the copy machine. She testified that she used the copy machine and the fax next to the copy machine and that after she was done, she took a step back and slipped and fell on the stack of mats. The accident occurred at approximately 9:45 A.M. Plaintiff testified that the floor mats must have been stacked sometime during the past night. Moreover, the unrebutted testimony was that no employee of LSS, LMC or LOI was present during that overnight period.

To impose liability upon the owner of premises, it must be established that a dangerous or defective condition existed and that the owner either created the condition or had actual or constructive notice of it (see King v. New York City Transit Authority, 266 AD 2d 354 [2nd Dept 1999] [citations omitted]; see also Medina v. Sears Roebuck and Co., 41 AD 3d 798 [2nd Dept 2007]; Richardson v. Campanelli, 297 AD 2d 794 [2nd Dept 2002]).

LSS, LOI and LMC have presented uncontested evidence that they did not stack the mats and, thus, did not create the condition that allegedly caused plaintiff's injuries. Indeed, counsel for plaintiff concedes, in his affirmation in opposition, that "it would appear that the carpet installer which was retained by

Commercial Flooring Specialists, a contractor hired by Lefrak Organization, Inc., not Canfield was the one responsible for moving the floor mats."

Moreover, there is no evidence that movants had actual notice of this condition. As plaintiff testified, the mats were removed and stacked sometime during the night before the day of the accident and the accident happened in the morning. That same evidence establishes that LSS did not have constructive notice of the condition either. In order for LSS to be deemed to have had constructive notice of the condition, the condition must not only have been visible, but it must have existed for a sufficient length of time prior to the accident to have allowed LSS to discover and remedy it (see Gordon v. American Museum of Natural History, 67 NY 2d 836 [1986]). Since the unrebutted evidence on this record is that the mats were removed from the workstations and stacked during the non-working hours of the night before the day of the accident and that the accident occurred shortly after the DEP's office opened in the morning, coupled with the uncontested fact that LSS did not occupy the building and did not maintain any office or staff on the premises, LSS has presented sufficient unrebutted evidence that the stacked mat condition did not exist for a reasonable length of time so as to have allowed LSS the opportunity to have discovered and remedied the condition.

In addition, an owner who is an out-of-possession landlord is only liable for injuries sustained by third parties on the premises if it retained control of the premises or was contractually obligated to perform repairs or maintenance to the premises (see Roveto v. VHT Enterprises, Inc., 17 AD 3d 341 [2nd Dept 2005]).

Sufficient retention of control of the premises for the purpose of holding an out-of-possession landlord liable for the injuries of a third party on the premises may be found "where the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, there is a specific statutory violation, and a significant design or structural defect that proximately caused the injury" (Spencer v. Schwarzman, 309 AD 2d 852, 853 [2nd Dept 2003]). Such a right of entry is provided in Article 37 of the lease. However, such right of entry could form the basis for liability against LSS "only when a specific statutory violation exists and there is a significant structural or design defect" (Lowe-Barrett v. City of New York, 28 AD 3d 721, 722 [2nd Dept 2006] [internal quotations omitted]). Here, "plaintiff failed to identify 'a significant structural or design defect which violated a specific statutory safety provision' . . . and which proximately caused the accident and injuries" (Khan v. Bangla Motor and Body Shop, Inc., 27 AD 3d 526, 527-28 [2nd Dept

2006])(citations omitted). It is clear that the defect which allegedly caused plaintiff to slip and fall – the stack of floor mats – was not a design or structural defect at all, let alone a significant one.

The second requirement for imposition of liability upon an out-of-possession landlord, namely, that the landlord was contractually obligated to perform repairs or maintenance to the premises, does not apply to the facts of this case, since the injury-causing condition at issue was not a defect resulting from a state of disrepair or neglect of the premises that arose as a result of the landlord's breach of its contractual obligation to repair and maintain the premises. Rather, the condition was one caused by the sub-subcontractor AC in the course of its carpeting work.

In this regard, the evidence presented was that AC was an independent sub-subcontractor hired by CFS which, in turn, was hired by Canfield the general contractor, which, in turn, was hired either by LSS or LOI, the agent of LSS. Both Canfield and CFS were independent contractors as well. A party who hires an independent contractor is not liable for the negligence of the independent contractor unless it is shown that the one who employed the independent contractor controlled the manner in which the work was done (see McSorley v. Tripoli, 284 AD 2d 900 [4th Dept 2001]). Plaintiff's argument that Canfield was not really an independent contractor but an employee of LSS or LOI merely because it reported to LOI is without merit. In any event, whether or not Canfield was an independent contractor is irrelevant, since even if it were not, it is conceded by plaintiff that Canfield hired CFS to perform the carpeting work and CFS, in turn, hired AC to do the work, and that it was AC that was responsible for moving the mats at issue. Since the unrebutted evidence presented is that AC, the sub-subcontractor that performed the work and moved the mats, was an independent contractor, movants are entitled to summary judgment as a matter of law (see Bennett v Commercial Flooring Specialists, Ltd., 2010 NY Slip Op 07302 [2nd Dept]).

Plaintiff has also failed to submit evidence raising a triable issue of fact as to whether LSS or LOI controlled the manner in which AC performed the carpeting work. No evidence is proffered so as to raise an issue of fact as to whether LSS or LOI directed and controlled the manner and method in which the carpet installer moved office furniture and laid down carpeting.

Plaintiff's argument that the stack of mats was an inherently dangerous condition and movants had a duty to warn plaintiff of that hazardous condition is without merit. Movants have proffered

unrebutted evidence that the stack of mats was open and obvious and readily observable to anyone employing the reasonable use of his or her senses. Indeed, plaintiff herself testified that she saw them before the accident. The evidence presented also establishes that the condition was not inherently dangerous and did not present an undue risk of harm, as a matter of law (see Rivas-Chirino v Wildlife Conservation Soc., 64 AD 3d 556 [2nd Dept 2009]; Sclafani v Washington Mut. , 36 AD 3d 682 [2 nd Dept 2007]). Although a property owner has a duty to maintain its premises in a reasonably safe condition, there is "no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (Lee v Oh, 3 AD 3d 473, 474 [2nd Dept 2004]; see also Kupo v Garfinkel, 1 AD 3d 48 [2nd Dept 2003]).

A property owner or other hirer is liable for the negligence of its independent contractor in creating a dangerous condition where "the contractor creates a special danger ... in the course of its work that is inherent in the work and anticipated by the landowner [or other hirer], and the landowner [or other hirer] has notice of the condition" (see Gamer v. Ross, 49 AD 3d 598, 600 [2nd Dept 2008]; see also Thomassen v. J&L Diner, Inc., 152 AD 2d 421 [2nd Dept 1989]). The stack of mats was not a "special danger" whose creation was inherent in AC's work of installing carpeting. No evidence was shown that movants anticipated, or could have anticipated, that the mats would be stacked in front of the copy machine. Finally, movants have shown unrebutted evidence that they did not have actual or constructive notice of this condition prior to the time of the accident so as to have enabled them to take take corrective or prophylactic measures.

Finally, it is uncontested that LMC has no relationship to this matter, and plaintiff does not oppose that branch of the motion for summary judgment dismissing he complaint and all cross-claims against LMC.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against LSS, LMC and LOI.

Dated: February 9, 2011

KEVIN J. KERRIGAN, J.S.C.