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| Rolston v GPT Props. Trust |
| 2018 NY Slip Op 34384(U) |
| July 27, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 619269/2016 |
| Judge: John H. Rouse |
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INDEX NO. 619269/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 01/24/2018
ADJ. DATE: 06/27/2018
Mot. Seq. 005-MG

MOTION DATE: 01/24/2018
ADJ. DATE: 06/27/2018
Mot. Seq. 006-MD

MOTION DATE: 11/01/2017
ADJ. DATE: 06/27/2018
Mot. Seq. 002-MD

MOTION DATE: 05/09/2018
ADJ. DATE: 06/27/2018
Mot. Seq. 007-MG

MOTION DATE: 12/06/2017
ADJ. DATE: 06/27/2018
Mot. Seq. 003-MG

MOTION DATE: 05/16/2018
ADJ. DATE: 06/27/2018
Mot. Seq. 008-MD

MOTION DATE: 12/06/2018
ADJ. DATE: 06/27/2018
Mot. Seq. 004-MG

MOTION DATE: 06/27/2018
ADJ. DATE:
Mot. Seq. 009-MD
e-filed full participation

Ann Rolston,

Plaintiff

-against-

DECISION & ORDER

GPT Properties Trust, Reit Management & Research LLC, GBM
Services Inc, The Brickman Group LLC, JFM Concrete, Corp.,

Defendants

TO:

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NYSCEF DOC. NO. 333 RECEIVED NYSCEF: 08/08/2018

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Upon the reading and filing of the following papers in this matter:

(1) Notice of Motion (Seq. #002) by Defendants GPT Properties Trust and REIT Management & Research LLC for an Order compelling Defendant The Brickman Group LLC to supply a copy of all insurance policies that were in effect at the time of the accident; (2) all e-filed documents numbered 8-83 and 172-175 and 177-179; and (3) e-filed letter filed as document 176 and e-filed document 84 erroneously filed in the folder for motion sequence 003;

(4) Notice of Motion (Seq. #003) by Defendants GPT Properties Trust and REIT Management & Research LLC for an Order compelling Plaintiff to provide all outstanding discovery and demanded medical authorizations; (5) e-filed documents numbered 49-31, 49-51, and 84-91;

(6) Notice of Motion (Seq. #004) by Plaintiff for an Order striking the answer of Defendants GPT Properties Trust and REIT Management & Research LLC for their willful failure to preserve and intentional destruction of evidence of the condition of the location of the occurrence of the accident, or in the alternative to provide an adverse inference charge at the time of trial and precluding Defendants GPT Properties Trust and REIT Management & Research LLC from offering expert opinion testimony concerning the dangerous condition of the accident location; and compelling GPT Properties Trust and REIT Management & Research LLC to turn over their entire file of its expert evaluation of the location of the accident;

(7) Notice of Cross Motion (Seq. #005) by Defendant GPT Properties Trust and REIT Management & Research LLC for an Order striking the complaint; providing an adverse inference charge at the time of trial; and precluding the Plaintiff from offering expert testimony; (8) e-filed documents numbered 58-63, 133-138, and 199-202;

(9) Notice of Motion (Seq. #006) by Defendants GPT Properties Trust and REIT Management & Research LLC for an Order granting them summary judgment and dismissing the Plaintiff's complaint against them; (10) e-filed documents numbered 64-81, 92-132, 180, 198, 203-209;

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(11) Notice of Motion (Seq. #007) by Defendant The Brickman Group, LLC, for an Order granting it summary judgment on all claims and cross claims, or in the alternative granting it summary judgment on its cross claim against JFM Concrete, Inc. based upon contractual indemnification; (12) e-filed documents numbered 145-171, 182-184, 257-260;

(13) Notice of Cross Motion (Seq. #008) by Plaintiff for Summary Judgment against Defendants GPT Properties Trust and REIT Management & Research LLC; (14) e-filed documents numbered 185-196, 244-255, 265-268; and

(15) Notice of Cross Motion (Seq #009) by Defendants GPT Properties Trust and REIT Management & Research LLC for an Order granting them summary judgment on their claims for contractual indemnity and attorney's fees against Defendant Brickman Group, LLC; it is:

ORDERED that the motion (Seq. #002) by Defendants GPT Properties Trust and REIT Management & Research LLC for an Order compelling Defendant The Brickman Group LLC to supply a copy of all insurance policies that were in effect at the time of the accident is **denied** as moot; and it is further

ORDERED that the motion (Seq. #003) by Defendants GPT Properties Trust and REIT Management & Research LLC for an Order compelling Plaintiff to provide all outstanding discovery and demanded medical authorizations is **granted**; and it is further

ORDERED that the motion (Seq. #004) by Plaintiff for sanctions for the spoliation of evidence, and the cross motion by Defendants GPT Properties Trust and REIT Management & Research LLC (Seq. #005) are **both granted** but only to the extent that both sides are precluded from offering expert testimony on the issue of liability; and it is further

ORDERED that the motion (Seq. #006) by Defendants GPT Properties Trust and REIT Management & Research LLC for summary judgment dismissing the Plaintiff's complaint is **denied**; and it is further

ORDERED that the motion (Seq. #007) by Defendant The Brickman Group, LLC, for an Order granting it summary judgment on all claims and cross claims is **granted** and the case is dismissed as to it; and it is further

ORDERED that the cross motion (Seq. #008) by Plaintiff for Summary Judgment against Defendants GPT Properties Trust and REIT Management & Research LLC is **denied**; and it is further

ORDERED that the motion (Seq. #009) by Defendants GPT Properties Trust and REIT Management & Research LLC for summary judgment against The Brickman Group, LLC is **denied**; and it is further

only some of her medical records. Moreover, whether some aspect of a pre-existing medical condition contributed to her fall certainly is within the ambit of material that if not directly relevant and admissible, could lead to relevant evidence. See *DeLouise v. S.K.I. Wholesale Beer Corp.*, 79 A.D.3d 1092 (2nd Dept. 2010). The motion (003) is granted.

Mot. Seq. 004 and 005

Plaintiff moves (004) for sanctions against Defendants GPT Properties Trust and REIT Management & Research LLC for their willful failure to preserve and the intentional destruction of evidence of the condition of the location of the occurrence of the accident. Plaintiff slipped and fell on December 17, 2013 and it is alleged that on October 16, 2016 Defendants caused the floor to be re-painted before Plaintiff had a fair opportunity to inspect the floor with its expert to assess its coefficient of friction.

Defendants GPT Properties Trust and REIT Management & Research LLC cross move (005) for sanctions against the Plaintiff. Plaintiff disposed of the boots she was wearing on the day she slipped and fell. *e-document 60, Plaintiff's deposition at page 71-72*. Plaintiff testified she did not recall the brand of the boots she had been wearing, and did know whether her boots were wet from walking in the snow prior to the delivery, and did not recall whether they had become wet inside her delivery truck. *Id.* Defendants contend this constitutes spoliation of evidence and seek sanctions.

This case is an unfortunately common slip and fall on premises. See *PJI 2:91*. Under the circumstances presented no expert can provide competent and admissible testimony about the coefficient of friction (CoF) between two surfaces when neither surface is available for examination, not the floor as re-painted and not the footwear that had been thrown out. Liability in this case will center on the respective fault of the parties in addressing the conditions present on the premises -- a wet floor. See *e.g. Maguire v. Southland Corp.*, 245 A.D.2d 347 (1997). There is nothing beyond the common understanding of the jury with respect to questions of liability that weigh in favor admitting expert testimony from either party. *Franco v. Muro*, 224 A.D.2d 579 (2nd Dept. 1996), followed by *Galasso v 400 Exec. Blvd., LLC*, 101 A.D.3d 677 (2nd Dept. 2012). Accordingly, the motion and cross motion are granted, but only to the extent that both sides are precluded from offering expert testimony on the issue of liability.

Mot. 006

Defendants GPT Properties Trust and REIT Management & Research LLC move this court for an Order granting them summary judgment. GPT Properties Trust and REIT Management & Research LLC argue they are excused from liability because of there was a storm in progress. See *e.g. Solazzo v. N.Y. City Transit Auth.*, 6 N.Y.3d 734 (2005) *NY Transit Authority not liable for snow and ice on subway stairs exposed to an ongoing storm, or for a reasonable time thereafter*. The "storm in progress doctrine" is informative with respect to liability for conditions that change in the interior of premises due to a storm in progress, but it alone is not dispositive. See *e.g. Kuznicki v. Beth Jacobs Teachers Seminary of Am. Inc.*, 39 Misc. 3d 286. Defendants have failed to make a *prima facie* case that they were not negligent in any part in the management of

the premises. *Ford v. Citibank, N.A.*, 11 A.D.3d 508 (2nd Dept. 2004); and *Hickson v Walgreen Co.*, 150 A.D.3d 1087 (2nd Dept. 2017). Accordingly, the motion is denied.

Mot. 007

Defendant, The Brickman Group, LLC, moves this court for an Order granting it summary judgment on all claims and cross claims arising out of the Plaintiff's slip and fall inside the premises at 5000 Corporate Court, Holtsville, NY. The Brickman Group, LLC has provided sworn allegations of fact that it contracted to provide snow removal services from the exterior of the building and had never contracted to perform any services inside the premises. Plaintiff concedes that The Brickman Group, LLC bears no responsibility for the Plaintiff's fall, and concedes responsibility for the interior floor is to be borne by either GPT Properties Trust and REIT Management & Research LLC (owner and management company) or GBM Services, Inc. its cleaning company. Defendants GPT Properties Trust and REIT Management & Research LLC and GBM Services, Inc. have failed to raise a triable issue of fact with respect to the movant's liability for conditions inside the premises. Accordingly the motion is granted in its entirety.

Mot. 008

Plaintiff cross moves for Summary Judgment against Defendants GPT Properties Trust and REIT Management & Research LLC. Plaintiff contends that because Defendants did nothing to remedy the accumulated water in the loading dock area they were necessarily negligent. Plaintiff has failed to make a *prima facie* case that Defendants were negligent and Plaintiff herself was free from negligence. *Hernandez v Conway Stores, Inc.*, 143 A.D.3d 943 (2nd Dept. 2016). Accordingly, Plaintiff's motion for summary judgment is denied.

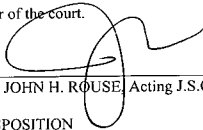
Mot. 009

Defendants GPT Properties Trust and REIT Management & Research LLC move for an Order granting them summary judgment against The Brickman Group, LLC. For those reasons stated with respect to The Brickman Group, LLC's motion for summary judgment (Mot. 007) this motion is denied in its entirety.

In view of the foregoing determinations with respect to the Brickman Group, LLC (Mot 007) there is no liability in JFM Concrete, Inc., the subcontractor for The Brickman Group, LLC, and all claims and cross claims against it are dismissed.

The foregoing shall constitute the decision and order of the court.

Dated: July 27, 2018



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION