SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SAMUEL LEFKOWITZ,

Plaintiff,

Index No. 158936/2013

-against-

DECISION/ORDER

NEW AMSTERDAM APARTMENTS COMPANY, L.L.C., GOODSTEIN ORGANIZATION, L.L.C. and PUNIA AND MARX, INCORPORATED,

Defendants.

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NEW AMSTERDAM APARTMENTS COMPANY, L.L.C., GOODSTEIN ORGANIZATION, L.L.C. and PUNIA AND MARX, INCORPORATED,

Third-Party Plaintiffs,

-against-

REMCO MAINTENANCE, LLC,

Third-Party Defendant.

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he slipped and fell on September 2, 2011. Third-party defendant Remco Maintenance, LLC ("Remco") now moves for an Order pursuant to CPLR § 3212

granting it summary judgment dismissing the third-party complaint, which asserts claims against Remco for contribution, common law indemnification and contractual indemnification. For the reasons set forth below, defendant's motion for summary judgment dismissing the third-party complaint is granted.

The relevant facts are as follows. On September 2, 2011, plaintiff allegedly slipped and fell on a wet, slippery, slick, waxy, over-polished and uneven lobby floor located at 320 East 23rd Street, New York, New York (the "building"). Defendant and third-party plaintiff Goodstein Organization, L.L.C. contracted with Remco for the maintenance of the marble and granite lobby floor (the "contract"). Remco last honed and polished the building's lobby floor before the date of the accident on August 12, 2011. According to the affidavit testimony of Angelo Sciarrino ("Sciarrino"), Remco's night operations manager, Remco maintained the marble and granite lobby floor by honing and polishing the floor each month. To hone and polish the floor, Remco's employees first wet-sanded the floor with diamond discs over water and then sprinkled an acid powder onto the water. Sciarrino stated that no "slippery compound" was used in the honing and polishing process. After the honing and polishing process was complete, Remco's employees mopped the floor "completely clean and dry" and hand-dried the floor. Sciarrino inspected the work to ensure that it was performed correctly. According to Sciarrino's affidavit testimony, the floor was left completely dry and without any residue on August 12, 2011.

The court first considers the portion of Remco's motion for summary judgment dismissing third-party plaintiffs' claim for common law indemnification. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as

to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

A claim for common law "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999).

Remco has made a *prima facie* showing of its entitlement to summary judgment dismissing third-party plaintiffs' claim for common law indemnification on the ground that it did not cause the accident through its negligence. "That a floor is slippery by reason of its smoothness or polish does not give rise to an inference of negligence; in addition, there must be proof of the negligent application of wax or polish." *Goldin v. Riverbay Corp.*, 67 A.D.3d 489 (1st Dept 2009) (holding that the defendant made a *prima facie* showing that it was not liable for the plaintiff's injuries through the submission of its maintenance supervisor's testimony that, although the floor was waxed and buffed when a tenant moved in, the floor was not slippery after the application of wax). In the present case, Remco has established that it did not cause the accident by negligently honing and polishing the floor by submitting Sciarrino's affidavit

testimony that the floor in question was honed and polished in accordance with Remco's standard procedure, which did not leave the floor in a slippery condition.

In opposition, third-party plaintiffs have failed to raise a triable issue of fact. Third-party plaintiffs' argument that there is an issue of fact as to whether Remco caused the floor to become slippery on the ground that it honed and polished the floor on September 1, 2011, one day before the accident, is without merit. Although third-party plaintiffs submitted an invoice dated September 1, 2011 for the honing and polishing of the floor, Sciarrino testified that the invoice dated September 1, 2011 was automatically generated by Remco's computer system at the beginning of the month for work that was not actually completed until September 21, 2011. Moreover, even assuming *arguendo* that Remco honed and polished the floor on September 1, 2011, third-party plaintiffs have failed to produce any evidence that Remco negligently applied wax or polish, thereby leaving the floor in a slippery condition.

To the extent that third-party plaintiffs contend that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1st Dept 2008). In the present case, third-party plaintiffs have failed to provide any evidentiary basis indicating that discovery may lead to relevant evidence.

Remco has also established its entitlement to summary judgment dismissing third-party plaintiffs' claim for contribution. Under New York's contribution statute, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or

wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CPLR § 1401. In the present case, Remco is not subject to liability for plaintiff's personal injuries as it did not cause the accident through its negligence, as discussed above.

Remco has also established its entitlement to summary judgment dismissing third-party plaintiffs' claim for contractual indemnification as it is undisputed that its contract with Goodstein Organization, L.L.C. did not contain a provision for contractual indemnification.

Accordingly, Remco's motion for summary judgment dismissing the third-party complaint is granted. This constitutes the decision and order of the court.

Dated: 6/15/16

Enter: _____
J.S.C.
HON. CYNTHIA S. KERN
J.S.C.