

**Taliana v Hines Reit Three Huntington Quadrangle
LLC.**

2019 NY Slip Op 32074(U)

July 15, 2019

Supreme Court, Suffolk County

Docket Number: 16649-2014

Judge: David T. Reilly

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:
HON. DAVID T. REILLY, JSC**

INDEX NO.: 16649-2014

LOUISE TALIANA AND ROBERT TALIANA,

Plaintiffs,

-against-

**HINES REIT THREE HUNTINGTON QUADRANGLE LLC.,
HINES INTERESTS LIMITED PARTNERSHIP, CBRE, INC.,
SUPERIOR AIR CONDITIONING & HEATING SYSTEMS,
INC. and JOHNSON CONTROLS, INC.,**

Defendants.

x
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MOTION DATE 05-06-18 (003)
MOTION DATE 07-09-18 (004)
MOTION DATE 10-03-18 (005)
ADJ. DATE 01-23-19
Mot. Seq. # 003 - MG
004 - MG
005 - MG; CASEDISP

Upon the following papers numbered 1 to 57 read on these motions for summary judgment: Notice of Motion and supporting papers 1-10; 18-31; 42-49; Answering Affidavits and supporting papers 11-15; 32-38; 50-55; Replying Affidavits and supporting papers 16-17; 39-41; 56-57; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (003) of defendant Hines Reit Three Huntington Quadrangle LLC, Hines Interests Limited Partnership (Hines), the motion (004) of defendant Superior Air Conditioning & Heating Systems, Inc. (Superior), and the motion (005) of defendant CBRE, Inc. (CBRE) are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Hines for summary judgment dismissing the complaint and cross-claims against it is granted; and it is further

ORDERED that the motion by defendant Superior for summary judgment dismissing the complaint and cross-claims against it is granted; and it is further

ORDERED that the motion by defendant CBRE for summary judgment dismissing the complaint and cross claims against it is granted and the action is dismissed.

Plaintiff commenced this action seeking money damages for personal injuries allegedly sustained on August 20, 2013 at approximately 12:00 p.m. when she was caused to slip and fall in a break room/lunch room located on the fourth floor of Three Huntington Quadrangle, Melville, NY. At the time of the accident plaintiff was employed as a Liability Claims Representative by Travelers Insurance Company which occupied, among other spaces, the fourth floor of the office building. By her bill of particulars and deposition testimony, plaintiff asserts that an HVAC unit located above the lunch room ceiling was leaking water onto the floor thereby causing a slippery surface to form on the floor. Plaintiff maintains that she entered the room in order to use one of the microwaves to heat some soup and that as she moved to exit the room she observed a garbage pail in the middle of the room. Near the garbage pail plaintiff states that she slipped and fell causing her alleged injuries. After falling plaintiff claims that she noticed water on her pants and some water located around the perimeter of the garbage can. Plaintiff contends that she later learned that the garbage can had been placed below a vent in the ceiling to catch water dripping from that vent. Plaintiff's husband Robert Taliana has asserted a derivative cause of action.

Each of the remaining defendants in this action (plaintiff voluntarily discontinued her action against defendant Johnson Controls, Inc.) now move for summary judgment. Defendant Hines, the owner of Three Huntington Quadrangle (THQ, or the building), argues that it neither created nor had actual or constructive notice of the alleged wet condition on the lunch room floor prior to the accident and it is, therefore, not liable to the plaintiff for her injuries. In support of the motion Hines submits, among other things, copies of the pleadings, a copy of an email exchange between the plaintiff and Patricia S. Pierce, the Operations Manager for Travelers Insurance Company at THQ, and copies of the deposition transcripts of the plaintiff, Patricia Pierce, Vanessa Santana, Ron Craddock and William Onorato.

Defendant CBRE similarly moves for summary judgment dismissing the plaintiffs' complaint and all cross-claims against them. CBRE is a property management firm which managed the voice, data and cable equipment (VDC) room for Travelers Insurance Company (Travelers), as well as the air conditioning unit for that room. CBRE argues that it is not a proper party to this action inasmuch as it did not control or maintain the air conditioning unit located in the lunch room. CBRE further contends that, even if the Court was to find it to be a proper party, plaintiff cannot establish that it created an alleged hazardous condition or had actual or constructive notice of one. In support of the motion CBRE submits, among other things, the deposition transcript of Barry Vickery, a Critical Environments Director who, at the time of the accident, oversaw the management of VDC rooms across the country, including the one occupied by Travelers at THQ.

Finally, defendant Superior moves for summary judgment arguing that it had no notice of any dangerous or defective condition and, therefore, bears no liability for the subject accident which gives rise to the instant action. Superior maintains that it performed its service at THQ in full satisfaction of defendants Hines and CBRE, did not launch a force or an instrument of harm that caused injury to the plaintiff, did not assume a comprehensive property maintenance obligation for the property and plaintiff did not rely on Superior to her detriment. In support of the motion Superior submits, among other things, a copy of a service agreement between Superior and Travelers, a copy of an invoice to Ambrosino Consultant Corp. and copies of the aforementioned deposition transcripts.

Plaintiff has submitted opposition to each of the defendants' motions for summary judgment. With respect to the motion by Hines, plaintiffs maintain that the property owner has failed to make a *prima facie* showing that there are no issues of fact relating to the creation and actual/constructive notice of the condition and, therefore, summary judgment must be denied. Specifically, plaintiffs argue that Hines had failed to adduce any evidence whatsoever regarding when the area in the lunch room where plaintiff fell was last cleaned or inspected prior to her fall. As to CBRE, plaintiffs contend that this defendant failed to show that they did not have actual/constructive notice of the leak. Plaintiffs claim that CBRE was responsible for the maintenance of the VDC room air conditioner and that Patricia Pierce stated that the leak came from that room into the lunch room. Plaintiffs further contend that CBRE had a maintenance obligation with respect to the VDC room air conditioner in the form of a preventative maintenance contract and that CBRE failed to demonstrate they adhered to all applicable portions of that contract. Finally, plaintiff argues that Superior has failed to sufficiently demonstrate that it had no actual/constructive notice of the hazardous condition and that the evidence tendered shows that the leak in the break room emanated from the air conditioning unit installed by Superior in the VDC room.

With respect to the parties' depositions, the plaintiff testified that on the date of the accident she proceeded into the lunch room at approximately 12:00 p.m. in order to heat some soup for lunch. The lunch room is about 20' by 25' with a number of tables and chairs located on one side with microwaves and refrigerators near the door she entered. She testified that she did not notice any water on the floor at the time she entered the room and did not notice the garbage pail located in the middle of the floor. Plaintiff testified that she had to wait approximately five minutes before a microwave became free before she could heat her soup and that during this time she may have made small talk to other workers. The lunch room was somewhat crowded at the time. After her soup was heated plaintiff testified that she went to leave the room and noticed the garbage pail for the first time. She went to walk towards the exit and slipped on the floor, fell on her left foot and extended her left hand to break her fall. Plaintiff testified that she noticed that her pants were wet after the fall and that she was assisted by Vanessa Santana. Plaintiff went back to her desk and sent an email to Patricia Pierce notifying her of the fall and requesting that the area be blocked off as the garbage pail was not large enough to catch all the water coming from the HVAC unit that was leaking on to the floor.

Patricia Pierce testified that in August 2013 she was an Operations Manager for Travelers at THQ and her responsibilities included reporting to the building owner any incidents which occurred in the building involving Travelers employees. She was ultimately responsible for reporting any safety issues within the building and people knew they should report incidents to her. Ms. Pierce testified that there were approximately twenty employees who were members of a safety committee in the Travelers' portion of the building that normally acted as "lookouts" for safety issues in the buildings, including leaks or certain elevator issues. On the date of the accident she testified that she received an email from the plaintiff at 12:19 p.m. informing her that plaintiff had fallen in the lunch room on some water and that she was hurt. Ms.

Pierce testified that she notified Patrick Scalesi, an employee of Hines, of the incident and went to check on the plaintiff and the lunch room. In the lunch room Ms. Pierce stated that she noticed some employees were cleaning the area around the garbage pail and that it was approximately one-half full of water. She testified that she noticed that the water was coming from the ceiling above the pail. Ms. Pierce spoke to the plaintiff who indicated that she fell and was "okay."

Ron Craddock testified on behalf of defendant Hines. He testified that he was the general manager of THQ at the time of the plaintiff's accident and was employed in that capacity from 2006 through 2016. Mr. Craddock stated that he was responsible for the functional operations of the building at that time, as well as taking reports of complaints and paying bills related to the building. He further testified that prior to the plaintiff's accident, Travelers had contracted to take over additional space at the building and was planning on occupying the entire fourth floor of the building. In furtherance of that occupancy, Travelers had planned some construction to make the space conducive to their business operation and Mr. Craddock was responsible for approving any type of construction. He testified that Ambrosino Consulting Corp. was the general contractor associated with the construction on the fourth floor.

At some point after the plaintiff's accident, Mr. Craddock responded to the fourth floor lunch room and observed several signs around a garbage pail located in the room with lettering indicating that the floor was wet. He stated that he saw a stream of water coming from the ceiling that was landing in the garbage pail. Mr. Craddock testified that it was his belief that the water was coming from an HVAC unit located in the ceiling above the leak and that it would have been his normal practice to notify the chief engineer of the building, thereby ending his own involvement. He did not recall ever before receiving any complaints of water leaking from the ceiling in the lunch room prior to the date of the accident, but testified that ABM Industries would have been responsible for supplying a porter to clean the area. Mr. Craddock later testified that there was an agreement between Hines and Ambrosino Consulting Corp. (Ambrosino) for structural changes to the fourth floor of the building prior to Travelers occupying the space and that the lease agreement for the space would have been negotiated by CBRE, on behalf of Hines, and Travelers. He further testified that it was normal practice for the chief engineer of the building to contact Ambrosino after being notified of a problem by him.

William Onorato testified on behalf of Superior who was responsible for installing certain mechanical equipment on the fourth floor of THQ prior to Travelers' occupancy as a subcontractor for Ambrosino. Mr. Onorato stated that it was his company that performed the work on the "water source heat unit" in the ceiling of the lunch room on the fourth floor of THQ in or around September to December 2012 and never received a report, phone call or email regarding that work, specifically referencing any leaks, prior to the plaintiff's accident. Superior executed a service contract directly with Travelers with respect to the air conditioning unit installed by Superior in the VDC room. The witness further testified that the first he heard of someone slipping and falling in the lunch room some eight months after this action was first commenced.

Vanessa Santana, a Claims Manager for Travelers, testified that she was working at THQ at the time of the plaintiff's accident, but does not recall any specifics as the cause of the fall. She does recall a garbage pail being placed in the middle of the lunch room floor, but cannot recall a specific time frame, nor whether she observed work being performed in the lunch room by Superior. She testified that she was not aware of any complaints made with respect to a leak in the lunch room during the time frame at issue and does not know who placed the garbage pail in the middle of the floor.

Finally, Barry Vickery, a Director of Critical Environments, testified on behalf of CBRE. He stated that he is based on Norcross, Georgia and performs critical support for VDC rooms across the country, specifically doing preventative maintenance for office equipment including uninterrupted power source (UPS) and air conditioning units for the VDC room at Travelers within THQ. Part of his responsibilities include coordinating quarterly preventative maintenance inspections on the technical equipment in the VDC room through an outside vendor Johnson Controls, Inc. He testified that he was not aware of any service appointments performed in the VDC room other than these quarterly inspections and was not aware of the plaintiff's accident prior to the commencement of this lawsuit.

It is well settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to meet such burden requires denial of the motion regardless of the sufficiency of the papers in opposition (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384, 795 NYS2d 502 [2005]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

To prove a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see Rodriguez v 5432-50 Myrtle Ave., LLC*, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; *Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]).

To prove a *prima facie* case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Feola v City of New York*, 102 AD3d 827, 958 NYS2d 258 [2d Dept 2013]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadro v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]). However, the party moving for summary judgment in a trip and fall action bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law (*Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; *Musachio v Smithtown Cent. School Distinguished by.*, 68 AD3d 949, 892 NYS2d 123 [2d Dept 2009]). Further, a defendant claiming a lack of constructive notice of the dangerous condition generally must offer proof showing when the area in question was last cleaned or inspected relative to the time of the subject accident to meet his or her initial burden on the issue of constructive notice (*Santos v 786 Flatbush Food Corp.*, 89 AD3d 828, 932 NYS2d 525 [2d Dept 2011]; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599, 869 NYS2d 222 [2d Dept 2008]; *see Feola v City of New York, supra*).

Here, the Court finds that each of the defendants have sufficiently demonstrated their entitlement to summary judgment.

With respect to Hines, based on the credible testimony offered through the depositions of Ron Craddock and Patricia Pierce, it is clear that the owner of the building had no notice of the allegedly defective or hazardous condition in the lunch room used by Travelers prior to the plaintiff's fall. The record before the Court indicates that the first notice that Hines received of the water on the floor was through the email generated by Patricia Pierce to an employee of Hines, Patrick Scalesi, apparently notifying him that the plaintiff had fallen in the lunch room and requesting that he remedy the condition in response to the plaintiff's email to her. There was no testimony presented as to whether the condition existed for any appreciable amount of time prior to the accident, nor any evidence presented that the condition was a reoccurring issue in the lunch room. In addition, the record is bereft of any evidence of prior complaints made as to water on the floor of the lunch room or that the ceiling in the lunch room was stained with water damage which may provide evidence of an on-going water issue (*compare Ciminelli v Kohl's Dep't Stores*, 2005 U.S. Dist. LEXIS 31747 [EDNY, 2005]; *Toussaint v Ocean Ave. Apt. Assoc.*, 144 AD3d 664, 40 NYS3d 508 [2d Dept 2016]). Stated otherwise there is no evidence to permit an inference that Hines had constructive notice of the condition (*see Anderson v Cent. Valley Realty Co.*, 300 AD2d 422, 751 NYS2d 586 [2d Dept 2002]).

In addition, "Control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v Goldberg*, 27 NY2d 887, 889, 317 NYS2d 361 [1970]; *see also Agbosasa v City of New York*, 168 AD3d 794, 92 NYS3d 100 [2d Dept 2019]). The duty of care is premised on the landowner's exercise of control over the property, as "the person in possession and control of property is best able to identify and prevent any harm to others" (*Gronski v County of Monroe*, 18 NY3d 374, 379, 940 NYS2d 518 [2011], quoting *Butler v Rafferty*, 100 NY2d 265, 270, 762 NYS2d 567 [2003]).

Here, the evidence presented demonstrates that Travelers had possession and control over the fourth floor of THQ and would have been in the best position to identify a hazardous or dangerous condition on the floor and prevent harm to others. Indeed, Patricia Pierce testified that there were approximately twenty "safety committee" volunteers made up of Travelers employees who routinely monitored the condition of the work premises and referred any issues directly to her. Ms. Pierce, in turn, would then refer the issues to an employee of Hines, Patrick Scalesi. Therefore, the Court finds the cases cited by plaintiff for the proposition that Hines failed to demonstrate when the lunch room was last cleaned or inspected, thus requiring denial of the motion, are not applicable to the instant application.

As to the motion by CBRE, the Court similarly finds that defendant had no prior notice of the allegedly dangerous or hazardous condition in the lunch room. Contrary to the arguments advanced by plaintiff there is no evidence to suggest that the leak in the lunch room was somehow caused by the faulty maintenance of the air conditioning unit in the VDC room maintained by CBRE, other than the unsupported opinions of Ms. Pierce. Rather, the evidence submitted sufficiently demonstrates that CBRE was completely unaware of the condition which allegedly caused the plaintiff to fall and was unaware of any prior issues with the air conditioning unit in the VDC room, despite quarterly maintenance inspections.

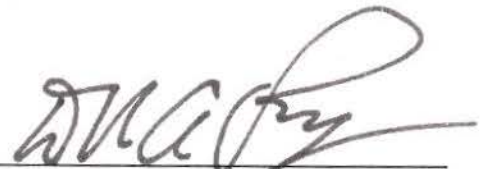
Finally, with respect to Superior, the Court finds that the defendant has sufficiently demonstrated that it did not create the condition at issue and that it did not have sufficient notice of the condition. Although plaintiff states with certainty that Patricia Pierce identified the cause of the leak as emanating from the air conditioning unit located in the VDC room, there is no evidence in the record to suggest that Ms.

Pierce is a reliable source for making this conclusion, nor is there any evidence which would permit such an inference. Further, despite the voluminous record before it, the Court cannot make any precise determination as to the cause of the leak, other than be led by the suggestion that it was caused by the air conditioning unit in the lunch room as viewed by Ray Craddock when he inspected that room some time after the plaintiff's accident. The evidence does show, however, that Superior had no knowledge of any issue with the air conditioners prior to the plaintiff's accident. William Onorato, the owner of superior, specifically testified that he never received any reports, phone calls or emails regarding complaints about the air conditioning unit in the lunch room and only learned of the alleged condition some eight months after the plaintiff commenced this action.

Based on the sum of the foregoing, each of the defendants' motions for summary judgment are granted and the plaintiffs' complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: July 15, 2019
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION