Murray v Community House Hous. Dev. Fund Co. Inc.
2020 NY Slip Op 34175(U)
December 15, 2020
Supreme Court, Kings County
Docket Number: 502556/2017
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of December 2020.

P R E S E N T:
HON. RICHARD VELASQUEZ,
Justice.

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GAIL MURRAY,

Plaintiff,

Index No. 502556/2017
DECEISION & ORDER

- against -

Mot. Seq. No. 23, 24, 26,& 27

COMMUNITY HOUSE HOUSING DEVELOPMENT FUND COMPANY INC., THE YMCA OF GREATER NEW YORK, METRO MAINTENANCE AND MANAGEMENT INC., D/B/A METRO MAINTENANCE, PROSPECT PARK YMCA OF GREATER NEW YORK AND METRO GROUP NYC,

Defendants.

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The following e-filed papered read herein:	Papers Numbered
Notice of Motion/Cross Motion,	
Affirmation (Affidavit), and Exhibits Annexed _____	389-390; 405-406; 447, 465, 469;452, 452, 454
Affirmation (Affidavit) in Opposition and Exhibits Annexed ____	462-463, 449-450; 449- 450, 457;

Reply Affirmation (Affidavit) and Exhibits Annexed	472, 474, 476; 470-471

Upon the foregoing papers, defendant Metro Maintenance and Management, Inc., d/b/a Metro Maintenance and Metro Group NYC (Metro) move, pursuant to CPLR 3212, in motion sequence (seq.) number (no.) 23, for an order granting summary judgment in their favor dismissing all claims and cross-claims against them. Defendants Community House Housing Development Fund Company, Inc. (Community Housing) and The YMCA of Greater New York (YMCA) move, pursuant to CPLR 3212, in motion seq. no. 24, for an order granting summary judgment dismissing the complaint and all cross-claims, and awarding them partial summary judgment as against Metro for breach of contract for failure to procure insurance and reimbursement of all defense fees and expenses. Plaintiff Gail Murray (plaintiff Murray) moves, by order to show cause, in motion seq. no. 26, for an order compelling defendants to permit her expert access to the subject location to perform necessary site inspections. Plaintiff Murray also moves, in motion seq. no. 27, for an order, pursuant to CPLR 3025(b), granting her leave to supplement the bill of particulars, deeming the supplemental bill of particulars served *nunc pro tunc*, and compelling further EBT and IME as to her left hip surgery, dated July 6, 2020, or alternatively, declaring further EBT and IME waived.

Background[1]

[1] The present action has been subject to considerable amount of motion practice during the discovery stage of litigation, not all of which are recounted in the instant order.

On May 16, 2015, plaintiff Murray resided at the Prospect Park YMCA of Greater New York facility located at 357 9th Street, Brooklyn, New York (premises). Community Housing and YMCA owned and operated the premises, while Metro provided maintenance service at the premises, including, among other services, mopping. Just prior to 11:00 a.m., on the aforementioned date, plaintiff Murray exited room C-501 (C-501) on the 5th floor of the premises to use the unisex bathroom located on the same floor. As she exited C-501, she observed a Metro worker in the hall. She recognized the individual as someone who performed maintenance services at the premises, including mopping. She further observed a yellow bucket with a mop in close proximity to the Metro employee. Additionally, she noted a cleaning odor lingering in the air as she entered the unisex bathroom. Approximately 5 minutes later she exited the restroom. While traversing the aforementioned hallway to return to C-501, plaintiff Murray slipped and fell on the freshly mopped floor.

She subsequently commenced the instant personal injury action asserting various theories of recovery against Community Housing sounding principally in negligence. Shortly thereafter, plaintiff Murray, with leave of the court, filed an amended summons and complaint naming YMCA and Metro as additional defendants and asserting various theories for recovery also sounding principally in negligence. Plaintiff Murray also commenced a second action against YMCA and Metro, asserting identical allegations as stated in the amended complaint. Metro appeared with the filing of an answer, asserting various affirmative defenses and multiple cross-claims against YMCA and Community

Housing sounding in indemnification, contribution, and breach of contract.[2] YMCA and Community Housing appeared with the filing of a joint answer, asserting various affirmative defenses and multiple cross-claims against Metro sounding in indemnification, contribution, and breach of contract.[3] Pursuant to court order and so-ordered stipulation, the actions were combined under the instant index number for all purposes. Further motion practice and discovery period ensued. On December 5, 2019, plaintiff Murray filed a note of issue. Subsequently, defendants timely moved for summary judgment and plaintiff Murray sought her relief relating to discovery.

Metro, Community Housing & YMCA's Motions for Summary Judgment:[4]
Metro

Metro principally argues that the alleged dangerous condition, the wet floor, was open, obvious and readily observable. Beyond this, Metro maintains that it satisfied its duty to warn of the alleged dangerous condition by placing adequate and appropriate signage informing the residents of the YMCA of the wet floor. Supporting this position, Metro proffers the deposition transcripts of, among others, plaintiff Murray, Mr. Cesar Escobar, who testified on behalf of Metro, and Ms. Shakila Monk, who testified on behalf of YMCA and Community Housing.

Metro highlights plaintiff Murray's deposition testimony wherein she attested that prior to the incident, she saw and recognized a Metro employee in the hallway of the 5th

[2] The operative document is Metro's answer to the amended complaint.

[3] The operative document is YMCA and Community Housing answer to the amended complaint.

[4] Defendants' motions for summary judgment present substantially similar arguments and plaintiff Murray submits opposition to both motions filed to motion seq. no. 24. The court shall consider plaintiff Murray's opposition as to both motions for summary judgment.

floor. She then proceeded to go into the bathroom located on the 5th floor and shortly after exiting she slipped and fell. She also attested that just prior to her falling, she observed a yellow bucket with a mop sticking out near the Metro employee. Additionally, Metro contends plaintiff Murray averred to the effect that prior to the accident and after observing the mop and bucket, she noted a smell in the air which she believed likely indicated that the floor was probably wet and that the floor had been mopped. She also attested, upon reviewing video footage of the incident, that there was a caution sign present in the area where the Metro employee was mopping.

Next, Metro refers to Mr. Escobar's testimony wherein he attested that Metro's policy for mopping floors dictated that Metro employees first place a caution sign in the area that was being mopped prior to commencing the mopping services. He further attested that his review of the video footage revealed that the caution sign was properly placed and in the correct location. Mr. Escobar further described the area where the sign was placed and opined that, due to the nature of the hallway configuration, the placement of the sign was correct. Additionally, Mr. Escobar stated that the sign was specifically placed to be viewed from the bathroom door on the 5th floor, and that plaintiff Murray can be seen walking around the sign prior to her slipping and falling. He also testified that his review of the footage reveals that Patrick, the Metro employee performing mopping services at the time, properly mopped the floor, properly expelled excess water from the mop, and properly placed the warning sign to notify the residents about the slippery condition. In addition, Metro notes that the testimony of Ms. Monk is consistent with both Mr. Escobar's and plaintiff Murray's deposition testimonies in that she also attested to

reviewing the video footage of the incident and identified a standing caution sign in the area where the incident occurred.

Metro argues that plaintiff Murray's own testimony demonstrates that she was aware of the alleged dangerous condition and beyond this, that the video evidence clearly establishes that the condition was open and obvious and readily observable. Further, not only was the condition observable, Metro contends that by plaintiff Murray's own admission she observed and had knowledge of the slippery condition, which cannot be deemed inherently dangerous. Alternatively and in conjunction with these arguments, Metro presents that regardless of whether the condition was open and obvious, it was not negligent in any form and satisfied its duty to warn of the condition by properly placing a caution sign at the location of the accident.

YMCA and Community Housing

YMCA and Community Housing likewise argue for accelerated judgment dismissing plaintiff Murray's claims. They maintain that as they are the owners of the premises and did not cause or create the condition, nor have actual or constructive notice of the alleged slippery condition, liability cannot attach to them. Further, they contend that the doctrine of respondeat superior does not apply in the instant action as Metro was an independent contractor. Additionally, they assert that they demonstrated entitlement to a judgment as a matter of law in their favor as to their cross-claims for breach of contract and indemnity against Metro. In support of their positions, YMCA and Community Housing proffer the aforementioned deposition transcripts of plaintiff Murray, Mr. Escobar, and Ms. Monk. YMCA and Community Housing also present various letters of denial from

Metro's insurance provider and the purported contract between YMCA and Metro, and argue that Metro agreed to name YMCA as an additional insured under its insurance policy.

Principally, YMCA and Community Housing rely upon the deposition transcript of Ms. Monk. They contend her testimony provides that neither YMCA nor Community Housing received any complaints as to Metro's mopping services; nor were either responsible for performing mopping services. Additionally, YMCA and Community Housing maintain that Ms. Monk also averred that neither YMCA nor Community Housing controlled Metro's work, in any capacity. Further, Ms. Monk attested that her review of incident reports and surveillance footage clearly demonstrates that the condition of the wet floor was created immediately before plaintiff Murray's accident by Metro's employee and, thus, YMCA and Community Housing never received constructive or actual notice of the slippery condition. Accordingly, YMCA and Community Housing argue that the facts clearly establish their entitlement to summary judgment dismissing plaintiff Murray's action as against them.

Turning to their cross-claim against Metro for breach of contract for failure to procure insurance, and in opposition to Metro's motion for summary judgment dismissing same, YMCA and Community Housing present multiple denials from Metro's insurer, Western World Validus Group (Western World), and a purported contract entered into between YMCA and Metro. YMCA and Community Housing argue that the contract is unambiguous and clear that Metro, upon being awarded the contract to provide cleaning services to the premises, was required to provide YMCA with general liability insurance

and name it as an additional insured under its policy. YMCA and Community Housing maintain that when they tendered a claim to Western World, their claim was denied based upon the finding that the contract between them was not an insured contract and neither were named as an additional insured under the policy. Thus, YMCA and Community Housing maintain that Metro breached the contract by not naming each as an additional insured, thus entitling them to recover attorney's fees and costs for defense of the action.

Plaintiff Murray

In opposition to both motions, plaintiff Murray argues that, contrary to her deposition testimony, there was no caution sign present at the accident site, or alternatively, if there was a caution sign, it was improperly placed. Thus, she argues there are triable issues of fact preventing accelerated judgment in defendants' favor. Plaintiff Murray contends it is beyond question that Metro created the dangerous condition and that YMCA and Community Housing possess a nondelegable duty to keep the premises safe for its residents.

Plaintiff Murray also proffers an expansive expert affidavit by Mr. Vincent A. Ettari, a professional engineer. Mr. Ettari avers that his opinion on the instant action is primarily based upon his review of the parties' deposition testimonies and surveillance footage of the accident. He opines that the defendants violated numerous regulations, internal policies, and building codes. Mr. Ettari specifically avers that defendants failed to properly set-up a caution sign and that the floor was not maintained in conformity with the

requirements promulgated by both Building Codes and professional standards.[5] Based upon the foregoing, plaintiff Murray argues that triable questions of fact remain thereby precluding summary judgment.

Metro's Reply and Opposition to YMCA and Community Housing's Motion

Metro wholly rejects YMCA and Community Housing's claims that it breached the contract. Metro argues that, pursuant to the terms of the contract, Metro was only required to procure general liability insurance protecting YMCA, not Community Housing. Likewise, Metro contends that the contract only required it to name YMCA as an additional insured on the policy, which Metro maintains it did, not Community Housing. In this regard, Metro proffers a certificate of insurance which named YMCA as an additional insured. Further, Metro insists that, contrary to YMCA and Community Housing's assertions, indemnification is never mentioned nor bargained for in the contract. Accordingly, Metro contends it complied with the terms of the contract and YMCA and Community Housing's cross-claims seeking attorney's fees and cost are unfounded. Alternatively, Metro argues that should the court find that it did breach its contract, damages must be limited to out-of-pocket expenses.

Regarding plaintiff Murray's opposition, Metro contends the deposition testimonies contradict the positions taken by plaintiff Murray in opposition. In this regard, Metro notes that plaintiff Murray acknowledged awareness of the slippery condition, demonstrating it was open and obvious, and that adequate warning was placed. Attacking Mr. Ettari's

[5] Plaintiff Murray's opposition also asserts various arguments relating to discovery matters. The court notes there was an extensive discovery period for this action and Plaintiff Murray filed her note of issue on December 16, 2019, attesting that all discovery was completed, waived, or not required.

expert deposition, Metro maintains the affidavit is of no evidentiary value. Metro asserts his opinion is improperly supported, lacks foundation, and is not based on sufficient information to be presented to the court. Additionally, it contends that the opinions presented in Mr. Ettari's expert affidavit are conclusory. Thus, Metro contends plaintiff Murray failed to rebut its entitlement to summary judgment dismissing the action.

YMCA and Community Housing's Reply

YMCA and Community Housing contend plaintiff Murray's expert, for the first time, raises new allegations of violations of various codes and regulations. They argue that these new allegations are impermissibly raised in opposition to their motion for summary judgment, as none were pled nor appear in the bill of particulars. Further rebutting Mr. Ettari's expert affidavit, YMCA and Community Housing assert that the expert disclosure is overbroad, non-specific, and fails to identify any basis for supporting his expert opinion. Additionally, they maintain that Mr. Ettari's opinions are conclusory in nature and are not supported by evidence. Critically, they argue his opinion is fatally defective as he never physically inspected the accident location, and his opinion is directly contradicted by the testimony of all the parties. Thus, YMCA and Community Housing posit that plaintiff Murray failed to present an issue of material fact defeating their entitlement to judgment as a matter of law and that all claims asserted by plaintiff Murray must be dismissed.

Turning to Metro's opposition, YMCA and Community Housing reject Metro's interpretation of the contract. They maintain that it is beyond question that, pursuant to the express terms of the agreement, Metro agreed to provide general liability insurance coverage and excess umbrella insurance, in addition to naming YMCA as an additional

insured. YMCA and Community Housing argue that Metro failed to comply with these terms of the contract, and thus is liable for covering the cost of YMCA and Community Housing's defense.

Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, "plaintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

"In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept 2015] [internal citations omitted]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted]). Further, "[s]ummary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] [internal citation omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Critically, where there are conflicting and competing expert affidavits summary judgment is inappropriate (*see Wilcoxen v Palladino*, 122 AD3d 727 [2d Dept 2014]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

Negligence

Generally, "to impose liability upon a defendant in a slip-and-fall action, there must be evidence that the defendant either created the condition which caused the accident, or had actual or constructive notice of the condition" (*Cusack v Peter Luger, Inc.*, 77 AD3d 785, 786 [2d Dept 2010]). Thus, traditionally "[a] defendant who moves for summary judgment in a slip-and-fall case 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 for a sufficient length of time to discover and remedy it" (*Granera v 32nd St. 99¢ Corp.*, 46 AD3d 750, 751 [2d Dept 2007]). "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it" (*Gonzalez v Jenel Mgt. Corp.*, 11 AD3d 656, 656 [2d Dept 2004]). Actual notice requires a showing that the specific defect was within the knowledge of the property owner either through personal observation or complaint of the specific defect.

"A property owner has a duty to maintain its property in a reasonably safe condition, which 'may also include the duty to warn of a dangerous condition'" (*Rivero v Spillane Enters., Corp.*, 95 AD3d 984, 984 [2d Dept 2012], quoting *Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]). Similarly, an independent contractor performing cleaning services at a premises owes a duty to exercise reasonable care in the performance of its duties, guarding against the creation of unsafe conditions which may result in injury to a foreseeable would-be plaintiff (*see Levine v G.F. Holding, Inc.*, 139 AD3d 910, 911-912 [2d Dept 2016], *citing DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486, 487 [1st Dept 2014]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 928 [2d Dept 2009]). Generally, where property owner contracts with an independent contractor, the property owner is not liable for the negligence of an independent contractor, provided the owner did not exercise a right to supervise or control the work being performed (*see Posa v Copiague Pub. School Dist.*, 84 AD3d 770, 772 [2d Dept 2011]; *Backiel v Citibank*, 299 AD2d 504, 507 [2d Dept 2002]). While an exception to this general rule includes nondelegable duties, such as maintaining a reasonably safe premises and safe means of ingress and

egress (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]; *Backiels*26 , 299 AD2d at 505), the judiciary has remained hesitant to extend this exception to incidents involving independent contractors providing cleaning services and slip-and-falls in areas not accessible to the general public (*see generally Lawson v OneSource Facility Servs., Inc.*, 51 AD3d 983 [2d Dept 2008]; *Spitzer v Kings Plaza Shopping Ctr. of Flatbush Ave.*, 275 AD2d 450 [2d Dept 2000], *but cf. Monroy v Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020] [wherein plaintiff slip and fell directly exiting a freight elevator]; *Blatt v L'Pogee, Inc.*, 112 AD3d 869 [2d Dept 2013] [wherein defendant's summary judgment motion was denied when plaintiff slipped and fell at the entrance of a showroom]).

However, there is no "duty to protect against an open and obvious condition, which, as a matter of law, is not inherently dangerous" (*cf. Twersky v Incorporated Vil. of Great Neck*, 127 AD3d 739, 740 [2d Dept 2015]). Thus, even where a defendant creates a slippery condition pursuant to a cleaning service and it is readily observable with reasonable use of the senses, summary judgment in favor of defendant is appropriate (*see generally Odiorne v Jascor, Inc.*, 175 AD3d 1016, 1016-1017 [4th Dept 2019]; *Brown v New York Marriot Marquis Hotel*, 95 AD3d 585, 585-586 [1st Dept 2012]; *Lawson*, 51 AD3d at 984; *Ramsey v Mt. Vernon Bd. of Educ.*, 32 AD3d 1007, 1008 [2d Dept 2006]).

In the present case, summary judgment in favor of defendants dismissing plaintiff Murray's action is warranted. Based upon plaintiff Murray's independent recollection of the accident, she attested that after exiting C-501 on the 5th floor of the premises, approximately 5 minutes before her accident, she observed a man, who she knew

routinely provided cleaning services at the premises, standing with a bucket and mop near the accident location (*see* Plaintiff Murray's deposition tr, January 5, 2018 at 61, lines 5-20; at 68, lines 13-25; Plaintiff Murray's deposition tr, October 22, 2019 at 10, lines 13-20; at 75, lines 7-13). Plaintiff Murray also testified that prior to the accident, beyond observing the maintenance staff with a bucket and mop, that she also smelled a lavender scent that she associated with cleaning and mopping services provided by Metro, resulting in her presuming the floor had been mopped (*see* Plaintiff Murray's deposition tr, January 5, 2018, at 67, lines 21-25; at 68, lines 1-17; at 78, lines 12-16).[6] Additionally, plaintiff Murray specifically testified to the following:

> **"Q: Now I am going to show you what has been marked as Defendant's Exhibit C for identification. That is you walking closer to the mop?**
>
> **A: That is me. You can barely see me.**
>
> **. . .**
>
> **Q: As you are shown in that photograph, Defendant's Exhibit C, what room are you next to?**
>
> **A: I am almost at room C503.**
>
> **. . .**
>
> **Q: The door that is next to the other window as you are going back to bathroom No. 6, is that another one of those co-ed bathrooms?**
>
> **A: This (indicating) is a bathroom.**
>
> **. . .**

[6] Plaintiff Murray notes that based upon her presumption that the floor had been mopped she walked slowly.

Q: I am going to show you a photograph marked as Defendant's Exhibit D for identification. That is the same hallway, right?

A: Yes.

Q: You are now a little closer to where the mop is?

A: Yes.

Q: Were you looking at the mop as you were walking down the hallway?
A: *I saw the mop*.

Q: As you were walking in this area that is shown in Defendant's Exhibit D, did the floor appear or feel wet to you in any way?

A: *Yes*.

Q: Did you smell that lavender smell?

A: *I smelled the lavender, though*.

Q: Did you know where it was coming from?

A: *I figured the floor*.

Q: Do you know where on the floor it was coming from?

A: No" (*Id.*, at 89, lines 11-25; at 90, lines 2-25; at 91, lines 2-8).[7]

Beyond this, plaintiff Murray testified to personal knowledge that the floors of the premises were mopped "every day" (*Id.* at 62, line 25; at 63, lines 2-3). Additionally, while plaintiff

[7] The court notes that plaintiff Murray's testimony is inconsistent about whether she observed a wet floor prior to her slip-and-fall. The testimony is consistent to the extent that she observed numerous indicators that mopping services were underway on the 5th floor, placing her on notice of the dangerous condition and making the slippery floor open and obvious with reasonable use of her senses.

Murray testified that she did not observe a caution sign warning of a wet floor on the date of the accident (*see* Plaintiff Murray's deposition tr, October 22, 2019 at 75, lines 3-25; at 76, lines 1-5), upon refreshing her recollection by presentation of the footage from video surveillance of her accident, plaintiff Murray attested that she not only can identify the placement of a caution sign indicating a wet floor, but also testified to walking past the caution sign and its placement within close proximity of her accident location (*see id.* at 77, lines 13-25; at 78, lines 1-18; at 80, lines 14-25; at 82, lines 12-19; at 83, lines 19-25; at 84, lines 1-6).[8]

Mr. Escobar's deposition testimony presents that his review of relevant material reveals that the mopping procedure employed on the date of the accident was correct and proper (*see* Mr. Escobar deposition tr at 17, lines 22-25; at 45, lines 23-25; at 46, lines 2-7; at 47, lines 18-22 ["He followed proper procedure to make sure the mop was properly rinsed out and strained of all water, and he had the wet-floor sign up"]). Regarding the type of cleaning solution used on the floor, Mr. Escobar testified that the specific ratio of water and cleaning solution was controlled by the "command center" which is located on each floor and the ratio is controlled automatically by the dispenser (*see generally id.* at 40-44). He further testified that there had been no complaints or other incidents at the subject location (*id.* at 45, lines 10-22; at 72, lines 6-8).

[8] Plaintiff Murray attested that she reviewed different video footage prior to being presented the video depicting her accident at the October 19, 2019, deposition; however, there is no dispute that the video used to refresh plaintiff Murray's recollection accurately depicted the circumstances of her accident.

Ms. Monk critically testified that, as a Property Manager of the premises and a YMCA employee, she was responsible for certain oversights regarding Metro's cleaning services. Specifically, Ms. Monk averred:

> **"Q: In terms of the cleanliness what were your duties and responsibilities?**
>
> **A: Making sure areas were clean, fully stocked with supplies needed for residents and guests, that the areas that our residents and guests were using was safe, nothing was broken or could potentially cause harm or risk, making sure the appropriate chemicals were used on the proper surfaces, preventing reduction of cross contamination of chemicals.**
>
> **Q: In terms of the cleaning of the facility did YMCA have any rules as to how cleaning was supposed to be done?**
>
> **A: Yes" (Ms. Monk deposition tr at 17, lines 8-21).**

Ms. Monk also attested that during her time as building manager, while there were complaints received from residents concerning some cleaning services, YMCA never received a complaint concerning mopping services (*see id.* at 34, lines 6-24).

Thus, the totality of the circumstances presented by the depositions, specifically plaintiff Murray's own deposition testimony, demonstrates that not only was she aware of the slippery condition of a wet floor, but that it was also adequately highlighted and warned against. Further, Mr. Escobar's deposition testimony established that his review of the relevant materials demonstrated that Metro's employee at the time of the incident followed proper procedures and was not negligent in his duties. While Ms. Monk's deposition testimony places YMCA in a precarious position, removing the traditional protections conferred to property owners who retain an independent contractor, it is of no

consequence with the facts at bar. To the extent that her deposition testimony supports a finding for summary judgment dismissing the case, she attested that there was adequate warning of the slippery condition present at the accident location. Thus, defendants established their prima facie entitlement to summary judgment dismissing plaintiff Murray's action by demonstrating reasonable cleaning techniques (as evident by Mr. Escobar's testimony), that the slippery condition was adequately noticed and warned against, and that, through reasonable use of her senses, plaintiff Murray could have observed the slippery condition, which was not inherently dangerous (as evident by plaintiff Murray's testimony) (*see Odiorne*, 175 AD3d at 1016-1017; *Brown*, 95 AD3d at 585-586; *Lawson*, 51 AD3d at 983-984; *Ramsey*, 32 AD3d at 1008; *but cf. Twersky*, 127 AD3d at 740; *Cupo*, 1 AD3d at 52).

In opposition, plaintiff Murray failed to submit evidence sufficient to raise a triable issue of fact (*see Landy v 6902 13th Ave. Realty Corp.*, 70 AD3d 649, 650-651 [2d Dept 2010], *citing Sanchez v. Barnes & Noble, Inc.*, 59 AD3d 698, 698 [2d Dept 2009]). Indeed, Mr. Ettari's expert affidavit is wholly speculative, mere conjecture, and insufficient to raise a triable issue of fact (*see generally Landy*, 70 AD3d at 650-65l). Critically, Mr. Ettari never examined the physical location and his assertions that there was no warning sign present at the site location is wholly refuted by the record evidence – three other deposition testimonies, including that of plaintiff Murray herself (*see id.*, citing *Greco v Starbucks Coffee Co.*, 58 AD3d 681, 681 [2d Dept 2009]; *Glorioso v Schnabel*, 253 AD2d 787, 788 [2d Dept 1998] [wherein the court found the expert testimony concerning defective condition on stairs was wholly refuted by the evidence]; *see also Reddy v 369*

Lexington Ave. Co., L.P., 31 AD3d 732, 733 [2d Dept 2006]; *Campanella v Marstan Pizza Corp.*, 280 AD2d 418, 419 [1st Dept 2001] [the expert never examined the alleged defective condition, thus "his observations are speculative and conclusory, incapable of forming the evidentiary basis upon which plaintiff can create a triable issue of fact"]).[9] Additionally, Mr. Ettari's expert affidavit in opposition to defendants' motions for summary judgment raises new theories of recovery, i.e. specific violations of codes and regulations not pled before in either the complaint or bill of particulars, thus the court "should not consider the merits" of these new theories (*Mazurek v Schoppmann*, 159 AD3d 814, 815 [2d Dept 2018]; *Mezger v Wyndham Homes*, Inc., 81 AD3d 795, 796 [2d Dept 2011]; *see also Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]; *Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]). Accordingly, plaintiff Murray's action asserted against defendants is hereby dismissed.

Breach of Contract for Failure to Procure Insurance [10]

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2019] citing

[9] The court acknowledges the transient nature of a slip surface in a slip-and-fall case; however, critical here is that Mr. Ettari never performed a site inspection nor does he aver as to materials that would constitute an appropriate substitute for an actual site inspection to reach the conclusions concerning surfaces and violations of any codes or regulations.

[10] YMCA and Community Housing's claims for common-law indemnification, contractual indemnification, and contribution must fail as the underlying action was dismissed, thus no liability can attach to either them or Metro. A finding of liability against the sought indemnitor/contributor is a necessary element of these causes of actions. Accordingly, those causes of actions sounding in common-law indemnification, contractual indemnification, and contribution are hereby dismissed.

Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership, 304 AD2d 738 [2d Dept 2003]; *McGill v Polytechnic Univ.*, 235 AD2d 400 [2d Dept 1997]). Additionally, where a defendant asserts such a cross-claim against a co-defendant "a final determination of liability for failure to procure insurance need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*DiBuono v Abbey, LLC,* 83 AD3d 650, 652 [2d Dept 2011], quoting *McGill*, 235 AD2d at 402). However, damages for failing to procure insurance "are limited to out-of-pocket damages caused by the breach" (*Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 935 [2d Dept 2015]; *see also generally Lerer v City of New York*, 301 AD2d 577 [2d Dept 2003]; *Taylor v Doral Inn*, 293 AD2d 524 [2d Dept 2002]; *Mercado v 1710 Realty Assoc.*, 289 AD2d 207 [2d Dept 2001]).

Here, Metro has failed to demonstrate entitlement to dismissal of YMCA's cross-claim for breach of contract; however, Metro has demonstrated entitlement to dismissal of Community Housing's cross-claim for breach of contract. By the same token, YMCA has failed to establish its entitlement to summary judgment in its favor on its breach of contract claim against Metro.

The proffered cleaning service contract presented by YMCA and Community Housing clearly identifies that the parties to the contract are various YMCA entities, including YMCA and Metro. Pursuant to pages 7 and 13 of the contract, Metro was obligated to procure certain insurance, including but not limited to general liability and excess/umbrella insurance, and was to have the YMCA named as an additional insured on said policies (NYSCEF Doc. No. 423, Cleaning Contract, at pages 7, 13). Distinctly absent from this contract is any mention, reference, or statements as to Community

Housing.[11] Inasmuch as Community Housing is not a party to the contract, nor mentioned therein, it has no standing to assert claims for breach of contract. Accordingly, Community Housing's cross-claim for breach of contract to procure insurance against Metro is hereby dismissed.[12]

