SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ERICA KOSTER,

Plaintiff,

- against -

CIFRAN CORP., CIFRAN CORP. d/b/a THE RUFFLE BAR, THE RUFFLE BAR, and ALBORROC REALTY, INC.,

Defendant.

- x

Index No.: 26338/2008

Motion Date: 05/03/12

Motion No.: 20

Motion Seq.: 3

The following papers numbered 1 to 23 were read on this motion by the plaintiff for an order pursuant to CPLR 3124 and 3126 compelling the defendants, CIFRAN CORP., CIFRAN CORP. d/b/a THE RUFFLE BAR and THE RUFFLE BAR ("Cifran"), to provide an affidavit from the owner of the Ruffle Bar in response to the plaintiff's Notice for Discovery and Inspection; and the cross-motion of defendant, ALBORROC REALTY, INC., ("Alborroc") for an order pursuant to CPLR 3025(b), 3212 and 3126, granting ALBORROC REALTY leave to serve an amended answer adding a cross-claim for contractual indemnification; for an order granting summary judgment dismissing the plaintiff's complaint and all cross-claims and for indemnification over CIFRAN; or in the alternative, for an order striking CIFRAN's answer for failure to supply a complete copy of the general liability policy pursuant to the prior orders of the Court:

Papers Numbered

Plaintiff's Notice of Motion-Affidavits-Exhibits...1 - 5
Alborroc's Notice of Cross-Motion-Exhibits-Memo....6 - 10
Cifran'S Opposition to Plaintiff's Motion.....11 - 13
Plaintiff's Affirmation in Reply.....14 - 16
Cifran Affirmation in Opposition to Cross-Motion...17 - 19
Alborroc Reply Affirmation.....20 - 23

This is a personal injury action in which plaintiff, Erica Koster, seeks to recover monetary damages for injuries she sustained as a result of an accident which took place on August 6, 2008, as the result of a slip and fall on a wet floor at the premises owned by Alborroc and leased to Cifran Corporation. The premises, doing business as the Ruffle Bar, is located at 919 Cross Bay Boulevard, Queens, New York. Cifran is the corporate owner of the Ruffle Bar.

Plaintiff commenced this action by filing a summons and complaint on October 28, 2008. Plaintiff alleges that she slipped and fell inside the Ruffle Bar as a result of water leaking onto the wood floor from an overhead air conditioner unit installed above the doorway entrance of the bar. In her bill of particulars, plaintiff alleges that the defendants were negligent in the ownership, operation and control of the premises and specifically the air conditioner. In a supplemental bill of particulars, dated January 10, 2011, plaintiff alleges that she slipped several feet inside the front entrance, that the defendants created the slippery condition by failing to maintain the air conditioner and that the defendants and their employees had actual and constructive notice of the slippery condition. Ms. Koster states that as a result of the fall she sustained a trimalleolar fracture of the right ankle which required an open reduction with internal fixation.

Issue was joined by service of Alborroc's verified answer with cross-claim dated April 9, 2009. The cross-claim alleged that plaintiff's injuries were caused by the negligence of co-defendant Cifran and alleged that Alborroc was entitled to common law indemnification and contributon by Cifran. Cifran joined issue by service of an answer dated May 20, 2009. Plaintiff filed a note of issue on October 12, 2010. However, on December 1, 2010, as EBTS had yet to be conducted, the parties entered into a stipulation before Justice Ritholtz stating, inter alia, that pending completion of discovery, the parties are stayed from making any applications to the Court.

In November, 2011, the plaintiff moved for an order compelling Cifran to supply an affidavit from the owner as to whether the air conditioner inspected at Ruffles Bar by plaintiff's expert on July 28, 2011, was the same air conditioner which was at the premises on the date of the accident or if not when the old air-conditioner was disposed of and when the new one was purchased. Plaintiff also moved for an order lifting the stay and permitting the matter to proceed to trial.

Alborroc filed a cross-motion seeking to amend its answer to add an additional cross-claim for contractual indemnification. Alborroc also moves for summary judgment dismissing the plaintiff's complaint and all cross-claims asserted against it. Alborroc contends that the lease imposes contractual duty on Cifran to maintain the leased premises and indemnify Alboroc for claims such as plaintiff's claim arising from Cifran's use and occupancy of the demised premises. Alborroc claims that it is entitled to summary judgment aaginst plaintff on the ground that plaintiff has not demonstrated that Alboroc was negligent or that Alborroc had notice of the wet floor. Alborroc contends that it was an out-of-possession landlord with no duty to maintain or repair the premises where plaintiff's accident occurred.

