SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MARGARET BARRETO,

Plaintiff,

- v -

750 THIRD OWNER, LLC, SL GREEN OPERATING PARTNERSHIP, LP, SL GREEN REALTY CORP., RECKSON OPERATING PARTNERSHIP, LP, ALLIANCE BUILDING SERVICES, LLC, and CLASSIC SECURITY, LLC,

Defendants.

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INDEX NO. 150514/2016

MOTION DATE

MOTION SEQ. NO. 002, 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54-67, 103-104, 107, 110-113, 121-122

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68-87, 105, 108, 114-120, 123-124

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 88-102, 106, 109

were read on this motion for summary judgment.

Plaintiff brings this action against defendants for personal injuries she sustained when she slipped and fell in the lobby of 750 Third Avenue in Manhattan.

By notice of motion, submitted without opposition from the other defendants, defendant Alliance Building Services, LLC moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it (mot. seq. two). Plaintiff opposes.

By notice of motion, submitted without opposition from the other defendants, defendants 750 Third Owner, LLC, SL Green Operating Partnership, LP, SL Green Realty Corp., and

Reckson Operating Partnership, LP (collectively, SL Green) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against them (mot. seq. three). Plaintiff opposes.

By notice of motion, submitted without opposition from the other defendants, defendant Classic Security, LLC moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it (mot. seq. four). Plaintiff opposes.

Plaintiff executed a stipulation of discontinuance as against Classic (NYSCEF 90), and at oral argument, the parties confirmed that they do not oppose Classic's motion for summary judgment (NYSCEF 125).

I. BACKGROUND

A. SL Green's deposition (NYSCEF 63, 76)

Access to the lobby of 750 Third Avenue, the building where plaintiff fell, is obtained via two center revolving doors and two swinging doors on either side of the revolving doors. Posted on each swinging door is a sign directing people to use the revolving doors.

An online portal operated by SL Green permits tenants to request maintenance, which requests are redirected to the appropriate individual, and SL Green's property manager is copied on all such requests. The property manager would inspect the building at least once daily. If the lobby required mopping, SL Green's fire safety director or concierge, stationed at the lobby desk, would contact one of the building's porters to mop and place warning cones if the floor is wet.

At the time of plaintiff's accident, the SL Green had a procedure by which the head porter was responsible for monitoring inclement weather and placing mats, wet floor signs, and umbrella bags in the lobby. During inclement weather, the building manager never saw porters

mop any part of the floor that was not covered by a mat.

Defendant Alliance is "the umbrella company for the services provided" to the building, including "Alliance Security, Alliance Metal and Marble, Alliance Cleaning and Alliance Security." At the time of plaintiff's 2015 accident, Alliance was known as "Classic Security, Onyx Metal and Marble, [and] FQM, First Quality Maintenance."

B. Plaintiff's deposition (NYSCEF 62, 75)

On July 14, 2015, plaintiff was out for lunch when heavy rain suddenly started to fall. Although she wore no raincoat or boots, had no umbrella, and wore sandals, she denied having been drenched when she returned to the building after lunch.

Upon her return, plaintiff entered the building through a swinging door. Having worked at the building for over a year, she had used both the swinging and the revolving doors, and observed others using both doors. Her first step was onto a mat and as she stepped off of it, she slipped and fell. There were larger mats near the elevator bank and near the revolving doors. Plaintiff does not recall having seen a sign directing the use of the revolving door instead of the swinging door, nor does she recall whether she had wiped her feet on the mat or whether she had seen a puddle before she had fallen. After her fall, however, she saw water on the floor and inferred that it was the source of wetness on the lower portion of the back of her dress. Also after she fell, plaintiff observed a yellow cone to her right. She was unaware of others having fallen in the building and she had registered no complaint about slippery conditions.

Plaintiff identified the area adjacent to one of the swinging doors as the situs of her accident and she circled it on a photograph of the lobby (NYSCEF 81). She also confirmed that a screenshot of a security video from the day of her accident (NYSCEF 83) accurately depicts the lobby and reflects that mats were placed in front of the doors and that a yellow cone was next to

one of the swinging doors.

C. Alliance's deposition (NYSCEF 65, 78)

Alliance's operation executive denied that Alliance worked at the building in July 2015, having commencing work there in 2017. Rather, First Quality Maintenance (FQM) was responsible for maintaining the building in 2015. While working for FQM, the operation executive supervised cleaners who replaced SL Green employees when they were out, and the operation executive performed nightly cleaning inspections, which included the lobby. Although he had neither placed nor instructed anyone to place mats in the lobby, he had seen them on the floor at night and he would inspect them for cleanliness and damage.

D. Classic's deposition (NYSCEF 64, 79)

Alliance's senior account executive testified that at the time of plaintiff's accident, he was not responsible for maintaining the building. Rather, he began overseeing security at the building in March 2018 and explained that security guards are posted in the lobby and that if they see someone fall, they contact cleaning staff or building personnel. At the time of plaintiff's accident, Classic was not responsible for placing mats in the lobby, which were deployed during inclement weather. There is a sign that directs people to use the revolving doors, instead of the swinging doors.

II. DISCUSSION

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. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). 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]).

A. Motion seq. two

1. Contentions

a. Alliance (NYSCEF 54-103)

Alliance argues that as it provided no services at the building at the time of plaintiff's accident, it cannot be held liable for it. It alleges that the head porter of the building, who was not an Alliance employee, was responsible for monitoring the weather and placing mats in the lobby when needed, and it denies having either created the condition or having had notice of it. And, even had Alliance serviced the premises at the time of plaintiff's accident, in its capacity as an independent contractor, it owed no duty to plaintiff.

Absent a contract with any of the other defendants, Alliance also disclaims any contractual duty to indemnify them, and as it was not negligent, the claims for apportionment, contribution, and indemnification are not viable.

b. Plaintiff (NYSCEF 110-112)

According to plaintiff, Alliance's denial of a duty owed under its contract with SL Green fails as it did not submit the contract with its motion. Consequently, plaintiff maintains that an issue of fact exists as to whether Alliance had a duty to maintain the premises. In addition, while Alliance performs inspections, it offers no evidence as to when it last performed an inspection before plaintiff's accident.

c. Reply (NYSCEF 121)

Alliance denies having serviced the building at the time of plaintiff's accident and maintains that there is no contract between it and SL Green. It reiterates its earlier contentions.

2. Analysis

To be held liable for a dangerous condition on the premises, the defendant must owe a duty of care to the injured party. (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). Given the undisputed testimony that Alliance did not service the building at the time of the accident, Alliance demonstrates, *prima facie*, that it owed no duty to plaintiff. Absent a duty owed to plaintiff, whether Alliance had notice of the condition is immaterial. (*See Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [absent duty to injured person, there can be no liability]). Plaintiff fails to raise an issue of fact as she offers no evidence supporting her allegation that a contract between Alliance and SL Green exists.

As it was not at the building when plaintiff fell, as it was not a party to a contract with the other defendants, and as it is not responsible for plaintiff's injury, Alliance cannot be held liable for contribution or indemnification.

B. Motion seq. three

1. Contentions

a. SL Green (NYSCEF 68-87)

SL Green contends that it exercised reasonable care in maintaining the premises by placing rain mats and a yellow warning sign in the lobby, and that given plaintiff's testimony that she failed to comply with the directive to use the central revolving door, that she did not remember if she had wiped her shoes before stepping off the mat, and that she did not observe water on the floor before she fell, its own alleged failure to adhere to procedures for placing mats

is neither evidence of negligence nor does it raise an issue of fact. It also denies having created or having had notice of a dangerous condition absent complaints that the floor was wet or slippery. In addition, it observes that the lobby was under constant observation during the workday, when plaintiff fell, and no evidence is offered as to if or for how long the asserted hazardous condition existed before plaintiff fell. Based on plaintiff's own testimony concerning the rain and her attire, SL Green asserts, she must have been wet when she entered the lobby. A search of SL Green's online portal reveals no complaints about water or moisture on the lobby's floor from January 1, 2015 through and including July 14, 2015. (NYSCEF 77).

b. Plaintiff (NYSCEF 114-120)

Plaintiff alleges that SL Green had notice of a dangerous condition in the lobby. In support, she submits an SL Green incident report dated April 9, 2014, which reflects that on April 8, 2014, a building tenant had fallen in the lobby after walking through the southern most swinging door and stepping off a rain mat onto the marble floor. (NYSCEF 115). She observes that although SL Green's property manager had referenced a protocol for placing mats, there is no evidence as to when the area was last inspected, and thus, SL Green fails to meet its *prima facie* burden of demonstrating a lack of constructive notice. Moreover, as SL Green was aware that the area near the small mats placed by the swinging door constitutes a dangerous condition, a question of fact remains as to whether the use of small mats, as opposed to larger mats, is reasonable.

c. Reply (NYSCEF 123-124)

SL Green observes that plaintiff does not contest whether it created or had actual notice of water on the lobby floor, and it maintains that it has no duty to cover the entire lobby floor with mats when it rains. Nor does the 2014 incident report permit an inference that it had

constructive notice of a hazardous condition absent any evidence as to the cause of the earlier accident which occurred in a different part of the lobby. Moreover, it alleges, tracked-in precipitation from an ongoing storm does not constitute a recurring dangerous condition, and plaintiff's concession that the rain was unexpected confirms the absence of notice, nor need it demonstrate when the area was last cleaned or inspected.

Additionally, SL Green observes that plaintiff speculates that there was water on the floor before she fell and thus does not know how she had actually fallen. Moreover, her failure to use the revolving door and see the yellow warning sign is no indication that SL Green was negligent.

2. Analysis

In a premises liability case involving an injury caused by a dangerous condition created by precipitation tracked into a building, a defendant must have either created the condition or had actual or constructive notice of it and a reasonable time to take remedial action. (*Ford v Citibank, N.A.*, 11 AD3d 508, 508 [2d Dept 2004]; *see also Amsel v New York Convention Ctr. Operating Corp.*, 60 AD3d 534, 535 [1st Dept 2009], *lv denied* 13 NY3d 710 [2009] [defendant established *prima facie* entitlement to summary dismissal by demonstrating that it was raining at time of accident and it had taken reasonable precautions to prevent tracked-in water by placing mats on lobby floor and mopping throughout day, and had neither actual nor constructive notice of wet condition at issue]).

To demonstrate a lack of constructive notice, defendants must submit evidence of their "measures to address the possibility of tracked-in water from accumulating" and of when the site was "last inspected or cleaned before plaintiff fell." (*Pineda v 1741 Hone Realty Corp.*, 135 AD3d 567 [1st Dept 2016]; *Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011] ["A defendant demonstrates lack of constructive notice by producing evidence of its

maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell"]). While a prior instance of rainwater being tracked into the building is insufficient for plaintiff to raise an issue of fact as to constructive notice (*Jones v Icahn Assocs. Corp.*, 173 AD3d 546, 547 [1st Dept 2019] [awareness that rainwater had been tracked into building in past, insufficient to raise triable issue of fact as to constructive notice of specific condition that caused plaintiff's accident]), defendants nonetheless bear the burden on their motion for summary judgment to affirmatively establish, *prima facie*, their lack of constructive notice.

Although SL Green offers evidence that it placed mats and a warning cone in the lobby, it does not demonstrate when, or if, the area was inspected and cleaned before plaintiff's accident. While defendants' witnesses testified as to SL Green's inclement weather procedures, none of the witnesses had personal knowledge of SL Green's activities that day and whether those procedures were followed. (*See Sada v Theater*, 140 AD3d 574 [1st Dept 2016] [although defendant described general cleaning routines, it offered no evidence as to activities on day of accident, including evidence of last time staircase inspected or maintained before plaintiff fell]). SL Green's property manager's testimony that she inspected the building daily, without specifically detailing her inspection on the day of plaintiff's accident, is too vague to establish SL Green's lack of constructive notice, and SL Green's failure to demonstrate that the area where plaintiff fell was inspected and cleaned before her fall is fatal. (*Compare Kelly v Roza 14W LLC*, 153 AD3d 1187, 1188 [1st Dept 2017] [defendant satisfied *prima facie* burden with evidence that, in addition to mats, wet floor warning signs placed in lobby, two porters assigned to mop wet areas, and area where plaintiff fell found dry 10 minutes before fall], *Toner v Nat'l R.R. Passenger Corp.*, 71 AD3d 454, 455 [1st Dept 2010] [defendants established, *prima facie,*

that it placed mats and had workers mopping floor], *Pomahac v TrizecHahn 1065 Ave. of Americas, LLC*, 65 AD3d 462, 464 [1st Dept 2009] [defendant satisfied *prima facie* burden by demonstrating, *inter alia*, that employee mopped floor several times before accident and was mopping it at time of accident], *and Decongelio v Metro Fund, LLC*, 2019 WL 916795, *2 [Sup Ct, NY County 2019, Jaffe, J.] [defendant satisfied *prima facie* burden with evidence that it followed cleaning procedures day of plaintiff's accident including constant patrolling and mopping of floors], *with Pineda v 1741 Hone Realty Corp.*, 135 AD3d 567 [1st Dept 2016] [defendant failed to offer evidence it took measures to address possibility of tracked-in water from accumulating on stairs earlier in day when it was raining, and failed to show when stairs last inspected or cleaned before plaintiff fell]).

Given SL Green's failure to present a *prima facie* case of nonliability, the sufficiency of plaintiff's opposition is not addressed. (*Clarke v Am. Truck & Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019]).

III. CONCLUSION

As plaintiff's claims against Classic and Alliance are dismissed, neither can maintain their cross claims for contribution or indemnification.

Accordingly, it is hereby

ORDERED, that defendant Alliance Building Services, LLC's motion for summary judgment is granted in its entirety, and plaintiff's claims against it and all cross claims against it are dismissed (mot. seq. two); it is further

ORDERED, that defendants 750 Third Owner, LLC's, SL Green Operating Partnership, L.P.'s, SL Green Realty Corp.'s, and Reckson Operating Partnership, L.P.'s motion for summary judgment is granted to the extent of dismissing all cross claims against them, and is otherwise

denied (mot. seq. three); it is further

ORDERED, that Classic Security, LLC's motion for summary judgment is granted in its entirety, and plaintiff's claims against it and all cross claims against it are dismissed (mot. seq. four); and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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2/20/2020
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