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SHORT FORM ORDER
COPY

INDEX No. 09-388
CAL No. 13-01345OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-19-13
ADJ. DATE 4-3-14
Mot. Seq. # 002 -MG; CASEDISP
003 - MotD

JULIE A. MAVIS and LAWRENCE MAVIS,

Plaintiffs,

- against -

REXCORP REALTY LLC and A.M.B. ONESOURCE FACILITIES SERVICES, INC.,

Defendants.

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Upon the following papers numbered 1 to 50 read on these motions for summary judgement; Notice of Motion/ Order to Show Cause and supporting papers 1-18; Notice of Cross Motion and supporting papers 19-34; Answering Affidavits and supporting papers 35-40, 41-44; Replying Affidavits and supporting papers 45-46, 47-50; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Rexcorp Realty LLC ("Rexcorp") for summary judgment dismissing plaintiff's complaint is granted and its cross claims asserted against OneSource are denied as moot; and it is further

ORDERED that the cross motion by defendant A.M.B., Onesource Facilities Services, Inc. ("OneSource") for summary judgment dismissing the complaint and all cross claims asserted against it is granted.

This is an action for personal injuries allegedly sustained by the plaintiff, Julia A. Mavis, on December 11, 2008 at approximately 9:00 a.m. when she slipped and fell while walking through the lobby of a building located at 58 South Service Road, Melville, New York. Plaintiff Lawrence Mavis interposed a derivative claim seeking damages for loss of services.

Defendant Rexcorp now moves for summary judgment dismissing the complaint, granting judgment against OneSource for contractual and common law indemnification and for failure to procure insurance. In support of the motion, it submits, *inter alia*, its attorney's affirmation and reply/opposition affirmations; a copy of the pleadings; the depositions the plaintiffs; and the depositions of Carmen Champa for defendant OneSource, Anthony Reid for Rexcorp, and Mauricio Pacheco for the defendant Rexcorp. Defendant OneSource opposes the motion and cross-moves for summary judgment dismissing the complaint and all cross claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation and reply/opposition affirmations; a copy of the pleadings; the depositions of the plaintiff Julia A. Mavis, Carmen Champa, Anthony Reid, Mauricio Pacheco and a copy of the service contract between the defendant OneSource and the defendant Rexcorp, dated February 19, 2007. In opposition to both motions, plaintiffs submit their attorney's affirmation; the affidavit of plaintiff Julia A. Mavis, sworn to January 15, 2014; and the affidavit of Robert L. Schwartzberg, P.E., sworn to on January 20, 2014.

Plaintiff Julia A. Mavis testified that on December 11, 2008, at approximately 9:00 a.m. she entered the front lobby of a building located at 58 South Service Road, Melville, New York, which is owned by the defendant Rexcorp. At the time she was employed by Jackson Lewis, a law firm with offices on the fourth floor of the building. She had been working at the building for approximately seven and a half weeks prior to that date. She entered the east entrance of the subject premises. At that time, there were no permanent mats or carpets in the lobby toward the front desk. She was wearing slip on shoes with a two inch heel. She was carrying her purse and umbrella at the time of her fall. She did not remember if she shook out her umbrella, but did recall using it that morning, because it was raining. After entering, she approached the front desk, stopped, and signed in a log book, as she did every work day. She did not recall if she saw anyone enter the building before she did. She did not have any trouble with her footing as she entered the building and walked to the front desk. She did not recall if she saw any mats or caution or warning signs in that area. After she signed the book she approached the elevators by walking around the north side of the desk. She slipped and fell on a portion of the flooring which was made up of black marble. Plaintiff did not see any foreign substance on the floor, but observed that the floor was "wet". The black strip of marble she fell on was "damp". It was not a puddle but a "tracked-in look." She did not know how long the dampness was there. Up until the time she fell, she did not see any water on the floor. She did not recall which foot slipped, but alleges that, as a result of her fall, she fractured a bone in her left foot.

