SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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DANIEL EBALO,

Plaintiff,

- v -

TRUSTEES OF COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY, and TITAN P&H LLC,

Defendants.

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TRUSTEES OF COLUMBIA UNIVERSITY and COLUMBIA UNIVERSITY,

Third-Party Plaintiffs

- v -

TITAN P&H LLC

Third-Party Defendants.

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DECISION AND ORDER

Index No.162193/14

MOT SEQ 005

NANCY M. BANNON, J.:

I. Background

In this action to recover damages for personal injuries, the plaintiff, Daniel Ebalo, claims that he was injured when a ceiling light fixture in his bathroom fell onto him due to the negligent installation of the toilet in the apartment above his by the defendants, Trustees of Columbia University, Columbia University (collectively Columbia), the property owners, and

Titan PH LLC, a plumbing contractor. Columbia commenced a third-party action against Titan alleging causes of action for contribution, indemnification, and breach of contract. Titan now moves (1) for summary judgment dismissing as against it, the sole cause of action of the amended complaint and the third-party claims, and (2) a sanction for spoliation of evidence in the form of (a) dismissal of the plaintiff's amended complaint and Columbia's third-party claims as against Titan; or (b) precluding the plaintiff and Columbia from introducing evidence at trial that Titan failed to properly install the toilet above the plaintiff's apartment that leaked and allegedly caused the light fixture to fall on him or (c) an adverse inference at trial. The plaintiff and Columbia each oppose the motion. The branches of the motion seeking summary judgment are denied. The branch of the motion for sanctions is granted in part.

It is undisputed that on December 4, 2013, Daniel Ebalo suffered serious injuries when he was struck by a light fixture in his bathroom in unit 2D at the building located at 90 Morningside Drive (the building), which is owned by Columbia. Both the plaintiff and his partner, Stewart state that they had complained to Columbia about the leaks and the plaintiff claims the fixture fell from his ceiling after becoming waterlogged from an allegedly leaking toilet in Unit 3D of the building, the unit directly above the one where the plaintiff resided. The

plaintiff claims that the leak was caused, at least in part, by the negligent installation of the toilet by Titan three months earlier, in September 2013. It is also undisputed that approximately one week after the accident, Columbia hired Alafogiannis Plumbing and Servicing (APH) to do repairs and replace the toilet installed by Titan. On December 11, 2013, APH disposed of the toilet installed by Titan. This action ensued.

II. Discussion

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City

of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra. This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Titan's Motion to Dismiss Complaint

The rules concerning premises liability are well settled. A landowner has a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017). Thus, in premises liability matters, defendants moving for summary judgment have "the initial burden of making a prima facie showing that [they]

neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." Amendola v City of New York, 89 AD3d 775 (2nd Dept. 2011). "In order to constitute constructive notice, a defect must be visible and apparent for a sufficient length of time to permit the defendant's employees to discovery and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836 [1986])." Atashi v Fred-Doug 117 LLC, 87 AD3d 455, 456 (1st Dept. 2011); see Lancaster v New York City Transit Auth., 226 AD2d 145 (1st Dept. 1996).

In support of the motion to dismiss the plaintiff's complaint, Titan relies upon the deposition testimony of numerous witnesses: (1) the plaintiff; (2) Alan Stewart, the plaintiff's domestic partner; (3) Consolcio Herrera, building superintendent; (4) Joseph Alafogiannis, the owner of the plumbing company that replaced the toilet in Unit 3D; (5) Gisela White, the occupant of apartment 3D; (6) Cathleen Ryder, the Director of Residential Services for Columbia's 50 buildings, (7) Spiros Skendros, the APH plumber who installed the replacement toilet, and (8) Carlos Ulloa, one of the two Titan plumbers who installed the toilet that allegedly leaked.

These submissions do not *prima facie* eliminate the existence of triable issues of fact as to Titan's negligent

installation of the toilet. The plaintiff's testimony and that of his partner Stewart state they had experienced leaks in his bathroom and reported them to Columbia. Herrera testified that when the toilet was replaced by Skendros, Skendros advised him that there was a leak in the right-hand corner on the back side of the toilet. Furthermore, Alafogiannis, the owner of APH, testified that a leak, such as the one alleged to have occurred, can be the result of the seal between the toilet tank and the bowl are not installed correctly and tightened down. Alafogiannis further testified that he would not anticipate being able to see the leak immediately, and that sometimes it can take a day or even a week for the leak to present itself. According to Alafogiannis, the pressure of someone sitting on a improperly installed toilet can cause the bowl to move and over time a leak can develop.

APH's employee, Skendros, also testified that when a toilet is not set properly a leak between the tank and the bowl can develop. He testified that the leak generally develops when the rubber seal between the tank and the bowl gets pinched, which can occur when the bowl is moved around too much while it is being installed and, consistent with Affogianni, he testified that you cannot always tell from looking at the toilet if the seal has been pinched or spot the leakage right away. Ulloa, who replaced the toilet along with Skendros, likewise testified that

a leak can develop when the plumber does not tighten the fasteners between the tank and the bowl properly. Specifically, if the screws or fasteners that connect the tank and the bowl are not tight enough upon installation, then the gasket can move as a result of normal use of a toilet when the person using it leans on it. This testimony raises triable issues of fact as to whether the toilet bowl was properly installed.

Moreover, even if Titan had met its *prima facie* burden in the first instance, both Columbia and the plaintiff have raised triable issues of fact with their submissions. The plaintiff submits an affidavit of an expert, Frank Musella, who is a licensed plumber with more than 30 years of experience in installing and repairing the same model toilet bowl. Upon reviewing the deposition testimony, Musella opined that "absent evidence of any other contributing factors, negligent installation is the only plausible explanation of the leaking toilet." Musella unequivocally states, consistent with the foregoing testimony, that this accident would not have occurred if the tank-to-bowl gasket and tank-to-bowl bolts were properly set upon installation by Titan. The plaintiff also cites to testimony from Ryder during which she testified that Alafogiannis told her that there was something wrong with the toilet, but that she did not recall what it was.

The plaintiff also relies upon the deposition testimony of Titan's CEO Peter Skyllas. While Skylas testified that he believed that a leak from the back of the toilet could have caused the leak, he also testified that it would be detectable upon installation. However, Skyllas admitted that the original work order prepared when Titan installed the toilet did not specifically indicate that the technicians checked to see if the toilet was installed properly, and opined that the employees who installed the toilet were typically "lazy."

The plaintiff also submits an unsigned letter from Alafogiannis to Ryder stating that APH had responded to a heavy water leak, performed a fixture test and found that the existing toilet was "leaking from the bottom of the toilet tank." The unsigned letter states that "The seal between the toilet and tank was not set right. Every time the toilet flushed the toilet leaked from the seal in the back."

Titan argues that the letter is inadmissible hearsay that the court cannot consider on a motion for summary judgment. However, as the plaintiff correctly argues, under these circumstances the court may consider the document in opposing summary judgment regardless of whether a trial judge ultimately finds it to be hearsay. As the First Department held in Marquez v. 171 Tenants Corporation, 106 AD3d 422, 423 [1st Dept. 2013],

"Assuming, without deciding, that the reports are hearsay, they may be submitted in opposition to the plaintiff's motion, and may bar summary judgment when considered in conjunction with other evidence." See also Guzman v. L.M.P. Realty Corp 262 AD2d 99 (1st Dept. 1999). Given the quantity of other evidence here, this report, which clearly supports the plaintiff's contention that there is a triable issue of fact as to Titan's negligence in installing the toilet, the court may consider it. Thus, Titan's motion for summary judgment dismissing the plaintiff's complaint is denied.

C. Titan's Motion to Dismiss Third-Party Claims

Titan has not established *prima facie*, its entitlement to summary judgment dismissing Columbia's third-party claims for indemnification, contribution and breach of contract to procure insurance.

To establish a claim for common law indemnification, a party must show that (1) it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work. See Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012). Similarly, contribution is only available where two or more tortfeasors combined to cause an injury and is

determined in accordance with the relative culpability of each such person. See Children's Corner Learning Ctr. v A. Miranda Contracting Corp., 64 AD3d 318 (1st Dept. 2009). As such, in order to prevail on a motion for summary judgement dismissing the claims for common-law indemnification and contribution, the third-party defendants must establish, *prima facie*, that they were not negligent. As discussed herein, Columbia has established that the leak which ultimately caused the plaintiff's injury may properly be found to be a result of an improperly installed toilet by Titan. Thus, Titan's motion for summary judgment dismissing Columbia's claims for common-law indemnification and contribution is denied.

In support of its summary judgment motion seeking to dismiss Columbia's claim for contractual indemnification, Titan submits its agreement with Columbia under which it seeks indemnification. That provision states in relevant part:

> In addition to any liability or obligation of the Contractor to the Owner under other provisions of this Agreement or at law or in equity, the Contractor, to the fullest extent permitted by law, shall be liable to, hold harmless, defend and indemnify the Owner and its directors, officers, agents and employees (the "Indemnitees") against any and all damages, suits, claims, liabilities, costs and expenses (including actual attorneys' fees) resulting from bodily injury, sickness, disease or death or destruction of

> tangible property (exclusive of the Owner's property insurance, if any, pursuant to Paragraph 9.2 hereof), including loss of use resulting therefrom, arising out of or relating to the performance of Work by the Contractor, Subcontractors and suppliers, and anyone directly or indirectly employed or retained by any of them. However, the Contractor shall not be required to indemnify or hold harmless an Indemnitee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such Indemnitee.

Since the agreement states that Titan may be required to indemnify Trustees for any bodily injury "arising out of or relating to the performance of Work by the Contractor," and, as discussed herein, Titan may properly be found to be negligent, summary judgment dismissing Columbia's claim for contractual indemnification is also denied.

To obtain summary judgment on a claim for breach of contract for failing to procure insurance, Titan must demonstrate that there is either no contract provision requiring them to procure insurance or that it did comply with an underlying requirement to procure insurance. See Amante v. Pavarini McGovern, Inc., (1st Dept. 2015); DiBuono v Abbey, LLC, 83 AD3d 650 (2nd Dept. 2011); Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership, 304 AD2d 738 (2nd Dept. 2003).

Titan contends that it is entitled to summary judgment because it purportedly procured an aggregate of $6 million in "liability insurance coverage" and thereby satisfied its obligation to procure insurance. As is relevant to this motion, Article 9 of the agreement required Titan to maintain:

> Commercial General Liability Insurance written on an occurrence form covering all operations by or on behalf of the Contractor and the Owner with minimum limits of coverage not less than $5,000,000 per occurrence and in the annual aggregate unless otherwise approved by the Owner against claims for personal injury, bodily injury and property damage (including all XCU hazards). Products and completed operations insurance shall be maintained for one (1) year after the expiration or termination of this Agreement. (emphasis in original)

To prove compliance with this provision, Titan submits two insurance declaration pages: one from their commercial liability umbrella insurance policy and the other declaration from Titan's commercial general liability insurance policy. The declaration for the commercial umbrella liability policy describes the commercial general insurance liability policy as underlying insurance under Titan's umbrella policy. Titan argues that when the coverage amounts in these two policies are aggregated, these declarations show that Titan procured $6,000,000 in personal injury, bodily injury, and property damage insurance coverage per occurrence, thereby satisfying its agreement with Columbia.

These declarations, do not, on their face eliminate triable issues of fact as to whether Titan complied with insurance requirements under the agreement. The agreement specifies that Titan must maintain "general commercial liability insurance" "with minimum limits of coverage not less than $5,000,000 per occurrence and in the annual aggregate unless otherwise approved by the Owner against claims for personal injury, bodily injury and property damage." The limit per occurrence on the face of the declaration for general commercial liability insurance is only for $1,000,000.00 rather than the $5,000,000.00 as the agreement requires.

Furthermore, the agreement specifically mentions maintaining commercial general liability insurance in bold letters and does not state that Columbia Titan may satisfy this condition by maintaining a commercial general liability policy with only $1,000,000 of coverage per occurrence and then aggregating additional coverage under a commercial umbrella policy. Titan has submitted no proof that this was "approved by [Columbia]," that Columbia was aware that Titan structured its insurance coverage in this fashion, or that Columbia intended something other than what the agreement says. As "the best evidence of what parties to a written agreement intend is what they say in their writing," Greenfield v Phillies Records, Inc.,

98 NY2d 562 [2002], there are triable issues of fact on this record as to whether Titan breached the agreement with Columbia.

Titan also argues that it is entitled to summary judgment dismissing this cause of action because Titan cannot prove the necessary element of damages for its breach of contract claim for failure to pay insurance. Titan cites to the Court of Appeals decision in Inchaustegui v 666 5th Avenue Limited Partnership, 96 NY2d 111 [2000], arguing that this case stands for the proposition that damages resulting from a breach of a contract to procure insurance are limited to out of pocket damages such as the cost of Columbia purchasing its own insurance premiums. Contrary to Titan's argument, the Court of Appeals in Inchaustegui held only that if a party sues for a breach of another party's obligation to procure insurance it is limited to recover premiums for its own insurance if that insurance covered the injury. Id. However, regardless of whether Columbia purchased its own insurance, which is not established in this record, Columbia has satisfied the element of damages. Under Inchaustegui, if Titan is found liable at trial for failing to procure insurance for Columbia, Columbia will either recover damages equal to premiums it paid for its own insurance or, if Columbia did not have insurance, its claimed damages will be the money it would have recovered from Titan's insurance provider if Titan had complied with the

agreement to obtain coverage. Id. Thus, summary judgment dismissing the cause of action for breach of contract is denied.

D. Spoliation

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (Kirkland v New York City Housing Auth., 236 AD2d 170, 173 [1st Dept. 1997]), and after being placed on notice that such evidence might be needed for future litigation. See New York City Housing Auth. v Pro Quest Security, Inc., 108 AD3d 471 (1st Dept. 2013); Sloane v Costco Wholesale Corp., 49 AD3d 522 (2nd Dept. 2008). The court has "broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation…or employing an adverse inference instruction at the trial of the action." Ortega v City of New York, 9 NY3d 69, 76 (2007); see CPLR 3126; VOOM HD Holdings LLC v Echostar Satellite LLC, 93 AD3d 33 (1st Dept. 2012); Gogos v Modell's Sporting Goods, Inc., 87 AD3d 248 (1st Dept. 2011); General Security Ins. Co. v Nir, 50 AD3d 489 (1st Dept. 2008).

> "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it

> was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing."

Duluc v AC & L Food Corp., 119 AD3d 450, 451-452 (1st Dept. 2014) (some internal quotation marks omitted); see VOOM HD Holdings LLC v EchoStar Satellite, LLC, supra; Mohammed v Command Sec. Corp., 83 AD3d 605 (1st Dept. 2011); Ahroner v Israel Discount Bank of N.Y., 79 AD3d 481 (1st Dept 2010); Standard Fire Ins. Co. v Federal Pac. Elec. Co., 14 AD3d 213 (1st Dept. 2004).

"Striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct." Iannucci v Rose, 8 AD3d 437, 438 (2nd Dept. 2004); see Melcher v Apollo Medical Fund Mgt. LLC, 105 AD3d 15 (1st Dept. 2013); Russo v BMW of North America, LLC, 82 AD3d 643 (1st Dept. 2011). The imposition of such a sanction is only appropriate where the evidence was destroyed with a "culpable state of mind" VOOM HD Holdings LLC v Echostar Satellite, LLC., supra, at 45; see Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543 (2015). The sanction of

the striking of a pleading is warranted only where the alleged spoliation prevents the movant from inspecting a key piece of evidence which is crucial to the movant's case or defense (see Bach v City of New York, 33 AD3d 544 [1st Dept. 2006]; Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Inc., 221 AD2d 243 [1st Dept. 1995]), or has left the movant "'prejudicially bereft' of the means of presenting their claim." Kirkland v New York City Housing Auth., supra at 174, *quoting* Hoenig, Products Liability, Impeachment Exception: Spoliation Update, NYLJ, Apr. 12, 1993, at 6, col 5; see Canaan v Costco Wholesale Membership, Inc., 49 AD3d 583 (2nd Dept. 2008). That is not the case here.

The plaintiff correctly argues that there are no grounds for sanctions against him arising from the disposal of the toilet. The plaintiff was never is custody or control of the toilet, which was in the apartment above his apartment, and thus could not have spoliated it.