Pursuant to a stipulation entered into by the parties on May 3, 2012, the plaintiff's motion to compel discovery was withdrawn. The parties agreed to vacate the stay on serving additional motions and also agreed that all remaining discovery would be completed within 90 days or by August 3, 2012. The matter is now calendared in the trial scheduling part for September 17, 2012. Alborroc's cross-motion, to amend the complaint and for summary judgment, was submitted for decision. The plaintiff did not submit papers in opposition to Alborroc's cross-motion for summary judgment.

In support of the cross-motion, Alborroc submits copies of the transcripts of the examination before trial of plaintiff, Erica Koster, Frederick Ciappetta on behalf of Cifran and Robert Pisani, the owner of Alborroc Realty; photographs of the air conditioner in question; plaintiff's expert witness disclosure statement; the lease agreement between Alborroc and Cifran; and a copy of Cifran's certificate of liability insurance.

In her examination before trial, taken on January 18, 2011, Ms. Koster, age 35, testified that she is employed as a dental assistant. She stated that the accident in question took place at approximately 12:00 a.m on August 5, 2008, at the Ruffle Bar located on Cross Bay Boulevard three blocks from her home. She stated that she entered the bar sometime after eleven and the accident occurred approximately one hour after that. She ordered one drink but didn't finish it. At one point she stepped outside to see where her friend was. She stayed outside for a minute and as she was walking back in, "I took a few steps and my ankle went from beneath me." When asked what caused her to fall, she stated that she slipped on a wet floor. She stated that as she was walking to the bar her right ankle slipped out from under her and she grabbed a barstool on her left. She didn't notice if the floor was wet prior to the accident. After she fell she felt that

her pants and hand were wet and she observed a puddle on the floor on the left side of the door. The size of the puddle was approximately a foot and a half or two feet wide and the same distance long. She noticed that the air conditioner that was above the doorway was dripping. She stated that anytime she went to the pizzeria next door in the summertime she would see water from the sidewalk to the street. She never saw a puddle inside the bar prior to the accident. Ms. Koster also stated that she does not know of anyone who complained about the leaking air conditioner.

Frederick Ciappetta testified on behalf of Cifran Corp. He testified that he and his wife are the owners of Cifran Corp. and he is the manager of the Ruffle Bar. He testified that he purchased the Ruffle Bar approximately three years prior to the accident. He leased the premises from the owner of the building Alborroc Realty Company. He stated that he personally operates the bar and is on the premises every day. Mr. Ciappetta stated that he was informed about the plaintiff's accident the following morning by a patron from the bar. He testified that the patron, Ms. Glade, told him that she believed Ms. Koster fell outside the bar. Ms. Glade told him she doesn't think Ms. Kosta fell inside the bar. He testified that the bartender told him that Erica Koster came into the bar and started an altercation with another customer. She was asked to leave. She left and came back again and was asked to leave again and then the ambulance came. He testified that he believed, based upon accounts he heard from other people, that plaintiff was in an altercation and fell outside the bar. He stated that he has written statements from two eyewitnesses to the incident.

Mr. Ciappetta stated that the air conditioner above the doorway of the front entrance was there when he purchased the bar. He states that he performs all the maintenance on the air conditioner himself. He stated that he cleans the filter. He states that he was aware hat the air conditioner drips water. He stated that water drops out of a hole in the air conditioner. He stated that there is a leak to the valve where it dispenses water. He states that the dripping water is directed by a tube towards the curb. Mr. Ciappetta stated that the water is directed to the curb and does not get into the bar and no one has made complaints about the operation of the air conditioner or water on the sidewalk. He stated that according to the terms of the lease he is responsible for the maintenance of the air conditioner and the landlord is not liable as he does not maintain it. He also stated that he never made a complaint to the landlord regarding the air conditioner. He stated that he purchased insurance for his property and that he named the owner of the building as an

additional insured on the policies.

Robert Pisani, the owner of Alborroc Realty, Inc., was also deposed on January 18, 2011. He testified that he is the owner of the premises, a one story building located at 919 Cross Bay Boulevard, Queens County, N.Y. He testified that the building was leased to Cifran Corp., for use as a bar. He testified that for at least one year prior to the time of the accident, neither he nor anybody on his behalf went to the location either as the owner of the building or as a patron of the bar. He testified that Alborroc does not have any maintenance responsibilities in relation to the air conditioner that is above the doorway to the bar. He testified that for the two year period prior to the accident there were no complaints from anyone regarding water leaking from the air conditioner outside the premises. He was not personally aware of water leaking from the air conditioner. He stated that he heard there was an incident regarding a fight between girls in a bar but he does not know how he received the information.

Defendant Alborroc also submits a copy of the plaintiff's notice of expert disclosure dated August 19, 2011, regarding an examination of the premises and an examination of photographs of the air conditioner made by Physical Engineer John Flynn on August 19, 2011. The plaintiff's notice states that Mr. Flynn intends to testify that the unit depicted in the photographs is tilted slightly to the right above the door frame. He states that it is tilted in such a way that the condensation is directed into an open metal channel along the right side of the doorway. He states that the condensate is deposited on the doorstep which then diverts the water out onto the public sidewalk. He states that the photos indicate a failed evaporator coil as the proximate cause of the substantial discharge. He states that the concrete doorstep has a slight pitch to the left while containing a 1/4 inch pitch to the front so that water tends to extend to the mid-section of the step before reaching the edge where it drops to the sidewalk. The expert opined that the interior portion of the floor would also have been wet from tracked in water and that the hard sheen of the manufactured flooring would be slippery when wet or when trod upon with wet shoes. The expert also states that the owners chose to replace the defectively operating air conditioning unit before permitting an inspection of the premises. He states that in his opinion, the defendants were negligent in the improper use, positioning and maintenance of the air conditioner unit and negligent in the choice of cooling method to control the interior's room temperature. He states that the negligence resulted in an ongoing wet condition both inside and outside the doorway of the premises.

In opposition to the motion, Cifran contends that the motion must be denied on the ground that the parties entered into a stipulation before Justice Ritholtz on December 1, 2010 which states that pending completion of discovery, the parties are stayed from making any applications to the Court.

Cifran also asserts in opposition, that the motion for summary judgment must be denied as there is a question of fact with respect to the negligence of the landlord based upon the slope of the concrete outside the door and the positioning of the air conditioning unit above the front door of the premises both of which caused the plaintiff to fall and both of which are the responsibility of the owner of the property, Alborroc. Co-defendant Cifran also contends that there is evidence that reflects that plaintiff fell in connection with a bar fight in which she was a participant, not by water by the doorway of the premises. Counsel also asserts that further discovery of non-party witnesses remains to be completed. In addition, Cifran contends that the air conditioner was provided by the landlord and owned by the landlord and the unit's location and position were the responsibility of the landlord. Counsel contends that the expert's report indicated that the negligence consisted of an ongoing wet condition both inside and outside the doorway and that the slope outside the door was provided by and was the responsibility of the landlord and thus there are questions of fact as to the potential liability of the landlord. Counsel also contends that Alborroc failed to provide evidence in admissible form to support the motion as the deposition transcripts are unsigned and unsworn.

In addition, Alborroc argues that Cifran's answer if not permitted to be amended does not contain a cause of action for contractual indemnity. Counsel states that Alborroc should not be permitted to amend its answer to include a cause of action for contractual indemity as the amendment is based upon information which was known to Alborroc at the time it served its original pleading almost three years ago.

Counsel also contends that the branch of the motion to strike the answer of Cifran for failure to provide a complete copy of the general liability policy as required by prior order of the court should be denied as insurance information has been provided to the plaintiff.

Upon review and consideration of the Alborroc's cross-motion, Cifran's affirmation in opposition and the movant's reply thereto, this court finds as follows:

The cross-motion submitted by the parties on May 3, 2012 is not prohibited by the prior stay of motion practice. Simultaneously with the submission of the instant cross-motion on May 3, 2012, the parties agreed to lift the stay. Co-defendant Cifran was not prejudiced as it had sufficient time to submit opposition to the motion.

That branch of Alborroc's cross-motion for an order pursuant to CPLR 3025(b) granting leave to amend the complaint to include a cross-claim for contractual indemnification is granted. CPLR § 3025(b) allows a party to amend its pleadings by setting forth additional transactions or occurrences, at any time by leave of court or by stipulation of all parties. An amendment may be sought at anytime, and shall be freely given unless the amendment is devoid of merit and unduly prejudices the party against whom the amendment is asserted. In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given (see CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]; Russo v Lapeer Contr. Co., Inc, 84 AD3d 1344 [2d Dept. 2011];) unless the proposed amendment is palpably insufficient or patently devoid of merit (see Bernardi v Spyratos, 79 AD3d 684 [2d Dept. 2010]; Martin v Village of Freeport, 71 AD3d 745 [2d Dept. 2010]; Malanga v Chamberlain, 71 AD3d 644 [2d Dept. 2010]; Uadi, Inc. v Stern, 67 AD3d 899 [2d Dept. 2009]); Lucido v Mancuso, 49 AD3d 220 [2d Dept. 2008]). Here, the proposed amendment is not palpably insufficient or devoid of merit, and there is prejudice to Cifran in allowing Alborroc leave to amend the answer to add a cross-claim for contractual indemnification (see CPLR 3025[b]; Emilio v Robison Oil Corp., 28 AD3d 417[2d Dept. 2006]). Cifran was certainly aware of the provision in the lease that provides for contractual indemnity for accidents occurring as a result of the negligence of the tenant.

With respect to the branch of the motion for summary judgment, the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). A defendant owner who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept.

2009]; Bruk v Razag, Inc., 60 AD3d 715 [2d Dept. 2009]). In opposition, the plaintiff must demonstrate the existence of a dangerous condition, that it was visible and apparent, and that the defendant created the condition or had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]; Gwyn v 575 Fifth Ave. Assocs., 12 AD3d 403 [2004]; Bluman v Freeport Union Free School Dist., 5 AD3d 341[2004]; Lynch v Middle Country Cent. School Dist., 283 AD2d 404 [2001]; Kraemer v K-Mart Corp., 226 AD2d 590 [1996]).

AS stated above, the plaintiff did not oppose Alborroc's cross-motion for summary judgment.

Here, this court finds that the evidence submitted by the Alborroc was sufficient to demonstrate, prima facie, that Alborroc did not create the defective condition nor did it have actual or constructive notice of the leaking air conditioner or of the water tracked or dripped on the floor of the bar prior to the plaintiff's accident. Mr. Pisani testified that he was an out-of-possession landlord who had not visited the premises in over a year. He stated that he was not aware that water was dripping from the air conditioner and that under the lease the responsibility for repairing defects on the premises belonged to the tenant. Mr. Ciappetta, the owner of the bar, agreed that he was aware that the air conditioner leaked on to the sidewalk and that he and not the landlord was responsible for maintaining the air conditioner in working order. In this regard the Courts have made clear that an out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord "has a duty imposed by statute or assumed by contract or a course of conduct" (Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10 [2d Dept. 2011]; also see Chapman v MCS Realty, LLC, 92 AD3d 913 [2d Dept. 2012][an out-of-possession landlord's duty to repair a dangerous condition on leased premises is imposed by statute or regulation, by contract, or by a course of conduct]; Moltisanti v Virgin Entertainment Group, Inc., 91 AD3d 838 [2d Dept. 2012]). Alborroc made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord, that the parties agreed that the responsibility for maintenance of the air conditioner was on the tenant, and that it did not perform any maintenance on the air conditioner, that did not retain control over the premises and was not contractually obligated to maintain or repair the subject air conditioner. The landlord was not bound by contract or course of conduct to make nonstructural repairs (see Goggins v Nidoj Realty Corp., 93 AD3d 757 [2d Dept. 2012]; Chapman v MCS Realty, LLC, 92 AD3d 913 [2d Dept. 2012]; Santos v 786 Flatbush Food Corp., 89 ADd 828 [2d Dept. 2011]; Mercer v.

Hellas Glass Works Corp., 87 AD3d 987 [2d Dept. 2011]).

In opposition to the defendant's prima facie demonstration of entitlement to judgment as a matter of law, co-defendant Cifran failed to raise a triable issue of fact as to whether the landlord either created the alleged dangerous condition or had actual or constructive notice of it(see Hayden v Waldbaum, Inc., 63 AD3d 679 [2d Dept. 2009]). Although the plaintiff's expert testified there was a 1/4 inch pitch in the step leading to the sidewalk, the defendant failed to submit expert opinion to show that the pitch was not a trivial condition, that it was a defective condition or that it was a proximate cause of the accident. Further, as the tenant was required to maintain the air conditioner, any defect in the air conditioner or its positioning which caused the air conditioner to drip was not a structural defect and would not have been the responsibility of the landlord to repair. In addition, the defendant has not submitted sufficient evidence to raise a question of fact as to whether the plaintiff's fall could have been caused by an altercation. The testimony in this regard was all based upon the hearsay statements of other witnesses and the written statements of those witnesses were not provided to the Court.

Lastly, the contention of Cifran raised in opposition to the motion that the deposition transcripts are not in evidentiary form is without merit. Although the depositions of Koster and Ciappetta were unsigned, the transcripts were certified by the court reporter and the respective parties did not raise any challenges to their accuracy. Thus, the transcripts qualified as admissible evidence for purposes of the motion for summary judgment (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Zalot v Zieba, 81 AD3d 935 [2d Dept. 2011]). The deposition transcript of Mr. Pisani is admissible as it is certified and is also admissible under CPLR 3116(a) since said transcripts was submitted by the party deponent and therefore was adopted as accurate by the deponent Pisani (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept. 2008]).

Accordingly, for all of the above stated reasons, it is hereby

ORDERED, that the branch of the motion to compel Cifran to provide insurance information is denied as academic, and it is further,

ORDERED, that the Alborroc's cross-motion for summary judgment dismissing the plaintiff's complaint and all cross-claims is granted, and it is further,

ORDERED that the Clerk of the Court is directed to enter summary judgment in favor of Alborroc realty corp., dismissing the plaintiff's complaint and all cross-claims.

Dated: July 31, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.