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| <b>Griffin v 575 Lex Prop. Owner, LLC</b>  |
| 2020 NY Slip Op 32465(U)   |
| July 17, 2020  |
| Supreme Court, Kings County  |
| Docket Number: 516941/2016   |
| Judge: Reginald A. Boddie  |
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At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 17<sup>th</sup> day of July 2020.

PRESENT:  
Honorable Reginald A. Boddie  
Justice, Supreme Court

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PATRICE GRIFFIN,

Plaintiff,

Index No. 516941/2016  
Cal. No. 13, 14, 15, 16, 17

-against-

DECISION AND ORDER

575 LEX PROPERTY OWNER, LLC and  
CAULWELL-WINGATE COMPANY, LLC,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

| <u>Papers</u>                                 | <u>Numbered</u> |
|---|-----------------|
| MS 6 AAA's Motion for Summary Judgment        | 1               |
| MS 6 Checker's Opposition                     | 2               |
| MS 6 Reply                                    | 3               |
| MS 7 Checker's Motion for Summary Judgment    | 4               |
| MS 7 Shamrock's Opposition                    | 5               |
| MS 7 Plaintiff's Opposition                   | 6               |
| MS 7 AAA's Opposition                         | 7               |
| MS 7 Reply to Each Opposition                 | 8-10            |
| MS 8 575 Lex & Cauldwell's Motion for SJ      | 11              |
| MS 8 Checker's Opposition                     | 12              |
| MS 8 AAA's Opposition                         | 13              |
| MS 8 Shamrock's Opposition                    | 14              |
| MS 8 Plaintiff's Opposition                   | 15              |
| MS 8 Reply to Checker & Shamrock's opposition | 16-17           |
| MS 9 Shamrock's Motion for SJ                 | 18              |
| MS 9 575 Lex & Cauldwell's Opposition         | 19              |
| MS 9 Checker's Opposition                     | 20              |
| MS 9 Plaintiff's Opposition                   | 21              |
| MS 9 Replies to Each Opposition               | 22-24           |

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|---|----|
| MS 10 575 Lex & Cauldwell’s Cross-Motion for SJ | 25 |
| MS 10 Checker’s Opposition                      | 26 |
| MS 10 Reply to AAA’s Opposition                 | 27 |
| MS 10 Reply to Plaintiff’s Opposition           | 28 |
| MS 10 Reply to Checker’s Opposition             | 29 |

Upon the foregoing cited papers, the decision and order on the above-referenced motions and cross-motion for summary judgment, pursuant to CPLR 3212, is as follows:

This action arises out of a trip and fall which occurred on Monday, May 4, 2015, at approximately 8:15 AM, on the 6th Floor of New York Presbyterian/Weill Cornell Medical Center (Weill Cornell) at 575 Lexington Avenue, New York, New York. On the date of the accident, 575 Lex was the owner of the premises and leased a portion of the premises to Weill Cornell, including the 6th Floor. On May 4, 2015, plaintiff Patrice Griffin was employed by Weill Cornell. She alleged she was walking on the 6th Floor when she tripped and fell on a “raised, protruding metal beam nailed to the floor” and sustained personal injuries. She further alleged that on Friday, May 1, 2015, the metal beam was not present when she left the office at approximately 4:30 PM. On Saturday, May 2, 2015, defendant Checker Glass Corporation (Checker) performed work in the building including on the sixth floor.

Weill Cornell retained Cauldwell-Windgate Company, LLC (Cauldwell) as a general contractor to perform renovation work on various floors of the hospital, including the 6th Floor. Cauldwell hired Checker to furnish and install architectural metal and glass, Shamrock Acoustics Inc. (Shamrock) to install flooring and ceilings, and AAA Architectural Hardware Co, Inc. (AAA) to supply certain hardware. All defendants made summary judgment motions seeking dismissal of the complaint against them.

Summary judgment is a drastic remedy that should not be granted where there is any

doubt regarding the existence of material issues of fact (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]). “The proponent of a motion for summary judgment ‘must make a prima facie showing of entitlement to judgment as a matter of law. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers’” (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

The proponent of a motion for summary judgment must establish its defense or cause of action sufficiently to warrant a court directing judgment in its favor as a matter of law; thus the defendant bears the burden to dispel any question of fact that would preclude summary judgment (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], citing *Friends of Animals*, 46 NY2d at 1067-1068; *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551 [1st Dept 2012]). Only after the movant meets its burden, does the burden shift to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman*, 49 NY2d at 562 [citations omitted]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013], citing *Kosson v Algaze*, 84 NY2d 1019 [1995]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975], citing *Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 63 [1959]; *Bank for Sav. v Rellim Constr. Co.*, 285 NY 708, 709 [1941]). Defendants must establish the existence of material facts to create a triable issue of fact (CPLR 3212 [b]; *Shaw*, 38 NY2d at 207 [citations omitted]).

Furthermore, in a slip and fall case, as here, the defendant seeking summary judgment has

the burden of establishing that it 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 (*Totten v Cumberland Farms*, 57 AD3d 653, 654 [2d Dept 2008]). Therefore, movant must establish when the subject area was last inspected or cleaned (*id.*; see also *Gerbi v Tri-Mac Enterprises of Stony Brook*, 34 AD3d 732 [2d Dept 2006]). This burden cannot be met by merely pointing to gaps in plaintiff's case (*Totten*, 57 AD3d at 654, citing *Picart v Brookhaven Country Day School*, 37 AD2d 798 [2d Dept 2007]).

AAA sought summary judgment and dismissal of all claims and cross-claims on the basis that it entered into a "Supply Only" contract to furnish hardware for non-glass doors to be installed on the sixth floor of the subject premises and did not perform any installation work within the subject premises. Checker opposed this motion. Counsel's creative, yet unconvincing argument was inapplicable to AAA and, in any case, was insufficient to raise a triable issue. Accordingly, AAA's motion is granted and the complaint against AAA is dismissed.

Checker also moved for summary judgment. It denied it installed the beam on which plaintiff fell or that such installation was negligent. However, the sworn testimony of Michael Carlone, on behalf of Checker, confirmed that Checker installed the metal beam depicted in the photographs which plaintiff identified as the metal beam on which she tripped. Moreover, work logs indicate that Checker was the subcontractor who worked on the sixth floor on Saturday, May 2, 2015. Accordingly, summary judgment is denied.

575 Lex and Cauldwell also sought summary judgment on the issue of liability on the grounds that they did not owe a duty to plaintiff. Defendants argued Cauldwell did not owe a duty to plaintiff as Cauldwell was not an owner of the premises but rather a contractor hired to

oversee work. Defendants further argued plaintiff cannot establish that either 575 Lex or Cauldwell created the alleged dangerous condition or had actual or constructive notice of it.

Plaintiff opposed arguing for denial of summary judgment as to Cauldwell. Plaintiff's opposition was silent as to 575 Lex. Plaintiff argued Cauldwell is liable to plaintiff because it had a general duty of supervision and responsibility to keep the premises safe for all persons who passed through the premises and breached its duty by allowing the subject aluminum channel to remain uncovered and unblocked with no safety devices in place to warn Ms. Griffin of the dangerous, trap-like condition existing on the sixth floor.

A general contractor may be liable in common-law negligence if it has control over the work site and actual or constructive notice of the dangerous condition (*Keating v Namuet Bd. Of Educ.*, 40 AD3d 706, 708-709 [2d Dept 2007], citing *see Kerins v Vassar Coll.*, 15 AD3d 623, 625 [2005]; *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349 [2003]; *cf. Wolfe v KLR Mech., Inc.*, 35 AD3d 916, 918 [2006]; *Blysmo v County of Saratoga*, 296 AD2d 637, 639 [2002]). Cauldwell, the general contractor, failed to establish, prima facie, that it lacked control over the work site or notice of the allegedly dangerous condition, thus precluding a finding, as a matter of law, that it was not negligent (*Keating*, 40 AD3d at 709, citing *cf. Castilla v K.A.B. Realty, Inc.*, 37 AD3d 510, 512 [2d Dept 2007]).

Moreover, Cauldwell failed to make a prima facie showing of its entitlement to judgment as a matter of law on the ground that it did not have constructive notice of the alleged dangerous condition. A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it reasonably could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67

NY2d 836, 837-838 [1986]; *Walsh v Super Value, Inc.*, 76 AD3d 371, 375 [2010]). To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident (*see Sartori v JP Morgan Chase Bank, N.A.*, 127 AD3d 1157 [2015]; *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2013]; *Levine v Amverserve Assn., Inc.*, 92 AD3d 728, 729 [2012]).

Here, Cauldwell's submissions in support of its motion failed to demonstrate, prima facie, a lack of constructive notice. The testimony of Theodore Fredrick Warren, III, Cauldwell's site superintendent in 2016, failed to demonstrate that he had knowledge of the scope of work Cauldwell was to perform, its obligations and practices to ensure safety on the site, or establish when the sixth floor was last inspected or cleaned relative to plaintiff's accident that occurred on May 4, 2015 (*see Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 880-881 [2012]; *Klerman v Fine Fare Supermarket*, 96 AD3d 907, 908 [2012]). Accordingly, Cauldwell has failed to establish its prima facie entitlement to summary judgment.

Checker also opposed 575 Lex and Cauldwell's motion. Checker argued 575 Lex failed to come forward with any evidence of when it last inspected the premises prior to plaintiff's trip and fall and that there is a question of fact as to whether 575 Lex had constructive notice of the condition which caused plaintiff's fall. However, a landowner's duty of care to maintain the property in a reasonably safe condition is premised on the landowner's exercise of control over the property, as "the [entity] in possession and control of property is best able to identify and prevent any harm to others" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], citing *see Peralta v Henriquez*, 100 NY2d 139, 144 [2003]; *see also Basso v Miller*, 40 NY2d 233, 241 [1976]; *Butler v Rafferty*, 100 NY2d 265, 270 [2003]). Here, the record demonstrated that 575

Lex was an out of possession owner who leased the premises to plaintiff's employer, Weill Cornell, who hired Cauldwell as a general contractor to renovate its offices. Accordingly, the motion for summary judgment is granted to the extent the complaint against 575 Lex is dismissed and denied as to Cauldwell.

Shamrock sought summary judgment. Shamrock argued Checker installed the beam that caused plaintiff's fall and Shamrock was not present at the site during the subject weekend as demonstrated in the daily logs. In an affidavit dated February 18, 2020, Christopher Brady, President of Shamrock, stated that Shamrock has never installed aluminum channels for glass doors or glass sidelights and did not install any at 575 Lexington Avenue. He further stated that Shamrock was not contracted to install, and did not install, the channel that plaintiff claimed she tripped over on May 4, 2015, and Shamrock was not present at the work site on the May 2, when the channel was installed. Work logs corroborate this testimony and demonstrate that Checker was present.

Checker argued in opposition that photo evidence showed plaintiff tripped over a very similar looking beam, one that was necessarily installed by Shamrock. Checker argued that plaintiff testified that the location had no sheetrock installed at the time of the accident. Checker contends the absence of sheetrock at the time of the accident is the single most important piece of information in this case. Checker asserted only Shamrock installs floor channels in the absence of sheetrock; Checker does not. Therefore, the subject beam then must have been installed by Shamrock, because sheetrock was not present when the accident occurred. This argument is unsupported by the EBT testimony and documentary evidence and is therefore insufficient to raise a triable issue.

Plaintiff also argued in opposition that in light of Checker and Shamrock each attempting to shift blame onto the other party, an issue of fact exists as to whether Checker or Shamrock installed the metal beam that caused Ms. Griffin to fall. This argument is unsupported by the EBT testimony and documentary evidence and is therefore insufficient to raise a triable issue. Accordingly, Shamrock's motion for summary judgment is granted and the complaint against it is dismissed.

Finally, 575 Lex and Cauldwell cross-moved for summary judgment for indemnification against Checkers and opposed Checker's motion for summary judgment. Checker opposed the cross-motion on the grounds that the motion is a successive motion by 575 Lex and Cauldwell and therefore, absent newly discovered evidence, is impermissible. Although the contract between Cauldwell and Checker contained a provision which required that Checker defend, indemnify and hold 575 Lex and Cauldwell harmless for any cause of action arising out of Checker's work, the instant cross-motion was untimely filed. Motions for Summary Judgment must be made within 60 days of filing of the Note of Issue. Here, plaintiff filed the Note of Issue on December 16, 2019. Therefore, summary judgment motions were to be filed on or before February 14, 2020.

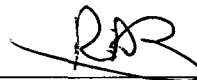
Movants filed their initial summary judgment motion (MS 8) on February 14, 2020. However, the motion for summary judgment failed to seek indemnification against Checker. Counsel averred the defense of 575 Lex and Cauldwell was transferred to her law firm approximately one week prior to the summary judgment deadline and the firm did not have adequate time to obtain the complete file from prior counsel before the filing deadline which resulted in movant's failure to request the relief now sought in its cross-motion. Counsel argued

the issues raised in its untimely cross-motion are already properly before the Court, and thus, the nearly identical nature of the grounds provides the requisite good cause to review the untimely cross-motion on the merits. The Court disagrees.

Here, the issues raised in MS 8 and MS 10 are not nearly identical (*cf. Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). The issue raised in MS 8 was defendants' duty to plaintiff and the issue raised in MS 10 was indemnification against a co-defendant. Accordingly, the cross-motion is denied as untimely.

Accordingly, 575 Lex, Shamrock, and AAA are granted summary judgment and the complaint against them is dismissed, Cauldwell and Checker are denied summary judgment, and the cross-motion is denied as untimely.

E N T E R:



Hon. Reginald A. Boddie  
Justice, Supreme Court