As to YMCA's breach of contract to procure insurance cross-claim against Metro, the court finds that the proffered documentary evidence fails to demonstrate Metro's compliance or dereliction of the contract's insurance provision. While the contract clearly requires Metro to provide insurance on behalf of YMCA, YMCA fails to proffer any evidence that it was not afforded such insurance coverage. The proffered denials of coverage only identify Community Housing as being denied coverage, not YMCA. In addition, Metro's proffered evidence, namely a certified copy of its insurance policy, fails to demonstrate compliance with the contract. The purported contract between the parties names multiple YMCA entities as clients under the contract. Among those is "Prospect Park YMCA of Greater New York," the YMCA of the present action. The insurance policy proffered does not expressly identify coverage for "YMCA of Greater New York" as an additional insured nor "Prospect Park YMCA of Greater New York," but does contain the

[11] Metro presents only cursory statements asserting issues with the admissibility of YMCA and Community Housing's proffered evidence concerning their cross-claims for breach of contract based upon their submission by way of their attorney's affirmation. The court shall consider such documents (*see Zuckerman*, 49 NY2d at 562; *Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984 [2d Dept 2012]; *Tingling v C.I.N.H.R., Inc.*, 74 A.D.3d 954 [2d Dept 2010] [wherein the court, in an action for breach of contract for failing to procure insurance, considered, among other proffered evidence, a contract submitted by means of an attorneys' affirmation]; *but cf. United Specialty Ins. v Columbia Cas. Co.*, 186 AD3d 650 [2d Dept 2020]).

[12] At no point in any papers do parties discuss the theory of third-party beneficiaries. As a result, the court does not consider such theories.

names of certain other YMCA entities named in the contract (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 459 at 60). Thus, Metro has failed to demonstrate complete compliance with the contract.[13] However, YMCA's damages, if any, are limited to out-of-pocket expenses (*see Bleich*, 132 AD3d at 935; *Lerer*, 301 AD2d at 578; *Taylor*, 293 AD2d at 525).

Plaintiff Murray's Discovery Motions

[13] The certificate of insurance only satisfies a portion of the insurance provision of the purported contract, which reads as follows:

> "Verification of Insurance Limits
>
> Insurance Checklist:
>
> General Liability Insurance policy of at least $1,000,000 limit: copy of declaration page to be sent on request.
>
> Worker's Compensation Insurance policy and limits: copy of declaration page to be sent on request.
>
> Disability Insurance Policy and limit: copy of declaration page to be sent on request.
>
> Excess/Umbrella Insurance Policy of at least $3,000,000 limit: copy of declaration page to be sent on request.
>
> Professional Liability Insurance Policy of at least $500,000 limit: copy of declaration page to be sent on request.
>
> In addition, all above policy certificates will name YMCA of Greater New York as an additional insured. The certificates will also state that Metro Maintenance will notify the YMCA of Greater New York when they are at 60 days from cancellation and/or renewal of Metro Maintenance's Insurance Policy" (NYSCEF Doc. No. 458 at 13).

Thus, the presentation of the certificate of insurance fails to demonstrate complete compliance with the insurance provision of the contract.

Plaintiff Murray's motions (motion seq. nos. 26 & 27) seeking relief related to discovery are hereby denied as moot as all claims brought by plaintiff Murray are dismissed.

To the extent not specifically addressed herein, the parties' remaining contentions have been considered and found to be either meritless and/or moot.

Conclusion

Accordingly, it is

ORDERED that Metro's motion for summary judgment (motion seq. no. 23) is granted to the extent that plaintiff Murray's claims are hereby dismissed, and all of YMCA and Community Housing's cross-claims against Metro, with the exception of YMCA's breach of contract to procure insurance cross-claim, are hereby dismissed as against Metro;

ORDERED that YMCA and Community Housing's motion for summary judgment (motion seq. no. 24) is granted to the extent that plaintiff Murray's claims are hereby dismissed as against them. It is denied in all other respects, and it is further;

ORDERED that plaintiff Murray's discovery motions (motion seq. nos. 26 & 27) are hereby denied.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
December 15, 2020

HON. RICHARD VELASQUEZ