Columbia claims that the toilet was disposed of by APH when it replaced the toilet after the plaintiff's injury during the course of the repair seven days after the incident that led to this lawsuit. Columbia claims that APH did so in the ordinary course of its repair and that they have no culpable state of mind in not preserving the toilet. Columbia is correct in that

Titan has not demonstrated that Columbia's failure to preserve the subject toilet constituted willful and contumacious conduct, much less an effort to frustrate discovery in an action that had not yet been commenced. See Melendez v City of New York, 2 AD3d 170 (1st Dept. 2003); Hartford Fire Ins. Co. v Regenerative Bldg. Const. Inc., 271 AD2d 862 (3rd Dept. 2000). The only evidence submitted concerning this issue is that Columbia's agents discarded the toilet in the normal course of business after replacing it seven days after the accident, which does not support the imposition of sanctions against Columbia. Id. Additionally, the evidence proffered by the parties in regard the summary judgment motion provides enough evidence to allow a jury to conclude whether Titan was negligent in installing the toilet without such an inspection, just as the plaintiff's expert was able to do. Thus, Titan has not shown that the toilet was such a "key" piece of evidence and would have been so crucial to Titan's defendant that its left it "prejudicially bereft" of a means of presenting its defense (Kirkland v New York City Housing Auth., supra at 174) so as to warrant striking any party's pleading. The record on this motion reveals that there are numerous witnesses who can, and have, testified as to the cause of the accident. Therefore, a sanction striking Columbia's pleadings pursuant to CPLR 3126 is not warranted. See Melendez v City of New York, supra

However, there is merit to Titan's contention that Columbia was on notice that there was a significant probability that the accident would result in litigation. Columbia's superintendent, Herrera, witnessed the plaintiff's partner taking photographs of the accident and took his own photographs of the light fixture. When asked why he took photographs, Herrera testified that he took photographs "for evidence" because he "[knew] there is going to be a lawsuit" and he wanted to "show the manager what happened. Exactly what happened [sic]." Herrera further testified that he accompanied Ryder to inspect the plaintiff's apartment and Apartment 3D on the day of the incident inspect the site. Thus, Columbia was, at a minimum, negligent in not directing APH to preserve the toilet and should have known that it had a duty to take steps to ensure that the toilet was preserved for inspection in the likely event of litigation. As such, the court concludes that while the striking of the answer is not warranted, spoliation sanctions against Columbia in the form of an adverse inference charge and preclusion of evidence (see Baldwin v Gerard Ave., LLC, 58 AD3d 484 [1st Dept. 2009]) can be requested at the time of trial. See Ortega v City of New York, supra; New York City Housing Auth. v Pro Quest Security, Inc., supra; Scholastic, Inc. v Pace Plumbing Corp., 129 AD3d 75 (1st Dept. 2015); Strong v City of New York, 112 AD3d 15 (1st Dept. 2013). Whatever remedy the trial court deems appropriate

will prevent Columbia from using the disposal of the toilet by its agent that repaired and toilet to its tactical advantage. See General Motors Acceptance Corp. v New York Central Mutual Fire Ins. Co., 104 AD3d 523 (1st Dept. 2013); see Ever Win, Inc. v 1-10 Indus. Assoc., 111 AD3d 884 (2nd Dept. 2013); Suazo v Linden Plaza Assocs., L.P., 102 AD3d 570 (1st Dept. 2013). Such sanctions could be appropriately tailored to restore the balance between the Columbia's right to defend itself and the prejudice to Titan that would arise if Columbia were to offer evidence relating to Titan's culpability for any negligence related to the plaintiff's accident. See Baldwin v Gerard Ave., LLC, supra; Balaskonis v HRH Constr. Corp., 1 AD3d 120 (1st Dept. 2003).

III. Conclusion

Accordingly, it is,

ORDERED that the branch of the motion of defendant/third party defendant Titan P&H LLC seeking summary judgment dismissing the amended complaint and the third-party complaint of Columbia University and the Trustees of Columbia University is denied in its entirety; and it is further

ORDERED that the branch of the motion of Titan P&H LLC's seeking a sanction for spoliation of evidence is granted to the

extent that the movant may request at trial that the defendant/third party plaintiffs, Columbia University and the Trustees of Columbia University be precluded from adducing certain evidence and that an adverse inference charge be given to the jury, and this branch of the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: June 18, 2020 **ENTER:**

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON