SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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ROBERT TADROS,

Plaintiff,

- v -

ANN INC D/B/A ANN TAYLOR, ET AL.,

Defendants.

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INDEX NO. 152670/2015

MOTION DATE

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 173-213 were read on this motion to/for SUMMARY JUDGMENT.

In this slip and fall action, defendant/third-party defendant Quality Building Services Corp. (QBS) moves pursuant to CPLR 3212 for summary judgment seeking dismissal of all claims asserted against it. Defendants/third-party plaintiffs SRI Nine 850 LLC and Shorenstein Realty Services LP cross-move pursuant to CPLR 3212 seeking dismissal of plaintiff's claims and for summary judgment on all of their claims and cross-claims, including for defense and indemnification.

The cross-motion by SRI and Shorenstein is untimely. Pursuant to this Part's Rules, dispositive motions are due within 60 days of the filing of the note of issue. It is undisputed that the cross-motion was filed, 61 days after plaintiff filed his note of issue. SRI and Shorenstein do not acknowledge this defect, much less attempt to demonstrate good cause for the delay. To the extent that the motion was filed as a cross-motion, it is improper as it seeks relief against a non-moving party, namely the plaintiff. *Hennessey Diaz v. City of New York*, 146 A.D.3d 419, 420 (1st Dep't 2017). Further, the cross-motion does not seek the same relief as QBS's motion since the

motions seek to dismiss claims asserted against different parties. Accordingly, the cross-motion by SRI and Shorenstein must be denied as untimely.

Turning to the motion by QBS, QBS first argues that plaintiff's claims against it should be dismissed under the storm-in-progress doctrine. Under the storm in progress doctrine, a defendant cannot be held responsible for accidents occurring as a result of accumulation of snow and ice on its premises until adequate amount of time has passed following the cessation of the storm to allow the defendant to ameliorate the conditions caused by the storm. *Weinberger v. 52 Duane Associates, LLC*, 102 A.D.3d 618, 619 (1st Dep't 2013). Here, there is a question of fact as to whether there was a storm in progress at the time of plaintiff's accident, which occurred at approximately 1:00 am on February 22, 2015. According to the expert weather report submitted by QBS, there was a storm in progress that was causing snow and freezing rain to fall and accumulate from approximately 1:30 pm on February 21, 2015 to the time of plaintiff's accident. Affirmation of Daniel J. Morse dated August 6, 2019, Exh. P. By contrast, plaintiff consistently testified that it was not snowing or raining from the time he left work, at approximately 8:00 p.m. on February 21, to the time of the incident. Morse Aff., Exh. J (Plf. Dep. Tr. 16-17). Accordingly, QBS is not entitled to summary judgment based on the storm in progress doctirne. *See Pipero v. New York City Transit Auth.*, 69 A.D.3d 493 (1st Dep't 2010).

Next, QBS argues that since it was a contractor hired by the landlord SRI Nine for snow removal purposes, it does not owe a duty of care to plaintiff. *See Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002). However, QBS has failed to meet its prima facie burden of showing that it did not entirely displace the landlord's duty to safely maintain the property. In support of this contention, QBS submits its snow removal contract with SRI Nine. However, the contract is merely attached to an attorney affirmation, and is not authenticated as required by CPLR

4518(a). Morse Aff., Exh. M. Thus, snow removal contract is inadmissible and cannot form the basis on which to grant summary judgment. *Clarke v. American Truck & Trailer Inc.*, 171 A.D.3d 405, 406 (1st Dep't 2019). Further, according to the testimony of Leo Micceri, property manager for SRI Nine, QBS was solely responsible for the removal of snow and ice for the premises. Morse Aff., Exh. K (Micceri Dep. Tr. 27). Accordingly, QBS is not entitled to summary judgment based on the theory it owed no duty to plaintiff.

QBS also argues that it is entitled to summary judgment because it had no notice of the allegedly defective condition. On a motion for summary judgment based on lack of notice, defendant has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence. *Infante v. Jerome Car Wash*, 52 A.D.3d 319, 320 (1st Dep't 2008). To meet their prima facie burden on the issue of constructive notice in a slip-and-fall case, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. *Hobbs v. New York City Hous. Auth.*, 168 A.D.3d 634 (1st Dep't 2019) (citing *Gautier v. 941 Intervale Realty LLC*, 108 A.D.3d 481 [1st Dep't 2013]). Reference to general cleaning practices is insufficient to establish a lack of constructive notice. *Gautier,* 108 A.D.3d at 481. Here, QBS has failed to satisfy this burden as it offers no testimony regarding when it last cleaned and inspected the area where the accident occurred. *Specter v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422 (1st Dep't 2011). Accordingly, QBS is not entitled to summary judgment based on the argument it had no notice of the defective condition.

Finally, QBS's motion seeking dismissal of the indemnification claims must be denied, because as discussed above, the contract it submits in support of this argument is not authenticated and therefore inadmissible. Accordingly, it is

ORDERED that the motion for summary judgment by defendant/third-party defendant QBS is denied; and it is further

ORDERED that the cross-motion for summary judgment by defendants/third-party plaintiffs SRI Nine and Shorenstein is denied; and it is further

ORDERED that in accordance with the court's order dated November 25, 2015, the caption shall be amended to remove defendant Ann Inc. d/b/a Ann Taylor, and all further papers and pleadings must be filed with the amended caption; and it is further

ORDERED that movant shall file a Notice to County Clerk form (form EF-22 available on NYSCEF) to notify the clerk of the amended caption and the clerk is directed to amend its records accordingly.

7/6/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [x] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [x] DENIED [ ] GRANTED IN PART [ ] OTHER [ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE