Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS Part 6**
**Justice**

MAGALY WOOD,
Plaintiff,

-against-

37-18 NORTHERN BOULEVARD, LLC,
Defendant.

Index
Number 10237 2010

Motion
Date September 11, 2012

Motion
Cal. Number 36

37-18 NORTHERN BOULEVARD, LLC,
Third-Party Plaintiff,

-against-

STANDARD MOTOR PRODUCTS INC.,
Third-Party Defendant.

Motion
Seq. No. 3

The following papers numbered 1 to 23 read on this motion by 37-18 Northern Boulevard, LLC (Northern), to dismiss the complaint and all cross claims pursuant to CPLR 3212, and (alternatively) for summary judgment on its claims for contractual and common-law indemnification and failure to procure insurance, against Standard Motor Products, Inc. (SMP) ; cross motion by plaintiff to strike the answer of defendant pursuant to CPLR 3126; and cross motion by SMP for summary judgment in its favor pursuant to CPLR 3212.

| | Papers Numbered |
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Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff in this trip and fall action seeks damages for personal injuries sustained on December 8, 2009, on the 5th floor of 37-18 Northern Boulevard, Long Island City, New York (property). Plaintiff alleges that she tripped and fell over pipes covering the ground at the location. Northern is the commercial building owner of the property; and third-party defendant SMP was the triple net manufacturing tenant of the building and plaintiff's employer.

Plaintiff commenced the action against Northern on or about April 16, 2010. Issue was joined and Northern thereupon commenced a third-party action against SMP for contractual and common-law indemnification, contribution and failure to procure insurance, on or about March 23, 2011.

Northern moves for summary judgment in its favor on the ground that the condition complained-of was open and obvious and not inherently dangerous. Plaintiff opposes the motion and cross-moves to strike defendants' answers on the ground that they have failed to submit to examinations before trial. SMP cross-moves for summary judgment in its favor and opposes the motion by Northern and cross motion by plaintiff.

Facts

On December 8, 2009, plaintiff was employed by SMP in the accounts receivables department. The business was located at 37-18 Northern Boulevard, Long Island City, New York. The area where plaintiff worked was on the 6th floor of the building. On the date of the accident, the 6th floor was undergoing renovations so the conference room was closed. A temporary area was created on the 5th floor of the building to accommodate the company's usual meetings. On the date of the accident, plaintiff attended a meeting on the 5th floor with 20-30 other employees. The meeting was called by Tom Tesore from Human Resources to discuss the packaging and labeling of office equipment and files during the renovation. At the conclusion of the meeting, all in attendance were asked to form a line starting at a table in the front of the meeting area for the purpose of picking up the labels for boxes and other information located at the table. When plaintiff took her place in the line, there were already 20-25 people in front of her on the line. The rest of the people were lined up behind plaintiff. The group was told by Mr. Tesore to line up at this specific location. Immediately to the right of the line were chairs being utilized for the meeting. Immediately to the left of the line was a wall.

Soon after getting on the line, plaintiff's co-worker, Donna Narine approached the line and plaintiff made space so Narine could join the line of front of plaintiff. Plaintiff then stepped forward and on her first step, her left foot tripped on a fixed object causing her to fall to the ground. While on the ground, plaintiff was able to determine that there was a yellow metal bar fixed to the ground that caused her to fall. The bar is pictured in photographs submitted with the instant motion. Plaintiff submits that given the large number of people in the small space, she

was unable to see the bar prior to tripping on it.

Motion by Northern

A landowner has a duty to maintain their property in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 241 [1976]; *Mathew v A.J. Richard & Sons*, 84 AD3d 1038, 1039 [2011]). To be entitled to summary judgment, Northern is required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [2004]; *Luksch v Blum-Rohl Fishing Corp.*, 3 AD3d 475, 476 [2004]; *Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071, 1072-1073 [1992]). Here, the defendant does not argue that it did not create the condition of which the plaintiff complains. Rather, Northern contends that it is entitled to judgment as a matter of law because the large bright pipe on the floor was an open and obvious condition and that its placement did not constitute a tripping hazard (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]).

Viewing the evidence submitted in support of the defendant's summary judgment motion in the light most favorable to the plaintiff, the nonmoving party (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]), under the circumstances, it cannot be determined, as a matter of law that defendant is entitled to summary judgment dismissing the complaint (*see Shah v Mercy Med. Ctr.*, 71 AD3d 1120 [2010]; *Cooper v American Carpet & Restoration Servs., Inc.*, 69 AD3d 552 [2010]; *Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008 [2008]; *Salomon v Prainito*, 52 AD3d 803 [2008]; *Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [2004]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]). "The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury" (*Shah v Mercy Med. Ctr.*, 71 AD3d at 1120). Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" (*Katz v Westchester County Healthcare Corp.*, 82 AD3d at 713). A hazard that is open and obvious "may be rendered a trap for the unwary where the condition is *obscured by crowds or the plaintiff's attention is otherwise distracted*" (*Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [2004] [emphasis added and citations omitted]; *see Michalski v Home Depot, Inc.*, 225 F3d 113, 120 [2000]). Here, given that the pipe may have been obscured by the other persons standing on the line, a triable issue of fact exists as to whether the pipe on the floor was an open and obvious condition.

Moreover, proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition, but does not preclude a finding of liability against a landowner for failure to maintain the property in a safe condition (*see Cupo v Karfunkel*, 1 AD3d at 52; *see also Slatsky v Great Neck Plumbing Supply, Inc.*, 29 AD3d 776, 777 [2006]; *Vinci v Vasaturo*, 8 AD3d 262, 263 [2004]; *Westbrook v WR Activities-Cabrera Mkts*, 5 AD3d at 71). Such proof is relevant to the issue of a plaintiff's comparative negligence (*see Cupo v Karfunkel*, 1 AD3d at 52; *see also Femenella v Pellegrini Vineyards, LLC*, 16 AD3d 546, 547 [2005]; *Vinci v Vasaturo*, 8 AD3d at 263; *Westbrook v WR Activities-Cabrera Mkts*, 5

AD3d at 72).

Accordingly, Northern's motion for summary judgment dismissing the complaint is denied regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The branch of the motion by Northern which is for summary judgment on its claims for contractual indemnification from SMP, is also denied. Contractual indemnification is generally decided as a matter of law pursuant to the terms of the contract, after the trier of fact determines culpability. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.,* 58 AD3d 660, 662 [2009]; *see Bellefleur v Newark Beth Israel Med. Ctr.,* 66 AD3d 807, 808 [2009] ). Where, as here, a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature (*see Bellefleur v Newark Beth Israel Medical Center,* 66 AD3d 807, 808 [2009]; *State of New York v Travelers Prop. Cas. Ins. Co.,* 280 AD2d 756, 757–758 [2001]).

Similarly, since Northern has not demonstrated that it was not negligent, it is also premature to reach the issue of common law indemnification ( *see e.g. Martinez v City of New York,* 73 AD3d 993, 999 [2010]; *Nasuro v PI Assoc., LLC,* 49 AD3d 829 [2008]; *Benedetto v Carrera Realty Corp.,* 32 AD3d 874 [2006]; *Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684–685 [2005]). Thus, the branch of the motion which is for common-law indemnification from SMP, is denied, without prejudice, as premature.

The branch of the motion which is for summary judgment on its breach of contract claim against SMP based upon SMP's alleged failure to procure insurance, is denied absent some evidence of the same (*see Brian Fay Const., Inc. v Morstan General Agency, Inc.*, 90 AD3d 796 [2011]).

Cross Motion by plaintiff

The motion by plaintiff to strike defendants' answers is conditionally granted unless defendants comply with outstanding discovery requests within thirty (30) days after service of a copy of this order with notice of entry.

The penalty of striking an answer is extreme and should only be imposed after "a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Herrera v City of New York,* 238 AD2d 475, 476 [1997] [internal quotation marks omitted]; *see Hinds v Price Club,* 2 AD3d 585 [2003]). Here, the plaintiff did not demonstrate that the defendants' failure to appear at depositions was willful, contumacious, or in bad faith (see *Perez v New York City Tr. Auth.,* 73 AD3d 529, 530 [2010]; *Banner v New York City Hous. Auth.,* 73 AD3d 502, 503 [2010]). Accordingly, the court grants plaintiff's request to compel defendants to produce documents and materials responsive to plaintiff's notice of discovery and

inspection, and following such responses to produce witnesses with knowledge for examination before trial on the issues raised therein.

Cross Motion by SMP

The motion by SMP for summary judgment in its favor is denied, without prejudice and with leave to renew upon the completion of discovery. The motion is premature as it was made before the plaintiff had an opportunity to conduct discovery, and there are essential issues of fact within the exclusive knowledge of SMP (*see* CPLR 3212 [f]]; *Morris v Hochman*, 296 AD2d 481, 482 [2002]).

Conclusion

Northern's motion for summary judgment dismissing the complaint is denied. The branch of the motion by Northern which is for summary judgment on its claims for contractual and common-law indemnification from SMP, is denied, without prejudice. The branch of the motion by Northern which is for summary judgment on its breach of contract claim against SMP based upon SMP's alleged failure to procure insurance, is denied.

The cross motion by plaintiff to strike defendants' answers is conditionally granted unless defendants comply with outstanding discovery requests within thirty (30) days after service of a copy of this order with notice of entry.

The cross motion by SMP for summary judgment in its favor is denied, without prejudice and with leave to renew upon the completion of discovery.

Dated: December 11, 2012

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**Howard G. Lane, J.S.C.**