SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MARIO GAGLIARDI

INDEX NO. 162540/14

MOT. DATE

- v -

MOT. SEQ. NO. 006 and 007

COMPASS GROUP USA, INC. et al.

The following papers were read on this motion to/for summary judgment (006)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits — NYSCEF DOC No(s). 117-129

Notice of Cross-Motion/Answering Affidavits — Exhibits — NYSCEF DOC No(s). 146-147, 151-157

Replying Affidavits — NYSCEF DOC No(s). 166-167, 168-169

The following papers were read on this motion to/for summary judgment (007)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits — NYSCEF DOC No(s). 131-145

Notice of Cross-Motion/Answering Affidavits — Exhibits — NYSCEF DOC No(s). 158-163

This action arises from an alleged slip and fall. Plaintiff claims that on May 5, 2014 at approximately 9:15am, he slipped and fell on water, ice or other liquid near a food table inside a cafeteria at a building located at 7 Hanover Square, New York, New York (the "building").

In motion sequence number 006, defendants Compass Group USA, Inc. ("Compass"), Restaurant Associates Corp., Restaurant Associates LLC ("RA") and Restaurant Associates, L.P. (collectively the "Compass/RA defendants") move for summary judgment dismissing plaintiff's claims and all cross-claims. Defendant Seven Hanover Associates, LLC partially opposes the motion to the extent that the Compass/RA defendants seek dismissal of the cross-claims. Plaintiff also opposes the motion.

In motion sequence number 007, Seven moves for summary judgment dismissing plaintiff's claims against it and alternatively for common law indemnification in its favor against defendants Compass and RA. Plaintiff also opposes that motion. Since they are interrelated, the motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Many of the relevant facts are not in dispute. Seven owns the building and defendant RA operates the cafeteria pursuant to a contract between it and Guardian Life Insurance Company ("Guardian"), a main tenant of the building. RA is a subsidiary of Compass. At the time of his accident, plaintiff was employed by Guardian and filed a Workers' compensation claim in connection therewith.

Dated: 1/23/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Plaintiff testified at his deposition about the accident as follows. After arriving at the building for work and going to his office, plaintiff headed to the cafeteria to purchase an apple and a seltzer water. Plaintiff stated that he went to the cafeteria approximately two times a day since he had started working for Guardian approximately four months prior. Plaintiff estimated that there were approximately ten to fifteen people in the cafeteria when he arrived, including RA employees. Less than a minute after he entered the cafeteria, plaintiff slipped when his right foot stepped in a puddle or spill and plaintiff lost his footing. The accident occurred approximately fifteen to twenty feet from the entrance that plaintiff used to enter the cafeteria, and close to an island with fruit. Plaintiff estimated that the accident occurred at approximately 9:15am or 9:17am.

When asked what substance he slipped on, plaintiff explained:

> Some sort of career liquid (sic). The floor of the cafeteria, from what I recall, was a white – I don't know if it was linoleum or – white flooring. Okay? So I did not see the spill. It was only when I stepped in the puddle and began to lose my footing that I realized that there was something there. When I fell, I fell back and to the right, and my left leg was going into a split, and as I lost my balance, my left leg shot out into the air, and that's when the injury occurred. So I was lying on my right side in the liquid, whether it be water or what have you, and my hand was wet, my shirt was wet and my pants were wet.

Plaintiff further testified that he never saw the puddle and couldn't describe its size or shape, what it was comprised of, or how the liquid got on the floor or how long it had been there. The cafeteria was otherwise well lit, and plaintiff didn't observe any cafeteria employees cleaning the area or any wet floor signs.

RA produced Erika Isaac for a deposition, who worked as a café manager at the cafeteria. Isaac testified that there were porters who checked the floors of the cafeteria for slippery conditions every fifteen minutes as well as a manger on duty when the cafeteria was open. Isaac stated: "so if we are made aware – like if a customer spills something, and we are made aware of it, we go get the porters. First we put the sign out, then we get the porter."

Isaac testified that she worked on the date of plaintiff's accident from 6am to 6:30pm. She stated that the floors had been mopped that morning right before the cafeteria opened at 6:25am. When the floors are mopped, Isaac explained that "four wet floor signs go out all over the café, and then it's mopped starting at the cashier station, back. Then the signage – the wet floor signs get pulled away once the floor is dry. Normally it's dry before we open. If not, they have to stay out."

Isaac was in the dining room when plaintiff fell. She responded shortly thereafter and took down information regarding the accident in order to prepare a report. Plaintiff testified that she took several photos of the location of plaintiff's accident. One photograph which has been produced by defendants depicts a skid mark on the tiled floor of the cafeteria. Isaac further stated that she observed a piece of ice on the floor near where plaintiff fell. Isaac admitted that the island near where plaintiff fell was filled with ice and was left uncovered.

RA also produced Rennie Singletary for a deposition, its catering manager. Singletary testified that she oversaw the employees who worked at the cafeteria. Singletary was on duty the day that plaintiff was injured. Singletary described the layout of the cafeteria, and specifically the island adjacent to where plaintiff fell as refrigerated and filled with ice to keep the fruit cold. Singletary further testified that the floors were mopped twice a day: after breakfast and at the end of the day. When asked "how often would an employee of [RA] make sure there was no water on the ground" in the area where plaintiff fell, Singletary stated:

> We walk through that every five minutes. That is an area of constant traffic, with management, our team and everything.

> ...
> If something on the ground, if wet, we have the wet floor signs or normally we will just stand there until a porter is noticing and comes and wipes it up.

The Compass/RA defendants have also provided a sworn affidavit by Singletary, wherein she states that "RA personnel had not mopped th[e] area [where plaintiff fell] or delivered ice to that area since prior to opening at 6:45am, and no RA personnel performed work in that area during breakfast service that resulted in water or ice (or other liquid) being on the floor." Annexed to Singletary's affidavit is an inspection schedule which indicates that one of four people were responsible for inspecting the floor and cleanup every fifteen minutes from 8am through 10:30am when the cafeteria is closed for breakfast.

The Compass/RA defendants argue that they are entitled to summary judgment because they did not owe plaintiff a duty. The Compass/RA defendants and Seven both further contend that they did not create the dangerous condition which caused his accident nor have notice of it either. Finally, Seven argues that if its motion for summary judgment dismissing plaintiff's claims is not granted, it is entitled to common law indemnification from Compass and/or RA because they "assumed full and complete operational, maintenance and cleaning duties for the cafeteria" and displaced Seven's duty of care to plaintiff.

In opposition, plaintiff maintains that both Compass and RA oversaw the food service operation at the cafeteria, based upon the deposition transcript of Ron Pederson, Compass's Senior Manager, who testified that "Compass Group oversees the food service operation at [the cafeteria]." Pederson further testified that he was involved in the day-to-day operation of the cafeteria insofar as he oversaw the managers at the cafeteria, including Singletary. Plaintiff further maintains that even though he a third-party beneficiary of RA's contract with Guardian, the Compass/RA defendants assumed a duty of care, breached that duty and thereby launched a force or instrument of harm thereby displacing Seven's duty to maintain the premises in a reasonably safe condition.

As for causation, plaintiff argues that the Compass/RA defendants have not met their burden of establishing that they didn't cause the slippery condition. "A jury could reasonably infer from the relevant facts and circumstances that ice which movants' morning porter had recently poured into the salad bar, which bar defendants left uncovered, fell to the floor creating the slippery condition which precipitated the subject occurrence." Plaintiff also argues that defendants did not meet their burden on the issue of notice, since there is conflicting testimony regarding mopping, and whether RA employees conducted routine inspections.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]).

Here, defendants' motions must be granted because they have established that they did not cause or create the slippery condition and did not have either actual or constructive notice of it. Plaintiff's theory of liability, that RA employees negligently placed ice into the island which fell to the floor and caused a slippery condition is too attenuated and lacks sufficient evidence from which a factfinder could find in his favor. The undisputed record is that RA employees placed ice in the island more than two and a half hours prior to plaintiff's accident. Further, based upon his own deposition testimony, plaintiff himself did not observe the slippery condition prior to his fall nor did he even observe ice in the island. It would be speculative for a jury to conclude on this record that the ice was negligently placed in the island without any facts to support this claim. Nor is the fact that the island was uncovered sufficient to raise a triable issue of fact. Indeed, plaintiff does not argue that an uncovered island with ice is necessarily negligent. Therefore, plaintiff has not raised a triable issue of fact on the issue of whether defendants caused the slippery condition.

Defendants have further established that they did not have notice of the condition, Here, defendants have established that RA employees conducted routine visual inspections of the floor and did not observe a wet condition prior to plaintiff's fall. While plaintiff contends that this is a triable issue of fact, the court disagrees. Here, conflicts between defendants' employees about when the floor was mopped notwithstanding, plaintiff's theory of the case is that the slippery condition on the floor was caused by ice which fell from the island, and there is no dispute on this record that the floor was not mopped after the cafeteria was open and for several hours before plaintiff's accident. It is of no moment whether the floor was mopped after plaintiff's accident.

As for defendants' claims regarding routine inspections, plaintiff himself only approximated that he fell at around 9:15am or 9:17am. On this record, it is undisputed that defendants' employees did not observe or otherwise have knowledge of the slippery condition prior to plaintiff's accident for a sufficient time to reasonably remedy said condition.

Accordingly, defendants' motions must both be granted. In light of this result, the court declines to consider whether Compass or other RA defendants owe plaintiff a duty or whether Seven is entitled to common law contribution.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 006 is granted to the extent that the Compass/RA defendants are entitled to summary judgment dismissing plaintiff's complaint and any cross-claims against them are hereby dismissed; and it is further

ORDERED that motion sequence number 007 is granted to the extent that plaintiff's claims against Seven are dismissed; and it is further

ORDERED that plaintiff's complaint and all crossclaims are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/23/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.