Carmen Champa testified as a witness for the defendant OneSource. She is employed by OneSource and was so employed on the day of the plaintiff's accident. She works five days a week from 7 a.m. to 4 p.m. at the subject building, providing janitorial services. She and her co-worker, Victor, would inspect the floor area near the four entrances to the building three times between 7 a.m. and 9 a.m. If the floor was wet, she would dry it with a mop. They did this every day. Between 9 a.m. until 12 p.m. she would do the inspection. If the entrance was wet, she would put out a "wet floor" sign and mop the area. She recalled a woman falling in 2008, although she did not witness it, but could not remember the date. When she saw the woman on the floor she did not see any water on the floor. She could not remember if it rained on that date.

Anthony Reid testified as a witness for the defendant Rexcorp. Mr. Reid was and is employed by Rexcorp as the front desk concierge at the subject building. He works from 8 a.m. until 4:30 p.m. Monday through Friday. He testified that the entire floor of the lobby is not covered by carpeting, but that back in 2008 there were three permanent carpet runners inside the lobby once a person entered into the building through the east entrance. He could not recall whether caution signs were put up on the date of the accident. If he noticed the floor was wet, he would call the cleaners. If they did not respond, he would call the property manager. It was the general practice that the janitorial contractor to place these signs in the lobby. He did not observe plaintiff's accident because he was away from his desk when it occurred. When he went over to the plaintiff, he observed that the floor was dry. He filled out an accident report based on information given to him by the plaintiff at the scene. The report indicates that it was raining at the time of the accident. He had no recollection of any prior slip and fall accidents in the lobby prior to the plaintiffs accident.

Mauricio Pachecho testified as a witness for Rexcorp. He has been employed by Rexcorp as lead mechanic for 14 years. He is responsible for the general maintenance of the building, ensuring that all of the entrances are safe in light of any relevant weather conditions. When it rains he ensures that the walkways are installed in the lobby. He also ensures that OneSource mops the floor and puts out signs. Prior to his working at the subject location, the position was held by Salvatore DiPreta, who is no longer employed by Rexcorp. Mr. DiPreta had all of the same responsibilities for which he is now responsible. However, Mr Pacheco has no personal knowledge with regard to the plaintiff's accident, since he did not work at that location at that time.

It is noted at the outset that defendant Rexcorp's additional submission of an unaffirmed report from a weather reporting company, not accompanied by any certified weather records or admissible climatological reports, cannot be considered (*see* ***McBryant v Pisa Holding Corporation***, 110 AD3d 1034, 973 NYS2d 757 [2d Dept 2013]; ***Morabito v 11 Park Place LLC***, 107 AD3d 472, 967 NYS2d 694 [1st Dept 2013].

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, 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]).

The plaintiff alleges that she fell on an accumulation of rainwater in the lobby of a building owned by the moving defendant Rexcorp. "A defendant [landowner] may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action" (***Mentasi v Eckerd Drugs***, 61 AD3d 650, 651, 877 NYS2d 149 [2d Dept 2009]; *see* ***Osbourne v 80-90 Maiden Lane Del, LLC***, 112 AD3d 898, 978 NYS2d 87 [2d Dept 2013]; ***Murphy v Lawrence Towers Apts., LLC***, 15 AD3d 371, 789 NYS2d 532 [2d Dept 2005]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837–838, 501 NYS2d 646 [1986]).

The Court turns first, as a matter of convenience, to the cross motion of defendant OneSource. A party who enters into a contract to render services may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons, where: (1) the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (***Gordon v Pitney Bowes Management Services, Inc.***, 94 AD3d 813, 942 NYS2d 155 [2d Dept 2012]; ***Sainval-Brice v All Seasons Indus. Servs., Inc.***, 85 AD3d 1004, 926 NYS2d 586 [2d Dept 2011]; ***Lawson v OneSource Facilities, Inc.***, 51AD3d 983, 859 NYS2d 249 [2d Dept 2008]). There is no evidence in the record that defendant OneSource launched a force or instrument of harm. The testimony of Mauricio Pacheco on behalf of defendant Rexcorp and the parties' service contract establish that OneSource did not entirely displace Rexcorp's duty to maintain the premises safely. Finally, there is no evidence of any detrimental reliance on the part of the plaintiff. Thus, the defendant OneSource entitled to summary judgment dismissing the complaint.

The Court next turns to Rexcorp's cross-claims for indemnification against OneSource. The right to contractual indemnification depends upon the specific language of the contract; the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement (***Sovereign Bank v Biagioni***, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]. The indemnification clause in the service contract indemnifies Rexcorp from damages arising for the negligent act or omissions of One Source's officer, agents employees etc. Since there is no evidence of any negligence by Onesource or anyone acting on its behalf, the indemnification clause was not triggered and Rexcorp has no claim for contractual indemnification against OneSource. The cross-claim for contractual indemnification must be dismissed.

Rexcorp's claim for common law indemnification from OneSource must also be dismissed. The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81[2d Dept 2009]). Rexcorp has failed to establish the plaintiff's accident resulted from any negligence on the part of defendant OneSource, thus negating any claim for common law indemnification.

However, in any event, as shall be seen below, the indemnification claims are moot.

Defendant Rexcorp has established its entitlement to summary judgment herein. "To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" ***(Williams v SNS Realty of Long Is., Inc.***, 70 AD3d at 1035, 895 NYS2d 528 [2d Dept 2010]; ***Pryzywalny v New York City Tr. Auth.***, 69 AD3d 598, 599, 892 NYS2d 181 [2d Dept 2010]; ***Holub v Pathmark Stores, Inc.***, 66 AD3d 741, 742, 887 NYS2d 215 [2d Dept 2009]; ***Braudy v Best Buy Co., Inc.***, 63 AD3d 1092, 1092, 883 NYS2d 90 [2d Dept 2009]). A defendant moving for summary judgment may meet its burden of affirmatively demonstrating a lack of constructive notice of the allegedly dangerous condition by offering proof of regularly recurring maintenance or inspection of the premises (***Austin v CDGA National Bank Trust***, 114 AD3d 1298, 980 NYS2d 660 [4th Dept 2014]; *see* ***Kropp v Corning, Inc.***, 69 AD3d 1211, 893 NYS2d 371 [3d Dept 2010]; ***Roy v City of New York***, 65 AD3d 1030, 885 NYS2d 108 [2d Dept 2009]. In her testimony, OneSource employee Carmen Champa stated that she and a co-worker would inspect the floor area near the four entrances to the building three times between 7 a.m. and 9 a.m., and, if the floor was wet, she would dry it with a mop. She did this every day of her employment. This testimony alone is sufficient for Rexcorp to meet its initial burden of showing a lack of constructive notice.

It is further noted, moreover, that "[a] general awareness that water might be tracked into a building when it rains is insufficient to impute to the defendants constructive notice of the particular dangerous condition" ***(Musante v Department of Educ. of City of NY***, 97 AD3d 731, 731, 949 NYS2d 104 2d Dept [2012]; ***Yearwood v Cushman & Wakefield, Inc.***, 294 AD2d 568, 742 NYS2d 661 [2d Dept 2002]).

The plaintiffs, in response, have failed to raise any issue of facts. It is noted that, under the facts adduced herein, plaintiffs' expert's affidavit, being based on an examination of the site almost two years after the alleged accident, is of no probative value.

There is no evidence in the record that Rexcorp had actual notice of the alleged dangerous, condition or that it had constructive notice and a reasonable time to undertake remedial action (there is, in fact no evidence in the record as to the length of time that the alleged condition existed (*see* ***Drogotta v Walmart, Inc.***,39 AD3d 800, 835 NYS2d 352 [2d Dept 2007]). In light of these facts and the controlling law, Rexcorp is entitled to summary judgment dismissing the complaint. This dismissal renders its cross-claims against OneSource moot.

Dated: 2 4 14

A.J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION