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SHORT FORM ORDER

INDEX No. 09-47864
CAL No. 12-00575OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-29-12 (#002)
MOTION DATE 5-24-12 (#003)
MOTION DATE 6-28-12 (#004)
MOTION DATE 7-26-12 (#005)
ADJ. DATE 10-18-12
Mot Seq. # 002 - MG # 004 - MG
003 - MD # 005 - MG

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LISA MONTEMARANO,

Plaintiff,

- against -

SODEXO, INC., ISLAND HEADQUARTERS OPERATORS, LLC, ISLANDIA OPERATORS, LLC and JONES LANG LaSALLE AMERICAS, INC.,

Defendants.

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Upon the following papers numbered 1 to 88 read on this motion for summary judgment and to vacate note of issue; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 33; 34- 48; 49 - 69; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 70 - 73; 74 - 75; 76 - 77; 78 - 80; 81 - 82; Replying Affidavits and supporting papers 83 - 84; 85 - 86; 87 - 88; Other ___; it is,

EAK

ORDERED that this motion (seq. #002) by defendant Sodexo, Inc., these motions (seq. #003 and #004) by defendants Island Headquarters Operators, LLC and Islandia Operators, LLC, and this motion (seq. #005) by Jones Lang LaSalle Americas, Inc. are consolidated for the purposes of this determination; and it is

ORDERED that this motion (seq. #002) by defendant Sodexo, Inc., this motion (seq. #004) by defendants Island Headquarters Operators, LLC and Islandia Operators, LLC, and this motion (seq. #005) by Jones Lang LaSalle Americas, Inc. for summary judgment dismissing the complaint and all cross claims against them are granted; and it is further

ORDERED that this motion (seq. #003) by defendants Island Headquarters Operators, LLC and Islandia Operators, LLC to vacate the note of issue is denied, as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Lisa Montemarano as a result of a slip and fall accident that occurred on June 20, 2008, in the cafeteria of her employer, Computer Associates ("CA"). Defendants Island Headquarters Operators and Islandia Operators (hereinafter "the Island defendants") allegedly own the subject premises, and defendant Jones Lang LaSalle Americas (hereinafter "Jones") allegedly manage the premises. Defendant Sodexo, Inc., allegedly operates the cafeteria on the premises. Plaintiff, who went to place her cup of coffee on a conveyor belt in the cafeteria where garbage is collected, allegedly slipped and fell after walking a few steps away from the conveyor belt. By her bill of particulars, plaintiff alleges that defendants failed to maintain the premises in a reasonably safe and proper condition and to place mats near the conveyor belt.

Sodexo moves for summary judgment dismissing the complaint against it on the grounds that it owed no duty to plaintiff, that it had no notice of any hazardous condition in the cafeteria, and that plaintiff was unable to identify the hazardous condition that caused her to fall. In support of its motion, Sodexo submits a copy of the pleadings and transcripts of the deposition testimony of plaintiff and Kevin Flaherty. It also submits copies of the lease agreement between the Island defendants and CA, the management agreement between CA and Sodexo, and the facilities management outsourcing master services agreement between CA and Jones.

The Island defendants move to vacate the note of issue and certificate of readiness on the ground that plaintiff has failed to comply with certain disclosure demands. Plaintiff opposes this motion, arguing that it is procedurally defective and submitted in bad faith. The Island defendants also move for summary judgment dismissing the complaint against them on the grounds that they are an out-of-possession landlord and that they did not have notice of the alleged dangerous condition. In support of their motion, the Island defendants submit a copy of the pleadings, a transcript of plaintiff's deposition testimony, an affidavit of Francesco Piovanetti, and a copy of their lease agreement with CA.

Jones moves for summary judgment dismissing the complaint against it on the grounds that it had no duty to plaintiff, as it was not responsible for maintaining the subject area at the time of the accident, and that it did not have notice of the alleged dangerous condition. In support of its motion, Jones submits a copy of the pleadings, transcripts of the deposition testimony of plaintiff, Kevin

Flaherty, and Christopher Joseph Duggan, and copies of the management agreement between CA and Sodexo, and of the facilities management outsourcing master services agreement between CA and Jones.

Plaintiff opposes the motions of Sodexo and Jones, arguing that they owed a duty to her and failed to demonstrate a *prima facie* entitlement to judgment as a matter of law on the issue of notice. Plaintiff also argues that she has sufficiently identified what caused her to fall. In opposition, plaintiff submits an affidavit of Ralph Musco and copies of the accident reports. The Island defendants partially oppose the motions by Sodexo and Jones in which they seek to dismiss the cross-claims of the Island defendants for common law indemnification and contribution. Jones partially opposes Sodexo's motion, arguing that Sodexo's assertions regarding the responsibility of Jones in connection with the maintenance of the subject area are inaccurate. Sodexo partially opposes the motion by Jones, arguing that it retained significant maintenance responsibility for the floor where plaintiff fell.

At her examination before trial, plaintiff testified that she went to the cafeteria with a co-worker, Ralph Musco, to get some coffee. She testified that after she finished drinking her coffee, she walked over to the conveyor belt in the cafeteria where the garbage is placed and put her cup on the belt. She testified that she turned around, took two steps, and then slipped and fell. She described the floor as extremely slippery and testified that she has frequently seen other people fall in the cafeteria.

At his examination before trial, Flaherty, the general manager of Sodexo at the time of the accident, testified that Sodexo is a food contract company which was hired by CA to oversee the food service operations on the premises. He testified that Sodexo reports to Jones, which is the facilities manager of the building. He testified that there are 25 Sodexo employees in the subject cafeteria, and that, while there is no maintenance crew, the employees are responsible for mopping and sweeping the floor, and cleaning spills and debris. He further testified that a separate company is responsible for cleaning the cafeteria area on a nightly basis.

At his examination before trial Duggan, vice president of occupancy planning for Jones Lang LaSalle, testified that CA outsourced its facilities management to Jones in 2007. He testified that while Jones has oversight over Sodexo, it does not control Sodexo as the contract for the food service operation is between Sodexo and CA. He testified that Jones is responsible for maintenance of the premises and that it has a contract with a company named SBM which provides a janitorial staff to clean the building. Duggan testified that Jones did not manage and was not responsible for maintenance of the cafeteria during business hours. However, he testified that janitors from SBM would maintain and clean the cafeteria after business hours.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for

summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. " 'Proof of negligence in the air, so to speak, will not do' " (***Martin v Herzog***, 228 NY 164, 170, 126 NE 814 [1920], *quoting* Pollock, Torts (10th ed.), at 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must demonstrate *prima facie* that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]).

Further, to establish a *prima facie* case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see* ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see,* ***Burgos v Aqueduct Realty Corp.***, 92 NY2d 544, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Highway Hosp. Ctr.***, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (***Gayle v City of New York***, *supra*, at 937, 680 NYS2d 900; *see* ***Grob v Kings Realty Assoc.***, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). Plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see* ***Gayle v City of New York***, *supra*; ***Bernstein v City of New York***, *supra*; ***Bardi v City of New York***, *supra*).

Defendants have established their entitlement to summary judgment as a matter of law by submitting deposition testimony showing that plaintiff is unable to identify what caused her to fall (*see* ***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; ***DeSantis v Lessing's, Inc.***, 46 AD3d 742, 849 NYS2d 580 [2d Dept 2007]; ***Pluhar v Town of Southampton***, 29 AD3d 975, 816 NYS2d 176 [2d Dept 2006]). The burden, therefore, shifted to plaintiff to raise a triable issue as to whether defendants' alleged negligence was a proximate cause of plaintiff's accident (*see* ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; *see generally*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, plaintiff failed to submit evidence showing that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see* ***O'Connor v Lakeview Assocs., LLC***, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; ***Holliday v Hudson Armored Car & Courier Serv.***, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf.* ***Stanojevic v Scotto Bros. Rest. Enters., Inc.***, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). Contrary to the assertion of plaintiff's counsel, plaintiff was unable to identify what caused her to fall. In her deposition testimony, she testified that the floor "seemed extremely slippery" and when she was asked whether she observed anything on the floor that would have caused her to slip, she merely stated, "[j]ust the fact that my foot slid forward." She also testified that she did not observe any debris on the floor prior to the accident, and that she "felt like there was some sort of a substance that [her] foot just went forward as [she] stepped to walk away from the belt." The affidavit of Ralph Musco, which states that he observed a slippery substance on the floor after plaintiff's fall, is insufficient to defeat summary judgement, as it merely attempts to create a feigned factual issue designed to avoid the consequences of plaintiff's deposition testimony that she could not identify what caused her to fall (*see* ***Capasso v Capasso***, *supra*; ***Hunt v Meyers***, 63 AD3d 685, 879 NYS2d 725 [2d Dept 2009]; ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]). The adduced evidence establishes nothing more than a possibility that plaintiff's fall was caused by a slippery substance and would require the trier of fact to base a finding of proximate cause upon nothing more than speculation (*see* ***Thompson v Commack Multiplex Cinemas***, 83 A.D3d 929,921 NYS2d 304 [2d Dept 2011]; ***Cangro v Noah Bldrs., Inc.***, 52 Ad3d 758, 861 NYS2d 121 [2d Dept 2008]; ***Curran v Esposito,*** 308 AD2d 428, 764 NYS2d 209 [2d Dept 2003]).

Accordingly, the motions by Sodexo, the Island defendants and Jones for summary judgment dismissing the complaint and cross-claims against them are granted. In view of this determination, the Island defendants' motion for an Order vacating the note of issue is denied as moot.

Dated: January 11, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION