Benedetto v Hyatt Corp.
2019 NY Slip Op 32401(U)
August 12, 2019
Supreme Court, New York County
Docket Number: 160322/2014
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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DOMINICK BENEDETTO and MARY BENEDETTO,

Plaintiffs,

- v -

HYATT CORPORATION, HYATT EQUITIES, L.L.C., GRAND HYATT NEW YORK, HYATT CORPORATION d/b/a GRAND HYATT NEW YORK, and HYATT EQUITIES, L.L.C. d/b/a GRAND HYATT NEW YORK,

Defendants.

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HYATT CORPORATION s/h/a HYATT CORPORATION d/b/a GRAND HYATT NEW YORK and HYATT EQUITIES, L.L.C. s/h/a HYATT EQUITIES, L.L.C. d/b/a GRAND HYATT NEW YORK,

Third-Party Plaintiffs,

-against-

SECURITAS SECURITY SERVICES USA INC.,

Third-Party Defendant.

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INDEX NO. 160322/2014

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595457/2015

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72-138 were read on this motion for summary judgment.

By notice of motion, defendants/third-party plaintiffs (Hyatt) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and for summary judgment on their third-party complaint. Plaintiff Dominick Benedetto (plaintiff) and third-party defendant Securitas Security Services USA Inc. (Securitas) oppose.

By notice of cross-motion Securitas moves for summary judgment dismissing the third-party complaint and all claims asserted against it. Hyatt opposes.

I. UNDISPUTED BACKGROUND

On February 26, 2009, Hyatt and Securitas entered into an agreement for the provision of unarmed security services at the Grand Hyatt New York (hotel) in Manhattan. The contract provides that Securitas will train and supervise its employees. In addition, Securitas is obligated to obtain comprehensive general liability insurance listing "Hyatt Corporation and Hyatt Equities, L.L.C. [...] and its members" as additional insureds, and the policy is to provide a minimum amount of $3,000,000 per occurrence. However, Hyatt is not covered under the insurance for the results of its own acts or omissions. Additionally, Securitas is required to indemnify Hyatt, but only to the extent that Securitas is negligent. (NYSCEF 109).

Plaintiff was employed by Securitas as a fire safety director and security guard at the hotel. A Hyatt guest incident report reflects that at 4:35 pm on November 24, 2012, a fire originated and was extinguished and contained by plaintiff in the hotel's laundry room. (NYSCEF 90). A Bureau of Fire Investigation incident report reflects that at 4:40 pm on November 24, 2012, a fire originated in the hotel's laundry sorting room which is located in the sub-basement. (NYSCEF 120).

By summons and complaint filed on October 13, 2014, plaintiff initiated this action against Hyatt, alleging that it was negligent in maintaining its premises, and failing to properly, train, and supervise their employees, and that he was thereby injured. (NYSCEF 74). By letter dated February 5, 2015, Hyatt's counsel informed Securitas of this action, and asked that Securitas defend and indemnify it pursuant to the parties' agreement. (NYSCEF 95).

By summons and complaint dated June 24, 2015, Hyatt initiated a third-party action

against Securitas for common law indemnification, contribution, contractual indemnification, and breach of an insurance procurement obligation. (NYSCEF 76).

In response to plaintiff's discovery demands, Hyatt stated that it is an additional insured on all insurance policies issued to Securitas, and is insured under its own policy. (NYSCEF 131).

At his deposition, plaintiff testified that he was on duty when he received notice that there was a fire in the hotel's laundry room, two floors below the Securitas office where he was stationed. Plaintiff initially responded by descending a stairway to the laundry room. The stairway had a landing at the top that was three to four feet wide and was unobstructed when he descended and ascended shortly thereafter.

Some time later, plaintiff returned to the laundry room along with the fire department battalion chief. He saw a steel housekeeping cart that was obstructing the landing leading to the laundry room and was obliged to "shimmy" around it. He tripped on it and injured himself. When returned from the laundry room one minute later, the cart was no longer there.

Plaintiff estimated the cart's dimensions as three and a half feet tall by three feet wide, and four feet long. He does not know who put the cart there but surmised that it could have been someone from either Securitas or Hyatt. He denied having moved the cart as he rushed to get to the fire. In plaintiff's opinion, he was not properly trained by Securitas, but notes that he did receive outside training and had taken a fire safety test. (NYSCEF 84, 85, 87, 89, 91, 93, 111, 121, 399). At his deposition, plaintiff marked the approximate location of the cart on photographs of the landing. (NYSCEF 86).

Hyatt's area director of security testified that he had received annual updated certificates of insurance from Securitas and has saved them digitally for seven years. Although he did not believe that plaintiff performed up to hotel industry standards, he described plaintiff as a "very

good" fire safety director. (NYSCEF 112).

Securitas's branch manager testified that he supervised Securitas's staff, and that there was a team of inspectors that supervised fire safety directors. He also testified that Securitas provided onsite training to plaintiff. (NYSCEF 80).

The FDNY battalion chief who responded to the fire, testified that had there been a cart blocking his path, he would have moved it before proceeding downstairs. He also testified that he saw no fire code violations at the Hyatt, but had he, he would have corrected it immediately or issued a violation. He does not recall if any violations were issued in connection with the fire. (NYSCEF 128).

II. HYATT'S MOTION FOR SUMMARY JUDGMENT

A. Contentions

1. Hyatt (NYSCEF 72-97)

Hyatt contends that plaintiff's complaint should be dismissed because the cart on which he allegedly tripped was openly and obviously standing on the stairway landing, and was not inherently dangerous, as evidenced by plaintiff's testimony that he saw the cart which was stationary before he tripped on it. Hyatt argues that as there is no evidence demonstrating that it had placed the cart on the landing and given plaintiff's testimony that the cart was on the landing for only one minute, it lacked constructive notice of the condition. Hyatt also contends that plaintiff lacks credibility, as he admitted to having lied in his deposition, lost his license to be a security guard, and had a "problematic" employment history with Securitas. (NYSCEF 97).

2. Plaintiff (NYSCEF 118-121)

According to plaintiff, he alleges not only that Hyatt was negligent in placing the cart on the landing, but that it failed to hire, train, and supervise its employees properly and that its

negligence in maintaining the premises resulted in the fire. As Hyatt addresses only the cart, he asserts, its motion must be denied.

Plaintiff also argues, relying on his testimony, that the cart's open and obvious presence on the landing is irrelevant given the circumstance of his having tripped on it while he was responding to the fire that was caused by Hyatt's negligence. Moreover, he maintains, that the cart's presence may have been open and obvious pertains only to his comparative negligence, and does not relieve Hyatt of its duty to maintain the premises in a safe condition, which Hyatt failed to do by leaving a cart on the landing.

Plaintiff observes that of all the depositions Hyatt offers, only that of plaintiff's was made with personal knowledge of the incident, and he otherwise asserts that the transcripts are inadmissible because Hyatt only submitted excerpts. (NYSCEF 118).

3. Reply (NYSCEF 133-137)

Absent any effort to rescue people, Hyatt argues, there was no emergency, and that plaintiff raises no issue as to whether the cart was openly and obviously on the landing or inherently dangerous, observing that plaintiff does not allege that the cart moved, contained protruding parts or that the landing was unsafe.

The deposition excerpts it submits are admissible, Hyatt claims, absent any assertion that there are issues of fact resolvable only by the omitted portions. In any event, Hyatt maintains, the complete transcripts are too voluminous and plaintiff is in a position to raise any issues of fact as it is in possession of them. (NYSCEF 133).

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the

absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

1. Open and obvious and inherently dangerous condition

While a landowner has a duty to maintain its property in a reasonably safe condition, there is "no duty to protect or warn, and a court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous." (*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 543 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]; *see also Johnson-Glover v Fu Jun Hao Inc.*, 138 AD3d 499, 500 [1st Dept 2016] [that condition was open and obvious does not require dismissal and is relevant to the issue of comparative negligence, unless the condition was not inherently dangerous]). A condition is open and obvious when it is "of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open." (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 71 [1st Dept 2004]).

Here, plaintiff admits having seen the cart before tripping on it, that the cart was large enough to be immediately apparent, and that the stairway was well lit. (*See e.g.*, *Barakos v Old Heidelberg Corp.*, 145 AD3d 562, 563 [1st Dept 2016] [step covered in dark carpet was open

and obvious where plaintiff was aware of step from prior visits, and with help of recessed lighting, could see where he was walking]; *Ruiz v 221-223 E. 28th St., LLC*, 143 AD3d 553, 553 [1st Dept 2016] [five feet high pile of garbage bags on sidewalk were open and obvious]; *Johnson-Glover*, 138 AD3d at 500 [condition was open and obvious as plaintiff admitted that she saw it before she tripped]; *Lazar v Heaven*, 88 AD3d 591 [1st Dept 2011] [chairs on sidewalk were open and obvious]).

Whether a condition is inherently dangerous "depends on the totality of the specific facts of each case." (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014], quoting *Russo v Home Goods, Inc.*, 119 AD3d 924, 925 [2d Dept 2014]). As Hyatt's assertion that the cart was not inherently dangerous is fatally conclusory, it fails to sustain its burden of proving, *prima facie*, that it was not inherently dangerous. (*See e.g.*, *Johnson-Glover*, 138 AD3d at 500 [issue of fact exists as to whether wheeled shopping bag, with metal stand protruding from it, placed along cluttered aisle of store was inherently dangerous]; *Jackson v Paramount Decorators Inc.*, 132 AD3d 583, 583 [1st Dept 2015] [defendants failed to prove that stools leaning against aisle shelves with their bottom feet protruding into aisle was not inherently dangerous]; *cf Schwartz v Kings Third Ave. Pharmacy, Inc.*, 116 AD3d 474, 475 [1st Dept 2014] [display rack that was placed flat against shelves and did not protrude into aisle, which was clear and uncluttered, was not inherently dangerous]). In any event, plaintiff raises an issue of fact as to whether the cart was inherently dangerous by testifying that it was at the top of the stairs and blocked most of the landing.

2. Notice

A defendant moving for summary judgment in an action involving a dangerous condition bears the *prima facie* burden of establishing that it neither created nor had actual or constructive

notice of the condition. (*Del Marte v Leka Realty LLC*, 156 AD3d 453, 453 [1st Dept 2017]).

Hyatt fails to offer evidence that it neither created nor had actual notice of the condition, as it relies only on the testimony of plaintiff, who is neither employed by nor represents Hyatt. (*See Clarkin v In Line Rest. Corp.*, 148 AD3d 559, 559–560 [1st Dept 2017] [defendants did not show lack of actual notice where it failed to offer testimony that it had inspected the area or received no complaints about condition before incident]; *cf Graham v YMCA of Greater New York*, 137 AD3d 546, 547 [1st Dept 2016] [defendant showed it lacked actual notice where "building engineer for the premises averred that he oversaw the maintenance of the premises and did not receive complaints about water on the floor prior to the accident"]; *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010] [lack of actual notice established by testimony of defendants' employee who stated he never saw condition before accident or received complaints regarding it]). Moreover, that the cart was no longer present one minute after plaintiff's accident does not demonstrate a lack of constructive notice as it is the existence of a condition before an accident that is legally significant, and Hyatt offers no evidence on that score. (*See Harrison v New York City Tr. Auth.*, 113 AD3d 472, 473 [1st Dept 2014] [constructive notice exists when "[the] condition was dangerous ... visible and apparent, and had existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it"]).

Hyatt also offers no evidence that it had inspected the landing or stairway. (*See e.g., Hill v Manhattan N. Mgt.*, 164 AD3d 1187 [1st Dept 2018] [defendant did not establish when area was last inspected before plaintiff's fall]; *Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992 [2d Dept 2009] [defendant did not meet *prima facie* burden of establishing lack of constructive notice of dangerous condition of display case absent evidence based on personal knowledge of when display last inspected before accident]).

Plaintiff's credibility or lack thereof as asserted here cannot be resolved on summary judgment. (*Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218, 218-219 [1st Dept 2002] ["issues as to witness credibility are not appropriately resolved on a motion for summary judgment"]).

As Hyatt fails to demonstrate *prima facie* that the condition was not inherently dangerous or that it lacked notice of the condition, plaintiff's contentions need not be addressed. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] ["moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers"]).

III. MOTIONS FOR SUMMARY JUDGMENT ON THIRD-PARTY COMPLAINT

A. Contentions

1. Hyatt (NYSCEF 72-97)

Hyatt contends that it is entitled to contractual indemnification from Securitas, as plaintiff alleges that his accident occurred while working as a fire safety director for Securitas, that Securitas's branch manager testified that fire safety directors supervised Securitas's workers, that Securitas had a team of inspectors supervise the fire safety directors, that Securitas provided training and gave instructions to fire safety directors at the hotel, and that their agreement requires Securitas to indemnify it for negligent performance of its workers while performing services under the contract, as is the case here, where plaintiff's accident is due to Securitas's negligence. Hyatt also relies on plaintiff's testimony that Securitas did not properly train him and that a Securitas employee could have placed the cart on the landing.

To the extent that its claim for contractual indemnification is premature, Hyatt maintains that it is entitled to conditional summary judgment.

Hyatt also asserts that Securitas must defend it in this action and that it breached its

obligation to procure insurance of $3,000,000 per occurrence. It alleges that Securitas acted as an insurer when it contracted with it, and that Securitas's general liability policy has a limit of $2,000,000. (NYSCEF 96, 97).

2. Securitas (NYSCEF 98-114; 123-125)

In opposition to Hyatt's motion and in support of its cross-motion, Securitas observes that Hyatt never complained about Securitas's insurance coverage, despite having received proof of it, and thus, Hyatt waived its arguments concerning insurance. It denies that Hyatt is entitled to common-law indemnification as Hyatt owed a duty to maintain its property in a safe condition, and disclaims responsibility for the fire, the hotel's laundry room, and the cart, and even if it breached a duty, it did not proximately cause plaintiff's injury.

Hyatt is also not entitled to contribution, Securitas maintains, because it is not liable to plaintiff, observing that it did not train plaintiff, that plaintiff was licensed, and that Hyatt's area director of security stated that plaintiff performed well.

Securitas denies that Hyatt is entitled to contractual indemnity because it cannot prove that it was not negligent. It maintains that, as Securitas was not responsible for either the laundry room or the cart, it cannot be held liable. It reiterates that it did not train plaintiff and that plaintiff was licensed, and thus, Securitas supplied a properly licensed fire safety director pursuant to its agreement. Securitas argues that the presence of a cart in the stairwell landing is a potential violation of the Fire Code, which is evidence of negligence, if not negligence per se. To the extent the agreement requires Securitas to indemnify Hyatt for its own negligence, Securitas maintains that it is void under the General Obligations Law. It also states that it procured the required insurance coverage, and argues that an agreement to procure insurance differs from indemnification. (NYSCEF 100, 123).

3. Hyatt's reply (NYSCEF 126-129)

Hyatt maintains that Securitas's motion to dismiss its claims for common-law indemnity and contribution is premature absent any findings of fault among the parties. In any event, it argues that it establishes its freedom from negligence, and observes that the battalion chief who responded to the fire, testified that he would not have moved around the cart, but would have moved it out of the way, and does not recall any fire code violations at the hotel. Hyatt otherwise denies seeking indemnity from Securitas to indemnify it for its own negligence. (NYSCEF 129).

3. Securitas's Reply (NYSCEF 130-131)

Securitas observes that plaintiff advances no claims against Securitas and that if summary judgment is granted in favor of Hyatt against plaintiff on the basis of a lack of notice, Hyatt's claims for contribution and indemnification against Securitas must also be dismissed as plaintiff, and thus Securitas, also lacked notice of the cart's presence on the landing. Securitas reiterates its freedom from negligence and maintains that Hyatt fails to prove its freedom from negligence. Moreover, that the battalion chief was unaware of any fire code violation is not evidence that there were no violations.

Securitas observes that Hyatt failed to address its argument regarding waiver, and observes that Hyatt has obtained its own insurance, and thus, has not suffered any out of pocket costs.

B. Analysis

Absent any demonstration as to which party is liable for plaintiff's injury, it is premature to grant summary judgment on Hyatt's claim for contractual indemnity. (*See Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616 [2d Dept 2011] ["where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for

contractual indemnification must be denied as premature"]; *Linarello v City Univ. of New York*, 6 AD3d 192, 194 [1st Dept 2004] [denying motion for conditional judgment of indemnification where movant "failed to demonstrate its freedom from negligence"]).

It is equally premature to dismiss or grant Hyatt's causes of action for common-law indemnification and contribution, as it unknown whether either party was negligent and liable for plaintiff's alleged injuries. (*See Wing Wong Realty Corp. v Flintlock Const. Servs., LLC*, 95 AD3d 709, 709 [1st Dept 2012] ["It would be premature to dismiss the claims for common-law indemnification and contribution, since it has yet to be determined whether third-party plaintiffs were at fault"]).

To prevail on a claim for failing to procure insurance, the movant "must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011], quoting *Rodriguez v Savoy Boro Park Assocs. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]).

Here, the parties' contract requires that Securitas procure insurance with coverage of $3 million per occurrence, and it is undisputed that Securitas's insurance coverage is only for $2 million per occurrence. Thus, Hyatt is entitled to summary judgment. However, as Hyatt is otherwise covered, it is only entitled to its out-of-pocket costs (*See Lima v NAB Const. Corp.*, 59 AD3d 395, 398 [2d Dept 2009], citing *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001] ["Where, as here, the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums"]), an amount which is yet to be determined.

That there has been no finding of liability yet, does not preclude the granting of summary judgment, "[b]ecause the insurance procurement clause is entirely independent of the indemnification provisions in the contract." (*Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 575 [2012]). In addition, Hyatt's possession of the insurance policy and failure to complain does not preclude a cause of action for failure to procure. (*See Am. Bldg. Supply Corp. v Petrocelli Grp., Inc.*, 19 NY3d 730, 736–737 [2012] ["The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker"]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted on its cause of action for breach of an insurance procurement obligation, and is otherwise denied; and it is further

ORDERED, that third-party defendant's motion for summary judgment is denied in its entirety.

8/12/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE