Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

RANDY LEFKOSKI, JR. and ASHLEY LEFKOSKI,
Plaintiffs,

-against-

FG LITTLE NECK, LLC d/b/a FIVE GUYS BURGERS & FRIES, et al.,
Defendants.

Index Number 701236/12

Motion Date December 4, 2014

Motion Seq. No. 5

Motion Cal. No. 97

The following numbered papers read on this motion by defendants, Market Place Development, Inc. and Market Place LaGuardia Limited Partnership (MarketPlace) seeking summary judgment dismissing the complaint and for indemnity, and cross motion by plaintiff seeking summary judgment, both pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion	EF 58
Memo of Law	EF 59
Exhibits	EF 60-75
Aff. In Opposition	HC A
Notice of Cross Motion	EF 79
Aff. In Opp. To Motion and In Support of Cross Motion	EF 80
Exhibits	EF 81-85
Aff. Of Service	EF 86
Aff. In Opp. To Cross Motion	EF 87
Aff. In Reply	EF 88
Exhibits	EF 89-91
Aff. In Opp. To Cross Motion	HC B
Aff. In Reply	EF 92
Aff. Of Service	EF 93

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff seeks damages for personal injuries sustained when he was allegedly caused to slip and fall on cooking oil while on property managed by defendant, MarketPlace, and leased to defendant, FG Little Neck, LLC, doing business as Five Guys Burgers & Fries (Five Guys), sustaining injury.

Plaintiff alleges that, while in the course of making a delivery to Five Guys, he was caused to slip on cooking oil left on the ground in a corridor outside of Five Guys' leased premises, resulting in his injuries. Plaintiff alleges that the oil was adjacent to several boxes of used oil stacked on the floor of the corridor, which boxes contained the name "Five Guys' Burgers and Fries" and the words "peanut oil" on their sides. Defendant MarketPlace moves for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for summary judgment on liability.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]).

Defendant, MarketPlace, moves for summary judgment and dismissal of plaintiff's complaint as against it, contending that there exists no triable issue of material fact sufficient to continue this action against moving defendant. MarketPlace avers that it did not create the dangerous condition that allegedly caused plaintiffs accident, nor did it have constructive notice of said condition. Movant also contends that it is entitled to contractual and common-law indemnity from defendant, Five Guys, pursuant to the terms of a sublease agreement between those parties containing an indemnity clause.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there

is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*,, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

To establish prima facie entitlement to judgment as a matter of law in a premises liability action, a defendant must demonstrate that it maintained the premises in a reasonably safe condition, and that it neither created a dangerous or defective condition on the property, nor had actual or constructive notice of such dangerous or defective condition for a sufficient length of time to discover and remedy it (*see Martin v I Bldg. Co., Inc.*, 126 AD3d 861 [2015]; *Guilfoyle v Parkash*, 123 AD3d 1088 [2014]; *Abrams v Berelson*, 94 AD3d 782 [2012]). A defendant has constructive notice of a dangerous or defective condition when such condition "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. Ctr., Inc.*, 61 AD3d 629, 629 [2009]; *Gordon v American Museum of Natural Hist.*, 67 NY2d 836 [1986]). However, while a general awareness of a recurring problem will not establish constructive notice of that particular condition, when an owner/landlord has actual knowledge of the tendency of a particular dangerous or defective condition to reoccur, he or she may be charged with constructive notice of each such reoccurrence of that condition (*see Schubert-Fanning v Stop & Shop Supermarket Co., LLC*, 118 AD3d 862 [2014]; *Weisenthal v Pickman*, 153 AD2d 849 [1989]). In the case at bar, MarketPlace has failed to establish *prima facie* entitlement to judgment as a matter of law as it contended it had no prior notice of the condition alleged to have caused plaintiff's accident, yet submitted evidence that it had warned Five Guys to clean up such dangerous condition several times in the past.

Further, movants' evidence disclosed that at the time of the accident, it employed an outside contractor to provide maintenance and cleaning services to the tenants until 10:00 p.m., and also employed a night porter who cleaned from 10:00 p.m. until morning. Both were assigned to cover the corridor where plaintiff's accident took place. While MarketPlace insists that neither the contractor, nor the night porter, was responsible for cleaning up or disposing of items left by tenants in that corridor, a question arises with regard to whether movant had, or should have had, notice of the alleged dangerous

condition of cooking oil on the floor prior to the accident, by reason of the duties of MarketPlace's agents in inspecting the terminal area, and whether such agents should have remedied, or notified MarketPlace of, such dangerous condition. MarketPlace's failure to refer to any specific inspection of the area in question, and the results thereof, is insufficient to establish a lack of constructive notice of the condition of the area (*see Rogers v. Bloomingdale's, Inc.*, 117 AD3d 933 [2014]).

Consequently, defendant-movant, MarketPlace, has failed to tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. v. Medical Center,* 64 NY2d 851), and the branch of its motion seeking to dismiss the complaint is denied.

With respect to the branch of the motion seeking summary judgment on the ground of contractual indemnification, Section 11.1 of the contract between MarketPlace and Five Guys states that Five Guys will indemnify MarketPlace "[t]o the maximum extent permitted by law ... arising directly or indirectly from any accident, injury ... to any person ... on or about the premises; or ... occurring outside of the premises but within the terminal or general area of the terminal where such accident injury or damage results or is claimed to have resulted from any ... negligence on the part of the tenant." Such clause demonstrates an intention to indemnify which is clearly expressed in the language and purpose of the agreement, entitling MarketPlace to contractual indemnification from Five Guys (*see Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774 [1987]). While a party seeking full contractual indemnification must demonstrate freedom from its own negligence, as it cannot be indemnified to the extent that its negligence contributed to the accident (*see Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2009]), the use of the language "to the maximum extent permitted by law" in the instant clause, "limits rather than expands a promisor's indemnification obligation", and, therefore, does not violate General Obligations Law §5.322.1, because it does not require the promisor to indemnify the promisee for promisee's own negligence (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Goryev v Tomchinsky*, 114 AD3d 723 [2014]). However, where a triable issue of fact exists regarding the promisee's negligence, summary judgment on a contractual indemnification claim must be denied as premature (*see McLean v 405 Webster Ave. Associates,* 98 AD3d 1090 [2012]; *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]). Further, as Five Guys is not an insurer, its duty to defend is no broader than its duty to indemnify (*see Sawicki v GameStop Corp.*, 106 AD3d 979 [2013], so that branch of the motion is also denied as premature. Similarly, the branch of the motion seeking common-law indemnification is denied as premature, as plaintiff's injury has not yet been shown to be attributable solely to Five Guys (*see Arrendahl v. Trizechahn Corp.*, 98 AD3d 699 [2012]).

The branch of MarketPlace's motion seeking a finding that Five Guys' breached the contract term requiring insurance procurement is denied, as Five Guys has demonstrated the existence of such insurance.

Plaintiff's cross motion seeks summary judgment on liability against defendants. On this cross motion, plaintiff has the initial burden of demonstrating the lack of a triable issue of fact, and the evidence is to be liberally construed in a light most favorable to defendants. On the facts presented, plaintiff has failed to establish *prima facie* entitlement to summary judgment as a matter of law, in that plaintiff has not shown himself to be free of comparative negligence, nor has he demonstrated either defendant's alleged actions to have been the sole proximate cause of the accident (*see Sanchez v Mapp,* 127 AD3d 844 [2015]; *Gardner v. Smith*, 63 AD3d 783 [2009]). The questions of comparative negligence and proximate and intervening cause are properly issues for the trier of fact (see *Jiminez v Batista,* 123 AD3d 668 [2014]; *Berish v Vasquez,* 121 AD3d 634 [2014]; *Bah v. Benton*, 92 AD3d 133 [1st Dept 2012]). As such, a triable issue of fact sufficient to defeat summary judgment exists herein (*see Sanchez v Mapp,* 127 AD3d 844).

The parties' remaining contentions and arguments either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, defendant, MarketPlace's summary judgment motion is denied in its entirety. Plaintiff's cross motion seeking summary judgment is denied.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: June 2, 2015

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Howard G. Lane, J.S.C.