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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 21**

ERMINIA DIAZ,

Plaintiff,

-against-

Index No. 020388/08
Mot. Seq. # 5
Motion Date 5.31.11
Submit Date 9.8.11

HUB PROPERTIES TRUST, REIT MANAGEMEMT & RESEARCH, LLC, SUTTON & EDWARDS MANAGEMENT, LLC, THE INCORPORATED VILLAGE OF MINEOLA and THE HIGHWAY DEPARTMENT OF THE INCORPORATED VILLAGE OF MINEOLA,

Defendants.

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1,2
Answering Affidavit 3,4
Reply Affidavit..... 5,6
Memoranda of Law 7,8

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Motion by defendant Sutton & Edwards Management, LLC ("S&E") for an order pursuant to CPLR 3212 dismissing plaintiff's complaint and all cross-claims against it and for summary judgment on its cross-claim over and against Hub Properties ("Hub") and Reit Management & Research, LLC ("Reit") seeking defense and indemnification and reimbursement of defense costs and attorneys' fees is determined as hereinafter provided. Motion by defendants

Hub, Reit and the Incorporated Village of Mineola (the "Village") for an order pursuant to CPLR 3212 granting them summary judgment dismissing all of plaintiff's claims as against them is **granted.**

On March 3, 2008, plaintiff allegedly tripped and fell on a dangerous, trap-like and hazardous condition related to the pavement in the indoor parking lot located adjacent to 200 Old Country Road, Mineola, New York. More specifically, plaintiff alleges in her Supplemental Verified Bill of Particulars that she was traversing the entrance ramp to the 3rd floor of said indoor parking lot when she tripped and fell approximately 30-40 feet from the stairwell to the 3rd floor of said indoor parking lot. Notably, no mention is made in either document of a raised piece of black rubber as the proximate cause of plaintiff's fall.

Reit is a real estate trust which invests in buildings and manages various buildings. Reit was responsible for the maintenance and management of the accident location. Reit had been the management company at the subject premises for the past ten years.

S&E was the management company on the date of the loss. S&E oversees the day-to-day operations. S&E had a contract with Reit. Reit took over in April 2008. Part of the garage is private (Hub) and the other is municipal.

Reit & Hub

Reit, Hub and the Village move for summary judgment on the grounds that (1) plaintiff is unable to identify the cause of her fall (*Antonia v Srour*, 69 AD3d 666 [2nd Dept. 2010]; *Louman v Town of Greenburgh*, 60 AD3d 915 [2nd Dept. 2009]); and defendants did not create the dangerous condition nor did they have actual or constructive notice of it.

In support of their motion, Hub, Reit and the Village submit plaintiff's deposition testimony; Mr. Maniscalco's deposition testimony; the deposition testimony of Reit's Chief Engineer, Ken Macvicar, the deposition testimony of John Healy; and the affidavit of Scott Derector, a professional civil engineer. In his affidavit, Mr. Derector states, in relevant part, as follows:

> "Per my inspection, there is no raised piece of black rubber placed between the cement anywhere in the subject area cited in the plaintiff's Supplemental Verified Bill of Particulars, specifically 'the entrance ramp to the 3rd floor of said indoor parking lot, approximately 30-40 feet from the stairwell to the 3rd floor of said indoor parking lot.'
>
> At the time of my inspection, there was an expansion joint located 28 feet 10 inches from the subject stairwell on the 3rd floor of the indoor parking lot, which is located just at the top of the vehicle ramp. That expansion joint was not raised, but rather was flush with the surrounding concrete surface.
>
> Per the deposition testimony of the defendant Reit, there have been no changes to the indoor parking lot with respect to expansion joints (black rubber placed between the cement slabs) in the subject area anytime between the plaintiff's accident on March 3, 2008, and the time of my inspection on December 29, 2009.
>
> Based upon the foregoing, I am of the opinion within a reasonable degree of engineering certainty that there was no defective or dangerous condition relating to a raised piece of black rubber placed between the cement in existence in the area set forth in the Supplemental Verified Bill of Particulars on the date of the plaintiff's alleged accident."

At her examination-before-trial, plaintiff testified that she fell on a piece of black rubber (Plaintiff's EBT, pgs. 38, 39) and her son-in-law, Mr. Maniscalco, told her that she fell "because the cement was a little higher and a piece of rubber was sticking up." (*Id.* at p. 41).

Overall, defendants' proof indicates that they were unaware of problems with the garage on the lower floors.

In opposition to the motion, plaintiff argues that "defendants' motions and supporting papers are wholly devoid of any affirmative proof whatsoever that defendants did not have constructive notice of the defect involved in the plaintiff's accident." Alternatively, plaintiff contends that triable issues of fact exist as to whether the defendants had constructive notice of the defect involved in the plaintiff's accident, whether the defendants breached their duty to keep the subject premises in a reasonably safe condition and whether the defendants were negligent in failing to properly warn users of the property of the impending hazard, thus, further warranting the denial of the defendants' motions.

Plaintiff relies upon the testimony of Mr. Macivar wherein he stated that there were a myriad of employees employed by all defendants in this case who performed certain duties. Mr. Macivar testified that if a "severe" defect were found, it would be reported in writing and he would be responsible to inspect, assess and repair the condition. Plaintiff argues that issues of fact exist as to whether the defendants simply failed to properly inspect and repair this defect simply because an agent of the defendants did not deem this defect to be "severe" and whether the defendants were negligent in failing to follow their own internal procedures of reporting tripping hazards.

In addition, plaintiff contends that, "[a]dmittedly, the moving defendants had a non-delegable duty as part of maintaining the aforesaid premises and parking garage in a reasonable safe condition by providing a safe means of ingress and egress to and from a building from an adjoining parking garage. These defendants had a duty to perform inspections to ensure that the expansion joints located at the accident situs were not dislodged, uneven or raised. These defendants had a duty to warn invitees of said defective condition and to perform timely and

adequate repair of said defective condition, namely, raised and dislodged expansion joints in a parking garage." (Stacey Guzman's Affirmation in Opposition, ¶ 32); *see Kellman v 45 Tiemann Associates, Inc.*, 87 NY2d 871 [1995]) .

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" *(Leary v Leisure Glen Home Owners Ass'n, Inc.*, 82 AD3d 1169 [2nd Dept. 2011]; *Williams v SNS Realty of Long Island, Inc.*, 70 AD3d 1034 [2nd Dept. 2010]; *Dennehy-Murphy v Nor-Topia Serv. Center, Inc.*, 61 AD3d 629 [2nd Dept. 2009]; *see Denker v Century 21 Dept. Stores, LLC*, 55 AD3d 527, 528 [2nd Dept. 2008]; *Rubin v Cryder House*, 39 AD3d 840 [2nd Dept. 20007]). "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" (*Dennehy-Murphy v Nor-Topia Serv. Center, Inc., supra; Gordon v American Museum of Natural History*, 67 NY2d 836[1986]; *Nelson v Cunningham Associates, L.P.*, 77 AD3d 638 [2nd Dept. 2010]; *Cusack* v *Peter Luger, Inc.*, 77 AD3d 785, 786 [2nd Dept. 2010]).

"Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." *Perez v 655 Montauk, LLC*, 81 AD3d 619 [2nd Dept. 2011]; *Sabino v 745 64th Realty Associates, LLC*, 77 AD3d 722 [2nd Dept. 2010]; *see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997].

In determining whether a defect is trivial as a matter of law, a court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the

defect, along with the time, place and circumstances of the injury (*see Sabino v 745 64th Realty Assoc., LLC, supra*; *Richardson v JAL Diversified Mgt.*, 73 AD3d 1012 [2nd Dept. 2010]; *Aguayo v New York City Hous. Auth.*, 71 AD3d 926 [2nd Dept. 2010]).

"In a trip and fall case, [a] plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (*Antonia v Srour,* 69 AD3d 666, *supra; Louman v Town of Greenburgh*, 60 A.D.3d 915, supra, [internal quotation marks and citations omitted]; *see Knox v United Christian Church of God, Inc.*, 65 AD3d 1017 [2nd Dept. 2009]; *Scott v Rochdale Vil., Inc.*, 65 AD3d 621 [2nd Dept. 2009]; *Howe v Flatbush Presbyt. Church*, 48 AD3d 419, 420 [2nd Dept. 2008]; *Jackson v Fenton*, 38 AD3d 945 [2nd Dept. 2007]; *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570 [2nd Dept. 2003]).

Further, a general awareness such as expansion joint dislodgement on the higher floors is not evidence of constructive notice of the particular condition that allegedly caused plaintiff to fall. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]).

Plaintiff's allegation at her deposition that she fell on a raised piece of black rubber in the subject garage is based solely upon an inadmissible hearsay statement which the plaintiff alleges was made to her by her son-in-law shortly after the accident and before she left the scene of the accident. Further, when deposed as a non-party witness himself, the son-in-law denied ever making the statement, and had no idea as to what the proximate cause of the accident might have been.

Even viewing the evidence in the light most favorable to plaintiff (*see Taylor v Rochdale Village Inc.*, 60 AD3d 930 [2nd Dept. 2009]; *Judice v DeAngelo*, 272 AD2d 583 [2nd Dept. 2000];

Robinson v Strong Memorial Hosp., 98 AD2d 976 [4th Dept. 1983]), plaintiff has failed to raise a issue of fact.

S & E

S&E asserts that it is entitled to summary judgment on its cross-claim over defendants Hub and Reit based upon the management agreement entered into between the parties.

Paragraph 6.2 of the above stated agreement states:

> Indemnification by Management Company. Management Company (Hub and Reit) shall indemnify, defend and hold harmless Manager (Sutton & Edwards) and its directors, officers, employees, agent, representatives, successors and assigns, except in case of fraud, willful misconduct or gross negligence of the Manager, from (i) all claims arising out of the course of Manager's duties in connection with the management of the Facility and from liability for injuries suffered by third parties while on the facility . . .

"The right to contractual indemnification depends upon the specific language of the contract" (*Langner v Primary Home Care Services, Inc.*, 83 AD3d 1007 [2nd Dept. 2011], quoting *Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2nd Dept. 2009] [internal quotation marked omitted]; *see D'Angelo v Builders Group*, 45 AD3d 522, 524 [2nd Dept. 2007]). Where the intentions of the parties are clear, the promise to indemnify should be found. (*Baginski v Queen Grand Realty, LLC*, 68 AD3d 905 [2nd Dept. 2009]). The indemnification provision at issue obligates Hub & Reit to defend and hold harmless S&E for any claims arising out of the course of their duties in connection with the management of the property and from liability for injuries suffered by third parties while on the premises.

In opposition to S&E's motion, Hub and Reit assert that S&E failed to comply with The Facilities Management Agreement at page one which identifies Reit as the "Management

Company," S&E as the "Manager," and Hub as the "Owner." At the time of the loss, S&E was the management company for the subject premises which included the garage where the plaintiff allegedly fell.

The Facilities Management Agreement also contains an insurance provision at Article V, pg. 11, which lists the insurance obligations owed by S&E as the Manager.

In particular, paragraph 5.2 states in pertinent part that:

> "Manager (S&E) shall cause to be placed and kept in force during the term of this Agreement, at its sole cost and expense, commercial general liability insurance with combined single limits of $3,000,000 for personal injury including death and $1,000,000 per occurrence for property damage . . . . The policies shall be issued by companies of recognized financial standing authorized to issue such insurance in the state where the Facility is located, and shall name the management Company (Reit) and the owner (Hub) of the Facility as an additional insured" (parentheticals added).

Based upon this provision, a letter was sent to S&E's insurer tendering the defense and indemnification of Hub and Reit. In response, S&E's carrier denied coverage, indicating that neither Hub nor Reit was endorsed onto S&E's policy as additional insureds.

In response, S&E relies upon the following provision:

Paragraph 6.1 states:

> "Indemnification by Manager. Manager agrees to indemnify, defend and hold harmless management company . . . from and against any and all liability . . . to any third person incurred by reason of any actions taken by Manager outside of the scope of Manager's authority under the terms of this agreement."

Since the duty to procure insurance for an entity is completely separate from the duty to indemnify, the two provisions should be viewed separately. (*See Kinny v Lisk,* 76 NY2d 215

[1990].) As indicated above, the failure to provide insurance coverage does not shift all responsibility to the offending party. Instead, the courts have limited damages to the cost of out-of-pocket expenses. The indemnification provision, however, does serve to shift responsibility from S&E to Hub and Reit, who have their own policy of insurance.

In light of our determination that S&E, Hub, Reit and the Village have made a *prima facie* showing of their entitlement to summary judgment dismissing the complaint as against them, and plaintiff has failed to raise an issue of fact, the branch of S&E's motion which seeks defense and indemnification has been rendered moot. Their application for reimbursement of defense costs and attorneys' fees is **denied** because the indemnity provision makes no reference for such fees and costs.

This constitutes the order and judgment of this Court.

Dated: October 18, 2011

ENTER:

HON. JEFFREY S. BROWN
J. S. C.

Attorney for Plaintiff
Stanton & Guzman, LLP
585 Stewart Avenue, Ste. 410
Garden City, NY 11530

Attorney for Defendants HUB, Reit & Mineola
Quirk & Bakalor, PC
845 Third Avenue
New York, NY 10022-6601

Attorney for Defendants Sutton & E.
Greenfield & Ruhl, Esqs.
220 Mineola Blvd.
Mineola, NY 11501