

<b>Murphy v Westchester One, LLC</b>
2019 NY Slip Op 34198(U)
December 23, 2019
Supreme Court, Westchester County
Docket Number: 58550/2017
Judge: Sam D. Walker
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
CHANDRA MURPHY,

Plaintiff,

-against-

**DECISION & ORDER**  
Index No. 58550/2017  
Motion Sequence 3

WESTCHESTER ONE, LLC and  
44 SOUTH BROADWAY PROPERTY, LLC,  
BEACON CAPITAL PARTNERS,  
BCSP IV PROPERTY MANAGEMENT LLC,  
Defendants.

-----X  
44 SOUTH BROADWAY PROPERTY, LLC,  
Third-Party Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.,  
Third-Party Defendant.

-----X  
44 SOUTH BROADWAY PROPERTY, LLC,  
Second Third-Party Plaintiff,

-against-

TEMCO SERVICE INDUSTRIES, INC.,  
Second Third-Party Defendant.  
-----X

The following papers were read and considered in connection with the defendant's

motion for summary judgment:

Notice of Motion/Affirmation/Exhibits A-K	1-13
Affirmation in Opposition/Exhibits A-C	14-17
Reply Affirmation/Exhibit L	18-19

### Procedural and Factual Background

The plaintiff, Chandra Murphy ("Murphy"), commenced this action on May 31, 2017, against the defendants, seeking damages for alleged injuries sustained on December 5, 2016, when she slipped and fell at 44 S. Broadway, White Plains, New York. Murphy testified at her examination before trial ("EBT") that, while she was at work at the New York State Department of Taxation and Finance, located on the sixth floor of the subject premises, at approximately 3:30 p.m. she entered the printer room within her office space to retrieve documents she had printed, when she fell. Murphy testified that she had been to the printer room multiple times after lunch without incident and did not see anything or feel anything on the floor. Murphy further testified that her pants were wet to the touch after she fell, but she did not look at the floor to see if there was water. Her co-workers rushed into the printer room when they heard her fall and Mildred Villalona ("Villalona"), a maintenance worker, employed by Temco Service Industries ("Temco"), also came rushing into the room, telling Murphy to get up. When Murphy saw Villalona again in March 2018, Villalona apologized to her for what had happened.

Jerome Montrone, Senior Vice President and asset manager for New York at Beacon Capital Partners ("Beacon") testified that 44 SBP is owned by BCP Fund Six, LLP, for which Beacon is an investment advisor. Cushman & Wakefield, Inc. ("Cushman") was the property manager at the time of the alleged incident and Temco was the cleaning subcontractor hired by Cushman at the time of the alleged incident.

On May 16, 2018, the defendant, 44 South Broadway Property, LLC ("44SBP") filed a third-party complaint against Cushman and on July 10, 2018, 44 SBP filed a second

third-party complaint against Temco Service Industries, Inc. ("Temco"). A Stipulation of Discontinuance dated August 14, 2019, was executed as to Temco and a Stipulation of Discontinuance dated December 6, 2019, was executed as to Cushman.

44 SBP now files the instant motion for an order granting summary judgment pursuant to CPLR 3212, to dismiss the complaint as against it, arguing that there was no duty owed to the plaintiff as the condition was open and obvious and the plaintiff should have been able to see the non-party witness performing her janitorial duties in the printer room. 44 SBP also argues that Cushman was contractually obligated to manage the property and that it is entitled to indemnification from Cushman as well as status as an additional insured. However, since the parties executed a Stipulation of Discontinuance against Cushman, that part of the motion seeking indemnification and status as an additional insured is moot and will not be addressed by the Court.

In opposition, Murphy, by her attorney, argues that Cushman was 44 SBP's agent vis-a-vis the work to be performed under the contract with Temco and Temco created the condition, so questions of notice are irrelevant. Murphy's attorney further argues that 44 SBP owed Murphy a nondelegable duty to keep the building safe, there was no wet floor sign and the water was not open and obvious. Murphy argues that, because 44 SBP's duty was nondelegable, it is vicariously liable for Temco's negligence.

#### Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[T]he proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (See e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden shifts to the party opposing the motion to show the existence of material issues of fact by producing evidentiary proof, in admissible form, in support of their position.

In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it, (*Sawicki v GameStop Corp.*, 106 AD3d 979; *Armijos v Vrettos Realty Corp.*, 106 AD3d 847, 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds that 44 SBP has met its burden and has made a prima facie showing of entitlement to judgment as a matter of law.

Here, 44 SBP is considered the owner of the property where Murphy is alleged to have injured herself. However, 44 SBP established that it neither created the condition, nor had actual or constructive notice of the condition that caused Murphy’s injuries.

“As a general rule, one who hires an independent contractor may not be held liable for the independent contractor’s negligent acts (*Sanchez v 1710 Broadway, Inc.*, 79 AD3d

845 [2d Dept 2010]). The evidence presented shows that Cushman was responsible for the management of the building and for hiring sub-contractors such as Temco, which was the company responsible for cleaning the building and the company that hired Villalona, who mopped the floor and allegedly created the condition.. Both Cushman and Temco are not named defendants in the action and Stipulations of Discontinuance have been filed with regard to the third-party and second third-party complaints against them.

Further, 44 SBP did not expend any control over the management of the building or the janitorial services. Therefore, it was essentially an out of possession owner/landlord and not liable for any defects. "An out-of-possession landlord is not liable for injuries that occur on its premises unless it retains control over the premises or is contractually bound to repair unsafe conditions" (*see Lalicata v 39-15 Skillman Realty Co., LLC*, 63 AD3d 889, 890[2d Dept 2009]). "Control may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises" (*Ever Win, Inc. v 1-10 Industry Associates, LLC*, 33 AD3d 845, 846 [2d Dept 2006]).

Accordingly, based on the foregoing, it is

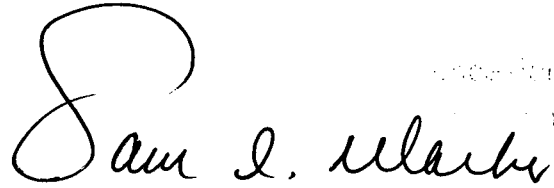
ORDERED that the motion for summary judgment is granted; and it is further

ORDERED that the complaint as against the defendant, 44 South Broadway Property, LLC, is dismissed;

The remaining parties are directed to appear before the Settlement Conference Part on February 18, 2020 at 9:15 a.m in Courtroom 1600.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
December 23, 2019

A handwritten signature in black ink, appearing to read "Sam D. Walker". The signature is written in a cursive, flowing style.

HON. SAM D. WALKER, J.S.C.