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SHORT FORM ORDER

INDEX No. 14-24522
CAL. No. 18-00279OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-12-18 (003)
MOTION DATE 8-9-18 (004)
ADJ. DATE 11-21-18
Mot. Seq. # 003 - MD
004 - MG

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LISA PIETRO LOGAN,

Plaintiff,

- against -

SUSAN PISANO and THE KNOLLS OF FOX HILL CONDOMINIUM PHASE IV (THE GOLF VILLAS),

Defendants.

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Upon the following papers numbered 1 to 54 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 38 ; Answering Affidavits and supporting papers 39 - 40; 41 - 46; 47 - 50 ; Replying Affidavits and supporting papers 51 - 52; 53 - 54; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 003) by defendant The Knolls of Fox Hill Condominium Phase IV and the motion (seq. 004) by defendant Susan Pisano are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Susan Pisano for, inter alia, summary judgment dismissing the complaint and the cross claim against her is granted; and it is further

ORDERED that the motion by defendant The Knolls of Fox Hill Condominium Phase IV for summary judgment dismissing the complaint and the cross claim against it and for summary judgment on its cross claim against defendant Susan Pisano is denied.

Plaintiff Lisa Pietro Logan commenced this action to recover damages for injuries she allegedly sustained on August 30, 2014, when she tripped and fell on a sidewalk while walking in front of a condominium unit known as 4009 The Fairway, Baiting Hollow, New York. The condominium allegedly is part of a private residential complex known as The Knolls of Baiting Hollow, and defendant The Knolls of Fox Hill Condominium Phase IV allegedly is a homeowners association that owns that common areas of such complex. Plaintiff allegedly rented the condominium unit from its owner, defendant Susan Pisano, who resides out of state. By her bill of particulars, plaintiff alleges defendants were negligent, among other things, in causing a dangerous and defective condition to exist on the sidewalk, in failing to repair the sprinkler system, in failing to post warning signs or barriers around the alleged dangerous condition, and in allowing the defective sprinkler system to deposit "sand, rock, debris and other obstructions upon the walkway," which caused her to slip and fall.

Defendant The Knolls at Fox Hill Condominium Phase IV (hereinafter "the Knolls") now moves for summary judgment dismissing the complaint against it, arguing that there is no credible evidence it created the alleged defective condition or had constructive or actual notice it. It further argues that defendant Pisano's cross claim should be dismissed and that its cross claim for contribution or indemnification should be granted. In support of the motion, the Knolls submits copies of the pleadings, photographs, and transcripts of the parties' deposition testimony.

Defendant Pisano moves for summary judgment dismissing the complaint and cross claims against her, arguing that she did not have any notice of the alleged defective condition and that she did not owe a duty to plaintiff to maintain the premises outside the condominium; rather, Pisano asserts, the Knolls owed a duty to plaintiff to maintain the sprinkler system and the sidewalk. Pisano also moves to extend her time to file a summary judgment motion in the instant matter. Pisano's submissions in support of the motion include copies of the pleadings, a copy of the condominium lease, and transcripts of the parties' deposition testimony.

Plaintiff opposes the motions, arguing that defendants failed to meet their burden of establishing prima facie entitlement to summary judgment, since there exist triable issues of fact as to whether defendants created or had notice of the defective condition. In opposition, plaintiff submits affidavits of her husband, Richard Logan, and her own affidavit.

The court notes that there is no opposition to Pisano's application to extend her time to make a summary motion. Pisano set forth good cause in support of extending the time to file the motion, including the fact that her office never received a copy of the note of issue, as plaintiff's attorney failed to send it to the attorney's new address on file with the court. Accordingly, the application to extend defendant Pisano's time to make a summary judgment motion is granted.

The Knolls opposes defendant Pisano's motion to the extent that it seeks dismissal of its cross claim for indemnification, and argues that there is no evidence that the purported defect existed on the

incident date, and that plaintiff did not notice any defect when she left her home the afternoon of the incident.

Plaintiff testified that she rented a condominium unit at the Knolls from its owner, Susan Pisano, at the time of the accident. She testified that on August 30, 2019, between 11:00 p.m. and midnight, she fell on the sidewalk leading from the driveway to the front door of the home. She testified that on the incident date she exited her vehicle in the driveway and proceeded to walk on the sidewalk toward the front door while carrying a shopping bag in each hand and a pocketbook on her shoulder. Plaintiff testified that prior to the incident, she complained to Pisano about the air conditioning unit, and about a problem with the sprinkler head pooling water on the sidewalk.

At his examination before trial, Robert Oleksiak testified that he was newly elected as president of the Knolls' homeowners association at the time of the accident. He testified that as president, one of his duties was to address any problems or complaints in the community and to take action, if necessary, through the homeowners association's board of directors. Oleksiak testified that Jim Hennesy, plaintiff's neighbor and the homeowners association treasurer, told him that plaintiff's husband complained of a problem with a sprinkler head at plaintiff's unit that was causing sand to accumulate on the walkway. He further testified that the people on the board of directors prior to his election were going to call the sprinkler company. Oleksiak testified that the complaint by plaintiff about the sprinkler head could not have been made more than five days prior to the accident, and that after the incident he took photographs of the sidewalk. He testified that the board of directors hires landscapers to care for the properties, that the landscapers' responsibilities included ensuring that the walkways were maintained in safe condition, and that landscapers would not dig up sprinkler heads. Oleksiak testified that if there was a problem with the sprinklers, the responsibility fell upon the Knolls' homeowners association to have them repaired by a sprinkler company.

At her examination before trial, Pisano testified that she was the owner of the premises located at 4009 The Fairway in Baiting Hollow, and that she entered into a lease to rent her condominium to plaintiff. She testified that the lease addressed the landlord's responsibility of maintaining the premises, but that the homeowners association was responsible for maintaining the walkway and driveway. Pisano also testified that if she received a complaint regarding a hazard, she bore the responsibility to notify the homeowners association. She testified that prior to this incident, she complained to the homeowners association about a problem with the sprinkler system and underground pipe at a different location from where the accident took place, and that the problem was repaired by the sprinkler company. Pisano testified that she did not receive any complaints from petitioner about any problems with a sprinkler by the sidewalk, nor did she ever receive any letter from plaintiff. After being shown a letter addressed to her, Pisano testified that she never received it. She further testified that while plaintiff and her son continually harassed her via telephone calls, text messages, and emails, not one of those communications related to any purported problems with the sidewalk or the sprinkler. Pisano testified that prior to the accident, the sidewalk from her driveway to the home did not ever contain water or any large amounts of piled sand or dirt, but that there was some sand that was "very fine, like beach sand on top of the driveway." She testified that after the accident, she was never notified by plaintiff or any member of plaintiff's family that plaintiff fell and was injured.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense" (***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). If the moving party meets this burden, the burden then shifts to the opposing party, who must demonstrate evidence of the existence of a material issue 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]). The failure of the moving party to make this prima facie showing requires denial of the motion (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Since the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As to the Knolls' application for summary judgment dismissing the complaint, an owner or possessor of real property has a common law duty to maintain such property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the potential injury, and the burden of avoiding the risk (***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). To establish liability in a trip-and-fall action, 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 (*see* ***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]). In addition to notice, the plaintiff must also demonstrate that the alleged dangerous condition was the proximate cause of his or her injury (*see* ***Dapp v Larson***, 240 AD2d 918, 659 NYS2d 130 [3d Dept 1997]). Where a plaintiff is unable to give a specific reason for the cause of an alleged accident he or she may not recover based on pure speculation (*see* ***Hunt v Meyers***, 63 AD3d 685, 879 NYS2d 725 [2d Dept 2009]; ***Visconti v 110 Huntington Assoc.***, 272 AD2d 320, 707 NYS2d 884 [2d Dept 2000]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept 1994]).

Here the Knolls failed to establish its prima facie entitlement to summary judgment, as it failed to eliminate triable issues of fact and credibility from the case (*see* ***Alvarez v Prospect Hosp.*** 68 NY2d 320 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Significantly, the Knolls' submissions, which include the transcripts of the parties' deposition testimony, raise triable issues as to whether they had actual or constructive notice of the alleged defective sprinkler system, and whether the alleged build-up of dirt from water proximately caused plaintiff's accident. Plaintiff testified that both she and her husband complained to board member Jim Hennesy about the sprinkler system accumulating water on the walkway prior to her accident, and Robert Oleksiak's testimony revealed that he had knowledge that plaintiff complained to Henessy and believed the complaint was made prior to the accident date. Moreover, Oleksiak testified that the Knolls' homeowners association is responsible for having the sprinklers repaired. Furthermore, the conflicting testimony between plaintiff and Pisano as to whether a letter was sent notifying Pisano of the sprinkler problems raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Tenkate v Top Mkts., LLC***, 38 AD3d 987, 831 NYS2d

565 [3d Dept 2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Thus the application by the Knolls for summary judgment dismissing the complaint is denied.

As to the Knolls' application for summary judgment in its favor against defendant Pisano, one seeking indemnification has committed no wrong but, by virtue of some relationship with the actual tortfeasor or some obligation imposed by law, is held liable to the injured party (***Glaser v Fortunoff of Westbury Corp.***, 71 NY2d 643, 529 NYS2d 59 [1988]). The right to indemnification arises out a contract, express or implied, between the indemnitor and indemnitee, and can be sustained only if the indemnitor breached some duty owed to the indemnitee (*see* ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; ***Mauro v McCrindle***, 70 AD2d 77, 419 NYS2d 710 [2d Dept 1979], *affd* 52 NY2d 719, 436 NYS2d 273 [1980]). Thus, common-law indemnification, which has its roots in the principles of equity, permits one who has been compelled to pay for the wrong of another to recover the damages paid from the actual wrongdoer (*see* ***McCarthy v Turner Const., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.***, 259 AD2d 75, 693 NYS2d 554 [1st Dept 1999]). To establish a claim for common-law indemnification, a party must show not only that it was not negligent, but also that the proposed indemnitor was negligent and that such negligence was a proximate cause of the plaintiff's accident, or that the proposed indemnitor had the authority to direct, supervise and control the work giving rise to the plaintiff's injury (*see* ***Wahab v Agris & Brenner, LLC***, 102 AD3d 672, 958 NYS2d 401 [2d Dept 2013]; ***Kielty v AJS Const. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]). In contrast, the right to contractual indemnification depends on the specific language in the contract, and a promise to indemnify should only be found if "it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (***Hooper Assoc. v AGS Computers***, 74 AD3d 487, 491-492, 549 NYS2d 365 [2d Dept 1989]; *see* ***Reyes v Post & Broadway, Inc.***, 97 AD3d 805, 949 NYS2d 141 [2d Dept 2012]; ***Alfaro v 65 W. 13th Acquisitions, LLC***, 74 AD3d 1255, 904 NYS2d205 [2d Dept 2010]; ***Canela v TLH 140 Perry St., LLC***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

Here, the Knolls' submissions in support of the cross claim for indemnification and/or contribution failed to eliminate all triable issues of fact as to their negligence, if any, in connection with Logan's accident (*see* ***Kielty v AJS Const. of L.I., Inc.***, 85 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bryde v CVS Pharmacy***, 61 AD3d 907, 878 NYS2d 152 [2d Dept 2009]). The testimony of Oleksiak revealed that if there was a problem with the sprinkler system, the homeowners association was responsible to fix it, and that the owner or resident of the unit was not permitted to dig up the sprinkler. The lease agreement between plaintiff and Pisano did not obviate the Knolls from its responsibilities for sprinkler maintenance and repair. Accordingly, the Knolls' application for summary judgment on its cross claim for indemnification and/or contribution is denied.

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Donatien v Long Is. Coll. Hosp.***, 153 AD3d 369, 790 NYS3d 422 [2d Dept 2017]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the

property (*see* ***Sanchev v 1710 Broadway, Inc.***, 79 AD3d 845, 915 NYS2d 272 [2d Dept 2010]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). "Where none of these factors are present, a party cannot be liable for injuries caused by the allegedly defective condition" (***Gover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 730, 869 NYS2d 593 [2d Dept 2008]).

Pisano established her entitlement to summary judgment as a matter of law by submitting evidence demonstrating that the Knolls was obligated to make any repairs to the sprinkler system at the condominium and that she herself had no duty to repair the sprinkler system. The testimony revealed that plaintiff rented the unit from Pisano and that plaintiff complained to the homeowner's association about the alleged dangerous condition on the sidewalk caused by the sprinkler system prior to her accident. While there is conflicting testimony whether Pisano received any notice of the alleged defect from plaintiff, the testimony clearly reflects that plaintiff notified the homeowners association, which was responsible for obtaining proper maintenance and repair of the sprinkler system. The lease agreement between plaintiff and Pisano did not obviate the Knolls' responsibility of maintaining the sprinkler system at all the units. Thus, since Pisano has demonstrated that she owed no duty to maintain the sprinkler system which allegedly caused the alleged dangerous condition, the burden, therefore, shifted to plaintiff to raise a triable issue as to whether Pisano owed her a duty to maintain and repair the sprinkler system. In opposition, plaintiff failed to raise a question of fact regarding Pisano's duty to maintain and repair the sprinkler system. Accordingly, Pisano's motion for summary judgment dismissing the complaint and all crossclaims against her is granted.

Dated: JUL 29 2019

HON. JOSEPH A. SANTORELLI
J.S.C.