SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRANSIT PART 21

WENSI GONZALEZ,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, and TRIBUNE NEW YORK NEWSPAPER HOLDINGS, LLC., d/b/a/ AM NEW YORK, CABLEVISION SYSTEMS CORPORATION d/b/a AM NEW YORK,

Defendant.

DECISION AND ORDER

Index # 156427/2013

Mot. Seq. 2

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

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmations/Memo of Law	1	28-39
Plaintiff's Memo of Law in Opposition	2	45
Defendant's Affirmation in Reply/Memo of Law	3	48

LISA A. SOKOLOFF, J.

In this personal injury action in which Plaintiff Wensi Gonzalez alleges injury from a slip and fall on subway stairs, Defendants Newsday LLC i/s/h/a Tribune New York Newspaper Holdings, LLC, d/b/a AM New York, and CSE Holdings, LLC i/s/h/a Cablevision Systems Corporation (respectively, "Newsday" and "CSC") move for summary judgment pursuant to CPLR § 3212 and to dismiss the complaint and all cross-claims.

Plaintiff alleges that on May 4, 2012 at approximately 5:35 a.m. or 5:40 a.m., as he traversed a passageway at the Fulton Street subway station while transferring from the A train to the southbound 4 or 5 train, he noticed an unsecured, unattended stack of AM NEW YORK newspapers on the landing next to the handrail leading down the stairs. As he took his first step down, he felt his right foot slipping, heard something crushing beneath his foot, looked down to see a newspaper, and fell down the stairs.

At the time of his accident, the Fulton Street subway station was undergoing construction and temporary walls and passageways were erected. There is no dispute that this was the only stairway leading from the A train to the southbound 4 and 5 trains.

Newsday and CSC move for summary judgment on four grounds. First, they owe no duty of care to Plaintiff because they do not own, control or make special use of the stairway where Plaintiff's accident occurred. Second, they cannot be held vicariously liable for any dangerous or defective condition created by the hawkers who distribute the newspapers because the hawkers are employees of vendor Liberty One Delivery One Consultants LLC ("Liberty One"), an independent contractor pursuant to a staffing Agreement ("Staffing Agreement") dated November 5, 2007 between Tribune New York Newspapers Holdings, LLC ("Tribune") and Liberty One. Third, neither Defendant Newsday nor its independent contractor created or had notice of the newspapers on the stairs as neither Plaintiff nor the station cleaner knew how long the papers had been there before Plaintiff's fall. Fourth, Plaintiff's claim is based upon mere speculation in that he never actually looked at the paper he slipped on.

In opposition, Plaintiff contends that he saw a stack of AM NEW YORK newspapers by the pillar on the staircase, about a foot from the handrail and slipped on one of the newspapers on the top stair. Plaintiff further argues that the movants have failed to demonstrate that they did not breach a duty of care to Plaintiff by leaving an unattended, unsecure bundle of newspapers on the landing, thereby causing a dangerous condition or slipping hazard. Nor have Newsday and CSC established that they did not control and supervise the employees of Liberty One.

"The drastic remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept

1990; *DeWanger v St. Vincent's Hosp. & Medical Center of New York*, 118 AD2d 412 [1st Dept 1986]). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Id.*) Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). All of the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *Medina-Ortiz v Seda*, 157 AD3d 499 [1st Dept 2018]). The motion should be granted only if there is no rational process by which the jury could find for the plaintiff as against the moving defendant (*Harding v Noble Taxi Corp.*, 182 AD2d 365 [1st Dept 1992]).

To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (*Sangaray v West River Associates, LLC*, 26 NY3d 793 [2016]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept 2013]). Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property (*Branch v County of Sullivan*, 25 NY3d 1079 [2015]). However, even if a party does not own or control the area where the defective condition exists, a party may be held liable if it causes or creates the condition (*Coulton v City of New York*, 29 AD3d 301 [1st Dept 2006] [defendant general contractor's summary judgment motion denied where contractor erected a plywood cover over a building which narrowed the width of sidewalk and plaintiff pedestrian tripped and fell due to a defective condition on the sidewalk]).

A contractor is potentially liable to third persons, where the contractor, in failing to exercise reasonable care in the performance of his duties, creates a dangerous condition or "launches a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Lopez v New York Life Ins. Co.*, 90 AD3d 446 [1st Dept 2011]; *Farrugia v 1440 Broadway Associates*, AD3d 452 [1st Dept 2018] [question of fact whether contractor caused, created, exacerbated or launched a force or instrument of harm when it removed oil tank and left a large opening in the metal plate exposed, injuring plaintiff]; *Cornell v. 360 West 51st Street Realty, LLC*, 51 AD3d 469 [1st Dept 2008] [question of fact whether contractor negligently removed demolition debris where plaintiff injured by hazardous substances released into the air during demolition work]). Moreover, when a party by its affirmative acts creates a dangerous condition that is the proximate cause of plaintiff's injuries, a plaintiff is not required to show actual or constructive notice of the dangerous condition (*Figueroa v City of New York*, 126 AD3d 438 [1st Dept 2015];

Here, Plaintiff testified that he saw an unsecured, unattended stack of AM New York newspapers at the top of the stairs and slipped on one of the newspapers on the top stair. On prior occasions, Plaintiff had observed stacks of newspapers in the same area, but they had been distributed by personnel.

The station cleaner, Mr. Darrel Miles, testified that he was employed by the New York City Transit Authority on the date of the incident to clean the Fulton Street station from 10 p.m. to 6 a.m. He was cleaning the area of the accident at 5:45 a.m. on the day of Plaintiff's accident and observed two AM NEW YORK newspapers on the landing at the top of the stairs where Plaintiff fell. He heard Plaintiff's call for help, saw him at on the floor at the bottom of the stairs and went to assist him. Although the cleaner had seen AM New York newspapers throughout the

station, he denied ever seeing newspapers on that landing before the accident despite the fact that he cleaned them nightly five days a week.

AM New York Distribution Clerk, Bill Paraszczuk, an employee of Newsday, testified that he was not sure where the papers were distributed at the Fulton Street station and that placement of hawkers was left to the discretion of a Liberty One supervisor. He noted that the hawkers were "pretty aggressive, and they were always trying to find new ways to distribute their papers more efficiently." There were no written records to show specific locations where papers could be distributed. Although Liberty One supervisors maintained accounting sheets on a daily basis that noted the hours that hawkers worked and locations, they did not specify whether the locations were on the street or underground.

Upon learning of the accident, Mr. Paraszczuk, had spoken to Malcolm Udogwu, the Liberty One supervisor responsible for the Fulton Street Station, to ask how the papers were distributed there. Mr. Udogwu allegedly told him that a hawker stood by a pillar to distribute the papers. Mr. Paraszczuk was not clear whether the pillar was near a staircase, acknowledging that that the space had changed as a result of the renovation.

Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039 [2016]). Thus, the disputed testimony as to whether an unsecured bundle of AM New York newspapers was left at the top of the stairs, raises a question of fact whether the hawkers left unsecured newspapers in the vicinity of Plaintiff's accident thereby creating an unsafe condition.

Even if the hawkers deposited a bundle of papers by the stairs, Defendants claim that they are not responsible for the negligent acts of the Liberty One hawkers because they were independent contractors. As a general rule, a party cannot be held vicariously liable for the negligence of an independent contractor if did not exercise actual or constructive control over the performance and manner in which the work was performed (*Kleeman v Rheingold*, 81 NY2d 270 [1993]) and mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability (*Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011]).

In support of their argument, Mr. Paraszczuk testified that under the Staffing Agreement, Liberty One supplies and staffs the hawker operation. Although Mr. Paraszczuk oversaw the ordering and distribution of the newspapers, hawkers were recruited, hired and trained by Liberty One supervisors, who also had discretion to direct their placement for newspaper distribution. Mr. Paraszczuk's testimony, however, directly contradicts the provisions of the Staffing Agreement, which provide that Tribune has the obligation "[t]o recruit, screen, select, hire, train, supervise, direct, discipline, promote, demote, adjust the compensation of… terminate the employment" of employees assigned to distribute the papers and may direct their specific work functions. Based on the terms of the Staffing Agreement, there is a triable issue of fact whether Defendants exercised control over the Liberty One hawkers and thereby be liable for their negligent acts.

Defendants argue that even assuming they owed a duty of care to Plaintiff, because he did not see that the paper he slipped on was an AM New York, it is based on speculation and conjecture. While "sheer speculation" as to the cause of an accident is not permitted (*Nadel v Cucinella*, 299 AD2d 250 [1st Dept 2002]), proximate cause may nonetheless be demonstrated if

the evidence identifies the defect or hazard and provides sufficient facts and circumstances from which causation may be reasonably inferred (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144 [1st Dept 2017] [question of fact as to whether alleged inadequate lighting on subject stairway was a proximate cause of decedent's fall]; (*Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311 [1st Dept 2008] [triable issue of fact raised by plaintiff's averment that, as she was carrying newspapers under her left arm, she slipped and tried to grab onto a handrail with her right hand, but there was no right-sided handrail, combined with plaintiffs' expert's unchallenged statement that the absence of a handrail on the stairway's right wall was a significant and dangerous departure from accepted standards and the applicable building code]; *Cartagena v Access Staffing, LLC*, 151 AD3d 580 [1st Dept 2017] [plaintiff's deposition testimony that immediately after she fell she noticed that the floor was wet and that there was a janitor's cart with wet floor signs attached to it near the accident location provided nonspeculative basis for her account of the accident and demonstrated nexus between the hazardous condition and the circumstances of her fall]; *cf. Gold v 35 East Associates LLC*, 136 AD3d 453 [1st Dept 2016] [plaintiff failed to raise a triable issue of fact where his affidavit stated that a black sticky substance caused the accident; his admission that he first noticed the substance weeks after the accident rendered proof speculative as to the existence of the substance at the time of the accident]; c*f. Issing v Madison Square Garden Center, Inc.*, 116 AD3d 595 [1st Dept 2014] [defendants entitled to summary judgment where plaintiff maintained that there was water on the basketball court in the area where he fell, but did not observe water on the court during the game or following his fall]).

While Plaintiff's evidence need not positively exclude every possible cause of his fall other than the alleged placement of AM New York Newspapers, it must be sufficient to permit a

finding of proximate cause based on logical inferences, not speculation (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 [1986]; *Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006]). Here, Plaintiff testified that he saw an unsecured pile of AM New York papers sitting a foot from the staircase handrail and that he slipped on the top stair on a "standard sized newspaper…[n]ot too thick." Viewing the facts in the light most favorable to Plaintiff, the court finds that Plaintiff's submission identifies a hazard and raises questions of fact whether causation of his fall may be reasonably inferred and whether Defendants can be held vicariously liable for the acts of Liberty One.

Accordingly, it is

ORDERED, that Defendants' motion for summary judgment is denied.

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: September 27, 2018
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- [ ] CASE DISPOSED
- [ ] GRANTED
- [ ] SETTLE ORDER
- [ ] INCLUDES TRANSFER/REASSIGN
- [X] DENIED
- [X] NON-FINAL DISPOSITION
- [ ] GRANTED IN PART
- [ ] SUBMIT ORDER
- [ ] FIDUCIARY APPOINTMENT
- [ ] OTHER
- [ ] REFERENCE