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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

RAMASHAR GIR,
Plaintiff,

-against-

25 BROADWAY OFFICE PROPERTIES, LLC, CB RICHARD ELLIS, INC., AND GUARDIAN SERVICE INDUSTRIES, INC.,
Defendants.

INDEX NO. 103920/07
MOTION DATE
MOTION SEQ. NO. 006
MOTION CAL. NO.

25 BROADWAY OFFICE PROPERTIES, LLC,
Third Party Plaintiff,

-against-

GUARDIAN SERVICE INDUSTRIES, INC.,
Third Party Defendant.

THIRD- PARTY INDEX NO. 590012/08

25 BROADWAY OFFICE PROPERTIES, LLC,
Third Party Plaintiff,

-against-

GUARDSMARK, LLC.,
Third Party Defendant.

SECOND THIRD-PARTY INDEX NO. 590106/09

The following papers, numbered 1 to 4 were read on the motion by defendant/third-part plaintiff 25 Broadway Office Properties, LLC, for summary judgment pursuant to CPLR §3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3, 4

Cross-Motion: ☐ Yes ■ No

Plaintiff Ramashar Gir ("plaintiff") brings this action against defendant/third-party plaintiff, 25 Broadway Office Properties, LLC ("25 Broadway") and Guardian Service Industries,

Inc. ("Guardian")[1] to recover damages for injuries allegedly sustained when plaintiff, a security guard, slipped and fell on debris in the loading dock area where he was employed. Plaintiff attributes Guardian and 25 Broadway's negligence in creating or allowing debris and other items to accumulate in the loading dock on a daily basis, which he claims created a dangerous condition. 25 Broadway brings two third party actions, one against Guardian, the company contracted to clean 25 Broadway, and the other against plaintiff's employer, Guardsmark, LLC. ("Guardsmark")[2]. Discovery has been completed and the Note of Issue has been filed. 25 Broadway now moves for summary judgment, pursuant to CPLR § 3212, to dismiss the complaint as against it on the ground that there are no triable issues of fact because plaintiff cannot establish a prima facie case of negligence. 25 Broadway also seeks summary judgment on its contractual and common law indemnification claims against Guardian, as well as costs and attorneys fees. Plaintiff and Guardian have responded in opposition to the motion.

BACKGROUND

In support of its summary judgment motion, defendant 25 Broadway submits, *inter alia*, plaintiff's deposition; testimony of 25 Broadway's Chief Engineer, Christopher Benson ("Benson"); testimony of Guardian's supervisor, Bruce Gessin ("Gessin"); testimony of non-party witness James Bleier and the contract between 25 Broadway and Guardian for cleaning and security ("Guardian Contract"). Both plaintiff and Guardian oppose the motion.

On February 25, 2005, at approximately 8:00 a.m., plaintiff began his shift at 25 Broadway, New York, NY, ("the premises"), owned by 25 Broadway, at the loading dock as a security guard employed by Guardsmark. Plaintiff changed into his uniform and proceeded to

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[1]In an Order by Justice Stallman, dated October 23, 2007, defendant CB Richard Ellis, Inc.'s motion for summary judgment was granted, dismissing all claims asserted against it.

[2]In an Order by this Court, dated June 23, 2010, Guardsmark was granted summary judgment against 25 Broadway in the second third–party action, dismissing all of 25 Broadways claims as against it.

pull a small wooden ramp onto the driveway, as he had done for the past six months. The driveway area, four feet away from the building, was wet from the rain the night before and was filled with debris that plaintiff believes blows in from the road and from people he believed to be homeless sleeping nearby during the night, including newspaper, old paper, cardboard boxes, paper plates and cups. Plaintiff took seven to eight steps backwards, dragging the ramp, which was used to give messengers with hand trucks easy access to 25 Broadway, and slipped and fell on debris strewn over the driveway of the loading dock in front of his small security office. He then lifted himself back up and although in pain, cleaned up all of the debris on the loading dock. Plaintiff alleges that the incident resulted in his physical injuries.

Plaintiff testified in his deposition that each morning for six months prior to the incident he cleaned up all of the debris on the loading dock, only to have the condition recur the following morning. On numerous occasions plaintiff claims that he complained to Guardian's supervisor Gessin about the debris filled loading dock and was assured by him that Guardian's night supervisor would clean the loading dock.

25 Broadway argues that it is entitled to summary judgment as a matter of law because plaintiff cannot establish that 25 Broadway owed plaintiff a duty as it neither created the condition that caused the accident, nor had actual or constructive notice of a dangerous condition. The building never received any complaints about the cleanliness of the loading dock, 25 Broadway proffers, as plaintiff only complained to Guardian's supervisor. In further support 25 Broadway claims that Guardian was responsible for cleaning the loading dock, not 25 Broadway, pursuant to their contract. Also, 25 Broadway argues that plaintiff never specifically identifies what caused him to slip or how long it had been there. 25 Broadway points to the deposition testimony of plaintiff who stated that at the time of the incident he did not notice anything on the floor immediately behind him the moment before he fell.

In opposition, plaintiff argues that there are issues of material fact regarding whether 25

Broadway had constructive notice of a dangerous recurring condition by knowingly allowing the debris to accumulate daily at the loading dock over the past six months. Plaintiff asserts that both the condition of the loading dock and the supervision of the Guardian employees who cleaned it were under 25 Broadway's control. Plaintiff claims that he told 25 Broadway's chief engineer Benson of the ongoing problem of debris littering the loading dock area and that it was never rectified. Furthermore, Benson conceded in his deposition that he saw debris and garbage laying around the loading dock:

> Q. Was there ever a time when you saw debris or garbage that you believe the homeless people had left?
> A. **I see once in a while garbage laying around, yes.**
> Q. Was there ever any human excrement that you saw in the area of the loading dock when you arrived at work in the morning?
> A. I seen it by the building, yes.
> Q. What about with respect to anything that looked like the residue of urine, did you ever observe anything like that in the loading dock area?
> A. Once in a while, yes.
> Q. What about the loading dock area any kind of paper plates, plastic to eat with or food bags or anything like that?
> A. You might see something like that once in awhile there but it is cleaned up by the Guardian people (Notice of Motion exhibit E) (emphasis added).

In opposition, Guardian points to Gessin's deposition testimony which indicates that all cleaning responsibilities for the loading dock, including daytime porters, would be under the order Benson who supervised, directed and controlled their responsibilities (Notice of Motion exhibit F at 14-15, 40). Gessin also testified that from the hours of 7:00 a.m. to 5:00 p.m. the only supervisor of Guardian's work was Benson (*id.* at 8-12).

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party

moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

A. Summary Judgment As Against the Plaintiff

It is well established that where, as here, a defendant moves for summary judgment in a slip-and-fall case the defendant has the initial burden to establish as a matter of law "that it neither created the hazardous condition" which caused the accident "nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). In order to constitute constructive notice, a defect must be visible and apparent and it

must exist for a sufficient length of time prior to the accident to allow the defendant to discover and remedy it *(Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

The Court finds that 25 Broadway has failed to meet its prima facie case of entitlement to summary judgment as a matter of law, of demonstrating that it neither created nor had actual or constructive notice of any hazardous conditions prior to the accident (*see Deluna-Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept 2003]). 25 Broadway presents the deposition testimony of Benson indicating that Guardian was responsible for cleaning the loading dock, yet Benson also states that he would check the cleanliness of the loading dock, but not on a daily basis. Benson's testimony as to 25 Broadway's maintenance procedures fails to satisfy 25 Broadway's burden that it lacked constructive notice, because Benson does not adequately describe the loading dock cleaning routines (*see Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]). Additionally, the details provided in Benson's testimony are insufficient regarding the last time the loading dock was checked prior to the accident and the actions of 25 Broadway or Guardian's staff on the date of the accident (*see Baptiste*, 45 AD3d at 259; *Porco v Marshalls Depart. Stores et al.*, 30 Ad3d 284 [1st Dept 2006]).

Furthermore, in opposition, plaintiff submits evidence which is sufficient to create material issues of fact as to constructive notice, with its evidence that an ongoing and recurring dangerous condition existed on the loading dock which may have been routinely left unaddressed by 25 Broadway and Guardian *(see Deluna*, 303 AD2d at 186; *Uhlich v Canada*

Dry Bottling Co. of N.Y., 305 AD2d 107 [1st Dept 2003]). The deposition testimony of plaintiff and Benson establish that both people had previously observed debris and garbage on the loading dock. Benson admitted to seeing people who he believed to be homeless, about twice a week, sleeping on the sidewalk approximately 200 feet away from the loading dock. Also on a number of occasions plaintiff alleges he complained about the condition of the loading dock to Guardian's engineer and security/shop stuart. This evidence is sufficient to raise a triable issue of fact as to a recurring condition (*see Uhlich*, 305 AD2d at 107). Accordingly, defendant's motion for summary judgment dismissing the complaint and cross claims asserted against it are denied.

B. Summary Judgment As Against Guardian

The portion of the 25 Broadway's motion seeking summary judgment against Guardian on its claims for common law and contractual indemnity are denied as premature. "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). Here, because there has been no determination yet as to Guardian or 25 Broadway's negligence, any order requiring Guardian to defend or indemnify 25 Broadway is not yet ripe for adjudication (*see Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp.*, 78 AD3d 613 [1st Dept 2010]; *Ezzard v One E. Riv. Place Realty Co., LLC.*, 80 AD3d 515 [1st Dept 2011]).

Further, it is fundamental that the right to contractual indemnification depends upon the specific language of the contract (*Kader v City of New York*, 16 AD3d 461 [2d Dept 2005]). Here, the indemnity language in the Guardian Contract is not triggered until there is a finding that Guardian was negligent in its performance of the contract. There has been no determination yet as to Guardian's negligence, and as a result any order requiring Guardian to

contractually indemnify 25 Broadway must be denied as premature (*see Inner City Redevelopment Corp.*, 78 AD3d at 613). Accordingly, the portion of 25 Broadway's motion for summary judgment as against Guardian for its common law and contractual indemnification claims are denied without prejudice as premature.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the portion of 25 Broadway's motion for summary judgment as against the plaintiff, Ramashar Gir, is denied in its entirety; and it is further,

ORDERED that the portion of 25 Broadway's motion for summary judgment as against Guardian for common law and contractual indemnification is denied without prejudice as premature; and it is further,

ORDERED that the portion of 25 Broadway's motion seeking attorneys fees and costs is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this Order, with Notice of Entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 5/24/11

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**