Supreme Court of the State of New York
County of Kings

Part 91

RASEM FATTAH,

Plaintiff,

against

BARNES & NOBLE, INC., BARNES & NOBLE BOOKSELLERS, INC., AND 55TH CLINTON ASSOCIATES, LLC,

Defendants.

55TH CLINTON ASSOCIATES, LLC,

Third-Party Plaintiff,

against

BARNES & NOBLE COLLEGE BOOKSELLERS, LLC P/K/A BARNES & NOBLE COLLEGE BOOKSELLERS, INC.,

Third-Party Defendants.

Index Number 517308/2016
SEQ #007 & 008

DECISION/ORDER

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

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1, 2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	3-6
Replying Affidavits.....	7-8
Exhibits.....	
Other	

Upon the foregoing papers, the motions for summary judgment by defendant/third-party plaintiff 55th Clinton Associates, LLC ("55th Clinton") (Mot. Seq. 007) and by defendant Barnes & Noble College Booksellers, LLC[1] (Mot. Seq. 008), are decided as follows:

Factual Background

Plaintiff brought this action against defendants for injuries allegedly sustained as a result of an accident on December 21, 2013 on premises owned or otherwise controlled by defendants. Plaintiff asserts claims for negligence against each defendant. Barnes & Noble asserts a cross-

[1] While defendant describes itself as only Barnes & Noble College Booksellers, LLC, it is appearing for all of the Barnes & Noble-related defendants and third-party defendants in this action.

claim for contribution, apportionment, and/or indemnification against 55th Clinton. Likewise, 55th Clinton commenced a third-party action against Barnes & Noble for indemnification, contribution, breach of contract, and failure to indemnify/defend. As third-party defendant, Barnes & Noble asserts a counterclaim for contribution, apportionment, and/or indemnification against 55th Clinton.

At his deposition, plaintiff testified that, on December 21, 2013, he visited a Barnes & Noble bookstore to return a book. He testified that he tripped as he was exiting the store through the front door. He testified that his right foot became caught in a "crevice or hole", causing him to fall forward. Plaintiff testified that he did not see the crevice when he first entered and exited the store, but saw it when he came back to the area a number of minutes after he fell. Plaintiff testified that the crevice was a foot wide and two inches deep, and within the store about six or seven inches from the door. Plaintiff testified that there was a black mat in the area that he assumed partially covered the crevice.

55th Clinton is the owner of the premises where the accident occurred, 845 Tenth Avenue, also known as 500 West 56th Street, in New York, New York. 55th Clinton submits a copy of its lease with the City University of New York ("CUNY"), who served as tenant, on behalf of John Jay College. In Article 18, the lease states that 55th Clinton was responsible for maintaining "(i) the utility systems to the point of entry into the Premises, (ii) the structural portions of the Premises, (iii) the sidewalks surrounding the Premises, and the facade of the Premises and (iv) the HVAC system and vertical transportation systems serving the Premises." In the same Article, the lease states that CUNY was responsible for making repairs, including repairs to sidewalks and passageways "adjoining and/or appurtenant to the Premises".

55th Clinton also submits a copy of the contract between John Jay College and Barnes & Noble for the operation of a bookstore at John Jay College. In Section 4(l) of the contract, Barnes & Noble agreed to, among other things, various cleaning and waste removal duties, and to "keep the Bookstore, as well as all furnishings, fixtures and equipment therein, in a clean, neat and safe condition."

Another portion of Section 4(l) requires Barnes & Noble to "maintain, repair and protect Corporation Property and Contractor's Equipment, including but not limited to obtaining and paying for the cost of preventive maintenance and repairs." Section 4(j) defines "Contractor's Equipment" as "such other equipment not provided by Corporation and necessary to efficient Bookstore Operations". The section states that a full list of "Contractor's Equipment" is included in Appendix B to the contract, but there is no Appendix B provided in the copy of the contract submitted by 55th Clinton. Section 4(k) defines "Corporation Property" as the property listed in Appendix C of the contract, but Appendix C simply states "None".

In addition, Section 9 of the contract states that Barnes & Noble is "solely responsible for any and all injuries to persons (including death), damage to property, and loss, expense, inconvenience and delay, arising out of or in connection with the performance of the Bookstore Operations, or from any act, omission or neglect of [Barnes & Noble], [Barnes & Noble's] directors, officers or Workers."

At her deposition, Jo'vi Codrington, the manager of the subject Barnes & Noble store, testified that, in December 2013, she or her assistant performed a daily safety walkthrough before the store opened. When asked if the walkthrough involved "mak[ing] sure there's nothing on the ground, [and] checking to see that everything is in proper working order", she testified that she or

her assistant would do so. She testified that this walkthrough included a review of the store's entrances. She testified that, although the Barnes & Noble employees cleaned the floors, they never removed the mats. She testified that the mats were removed and changed by an outside vendor, and that Barnes & Noble employees were not present for this. She testified that, in the five years she managed the store, she never saw any broken tiles at the entrances of the store, and that no one had fallen in the store. She also testified that no one had noticed a broken tile in the floor or complained about the floor.

Steve Stankovich, a regional manager with Related Management Company, LP, the manager for the subject premises, states in his affidavit that, according to his file, neither Related Management nor 55th Clinton received notice of any defect with respect to the floors inside the Barnes & Noble store.

Analysis:

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's and Barnes & Noble's Claims Against 55th Clinton

55th Clinton seeks summary judgment dismissing plaintiff's claim for negligence against it. 55th Clinton also seeks summary judgment dismissing Barnes & Noble's cross-claims and third-party counterclaims for contribution, apportionment, and/or indemnification. 55th Clinton contends that it is entitled to both forms of relief because it is an out-of-possession landlord (*see*,

e.g., *Gavallas v Health Ins. Plan of Greater New York*, 35 AD3d 657, 657 [2d Dept 2006]).[2] However, plaintiff correctly argues that, because the premises are open to the public, 55th Clinton has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress (*Richardson v David Schwager Assoc., Inc.*, 249 AD2d 531, 531-32 [2d Dept 1998]; *Rampardarath v Crunch Holdings, LLC*, 38 Misc 3d 1231[A], 2013 NY Slip Op 50349[U], *5 [Sup Ct, Queens County, 2013]).

Because 55th Clinton is obligated to provide a safe ingress and egress, it must show that it did not create the condition and did not have actual or constructive notice of it (*Davidson*, 138 AD3d at 912). While 55th Clinton has established, prima facie, that it had no actual notice of the defect, it failed to establish that it did not have constructive notice, which requires evidence of the last time the accident location was cleaned and inspected (*Lauture v Bd. of Managers at Vista at Kingsgate, Section II*, 172 AD3d 1351, 1352 [2d Dept 2019]; *Ryan v Beacon Hill Estates Coop., Inc.*, 170 AD3d 1215, 1215-16 [2d Dept 2019]).

55th Clinton's and Plaintiff's Claims Against Barnes & Noble

Barnes & Noble moves for summary judgment to dismiss plaintiff's negligence claim and to dismiss 55th Clinton's third-party claims against it for indemnification, contribution, breach of contract, and failure to indemnify/defend.

Barnes & Noble argues that it is not a tenant and so it does not have any common law responsibility to keep the premises safe. Nevertheless, Barnes & Noble may still be duty-bound to keep the premises safe pursuant to contract (*Nachamie v County of Nassau*, 147 AD3d 770,

[2] 55th Clinton also argues that it had no duty to plaintiff because the relevant lease documents do not impose no such a duty of care. Because this court holds that 55th Clinton has a duty of care separate from any duty that may arise from the lease, this argument is irrelevant.

774 [2d Dept 2017]). The are three situations in which a party, by entering into a contract, may have assumed a duty of care to third persons: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Nachamie*, 147 AD3d at 774, quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

Barnes & Noble and CUNY entered into a contract for Barnes & Noble to operate a bookstore in the space leased by CUNY from 55th Clinton. Section 4(l) of the contract requires Barnes & Noble to, among other things, keep the bookstore "in a clean, neat and safe condition." In accordance with this section, Ms. Codrington, the manager of the subject Barnes & Noble store, testified that she or her assistant performed a safety walkthrough prior to opening each day. During this walkthrough, which included the store's entrances, they made sure that nothing was on the floors and that "everything [was] in proper working order" (Deposition of Ms. Codrington at 28).

In addition, Section 9 of the contract states that Barnes & Noble is "solely responsible for any and all injuries to persons . . . arising out of or in connection with the performance of the Bookstore Operations". Bookstore Operations is defined in the first Whereas clause of the contract as "management and operation of the official College bookstore to be located at the Westport Building, 845 Tenth Avenue . . . and related activities, as further described in Section 4 of this Contract". Arguably, this definition is quite broad, and certainly includes plaintiff's errand to return a book.

The parties do not address any of the three situations described in *Nachamie*. However, the language of the contract between Barnes & Noble and CUNY, as well as Ms. Codrington's testimony about the safety walkthroughs, suggest that Barnes & Noble may have assumed a duty of care at least with regard to dangerous conditions on the store's floor.

Barnes & Noble argues that plaintiff's negligence claim should be dismissed on summary judgment because plaintiff has not shown that the condition existed for a sufficient amount of time and plaintiff did not show notice. However, Barnes & Noble, as the movant, has the burden to make a prima facie case that it did not create the condition or have notice of it, and not rely on a purported lack of evidence to the contrary (*Vanderhurst v Nobile,* 130 AD3d 716, 717 [2d Dept 2015]). That said, Barnes & Noble established, through the testimony of Ms. Codrington and Mr. Stankovich's affidavit that it did not have actual notice of the condition. Barnes & Noble has not established a lack of constructive notice, which requires evidence showing when it last cleaned or inspected the area surrounding the condition (*Joe v Upper Room Ministries*, 88 AD3d 963 [2d Dept 2011]). "Reference to general cleaning practices is insufficient to establish lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" (*Rong Wen Wu v Arniotes,* 149 AD3d 786,787 [2d Dept 2017]).

Additionally, Barnes & Noble argues that 55th Clinton does not have a claim for contractual indemnification or breach of contract because the agreement between CUNY and Barnes & Noble does not name 55th Clinton as an indemnitee. Barnes & Noble also argues that 55th Clinton is not a third-party beneficiary. 55th Clinton does not argue to the contrary.

Lastly, Barnes & Noble's request to strike the third-party complaint is denied. 55th Clinton appeared for deposition sufficiently in accordance with the schedule set by the parties

and the court.

Conclusion

For the foregoing reasons, defendant 55th Clinton's motion is denied, and defendant Barnes & Noble's motion is granted only to the extent that 55th Clinton's third-party claims for contractual indemnification and breach of contract are dismissed.

This constitutes the decision and order of the court.

March 16, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court