Murphy v Westchester One, LLC
2020 NY Slip Op 34557(U)
September 25, 2020
Supreme Court, Westchester County
Docket Number: 58550/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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CHANDRA MURPHY,

Plaintiff,

-against-

WESTCHESTER ONE, LLC and 44 SOUTH BROADWAY PROPERTY, LLC, CUSHMAN & WAKEFIELD INC., BEACON CAPITAL PARTNERS, BCSP IV PROPERTY MANAGEMENT LLC,

Defendants.

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44 SOUTH BROADWAY PROPERTY, LLC,

Third-Party Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendant.

---x

44 SOUTH BROADWAY PROPERTY, LLC,

Second Third-Party Plaintiff,

-against-

TEMCO SERVICE INDUSTRIES, INC..,

Second Third-Party Defendant.

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DECISION & ORDER
Index No. 58550/2017
Motion Sequence 4

The following papers were read and considered in connection with the defendant's motion for an order for summary judgment dismissing all claims and cross-claims against it; granting Cushman & Wakefield, Inc. ("Cushman") leave to amend its answer pursuant to CPLR 3025(b) to assert cross-claims against Temco Service Industries, Inc. ("Temco")

and granting summary judgment pursuant to CPLR 3212 to Cushman on its cross-claims against Temco.

Notice of Motion/Affirmation/Exhibits A-S
Memorandum of Law in Support
Affirmation in Partial Opposition/Exhibits A-C
Reply Affirmation

Procedural and Factual Background

The plaintiff, Chandra Murphy ("Murphy"), commenced this action on May 31, 2017, against the defendants Westchester One, LLC and 44 South Broadway Properties LLC ("44 SBP"), seeking damages for alleged injuries sustained on December 5, 2016, when she slipped and fell at 44 S. Broadway, White Plains, New York.

Murphy testified at her examination before trial ("EBT") that she fell when she entered the printer room within her office space at the New York State Department of Taxation and Finance, located on the sixth floor of the subject premises. Murphy testified that she had been to the printer room multiple times after lunch without incident and did not see anything or feel anything on the floor. Murphy further testified that her pants were wet to the touch after she fell, but she did not look at the floor to see if there was water. Her co-workers rushed into the printer room when they heard her fall and Mildred Villalona ("Villalona"), a maintenance worker, employed by Temco Service Industries, Inc. ("Temco"), also came rushing into the room, telling Murphy to get up. When Murphy saw Villalona again in March 2018, Villalona apologized to her for what had happened.

The Court (Everett, J.) previously granted the plaintiff's motion for leave to serve and file a supplemental summons and amended verified complaint to add Beacon Capital Partners ("Beacon"), BCSP IV Property Management LLC, and Cushman as direct

defendants to the action. Jerome Montrone, Senior Vice President and asset manager for New York at Beacon, testified that 44 SBP is owned by BCP Fund Six, LLP, for which Beacon is an investment advisor. Cushman was the property manager at the time of the alleged incident and Temco was the cleaning subcontractor hired by Cushman at the time of the alleged incident.

On May 16, 2018, the defendant, 44 SBP filed a third-party complaint against Cushman and on July 10, 2018, 44 SBP filed a second third-party complaint against Temco. The parties in the third-party actions executed a Stipulation of Discontinuance dated August 14, 2019 as to Temco and a Stipulation of Discontinuance dated December 6, 2019, as to Cushman only with regard to the third party complaint.

This Court granted 44 SBP's motion for summary judgment pursuant to CPLR 3212, to dismiss the complaint against it, finding that 44 SBP established that it neither created the condition, nor had actual or constructive notice of the condition that caused Murphy's injuries. The Court also found that 44 SBP did not expend any control over the management of the building nor the janitorial services and was essentially an out of possession owner/landlord and not liable for any defects.

Cushman also filed a motion for summary judgment and leave to amend its answer, which this Court did not address because it was under the mistaken belief that Cushman was no longer a part of the case due to the Stipulation of Discontinuance. It also did not address that part of 44 SBP's motion seeking indemnification and status as an additional insured for the same reason. The Court now addresses Cushman's motion.

Cushman argues that it did not cause or create the alleged hazardous condition nor did it have constructive notice of it. Cushman argues that Villalona was trained to place a wet floor sign down prior to mopping the floors and chose to ignore her training on the day of the incident, which happened moments after Villalona failed to place the wet floor sign on the floor. Villalona argues that it had no notice that Villalona failed to put the sign down and could not have caused nor created the alleged dangerous condition.

Cushman also argues that Cushman did not owe a duty of care to the plaintiff, a non-contracting third-party and none of the exceptions apply to this action, because Cushman did not launch a force or instrument of harm, the plaintiff did not detrimentally rely on the continuing performance of Cushman's duties and Cushman did not entirely displace 44 SBP or Temco in the duty to maintain the premises safely.

With regard to the cross-motion by 44 SBP for breach of contract and contractual indemnification, Cushman argues that the indemnification provision of the contract between it and 44 SBP is only triggered upon a showing of gross negligence and in this case, Cushman was neither negligent nor grossly negligent. Cushman also asserts that it did not fail to procure insurance pursuant to its management agreement because its employees were not grossly negligent. Cushman further asserts that it was not negligent in any way that caused or contributed to the plaintiff's claimed accident and therefore, 44 SBP is not entitled to contribution nor common law indemnification.

With regard to its cross-motion against Temco for common law indemnification and contribution, Cushman argues that it did not have actual nor constructive notice of the hazardous condition and did not owe the plaintiff a duty of care, but that Temco admitted

responsibility for the plaintiff's alleged injuries. Therefore, Cushman seeks to amend its answer and file cross-claims against Temco.

In opposition, Murphy, by her attorney, argues that Cushman was 44 SBP's agent vis-a-vis the work to be performed under the contract with Temco and since Temco created the condition, so questions of notice are irrelevant. Murphy's attorney argues that there was no wet floor sign and the water on the floor was not open and obvious.

In reply, Cushman asserts that the plaintiff's papers do not make any argument in opposition to Cushman's motion for summary judgment and in fact, argues that Cushman cannot be held liable for the claimed accident. Instead, the plaintiff argues that Temco is negligent and that 44 SBP is vicariously liable. Cushman also argues that since no party has opposed those branches of its motion seeking leave to amend its answer pursuant to CPLR 3025[b], to assert cross-claims against Temco, and granting summary judgment pursuant to CPLR 3212 to Cushman on its cross-claims against Temco, those branches of its motion should be granted.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[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]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (*See*

e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden shifts to the party opposing the motion to show the existence of material issues of fact by producing evidentiary proof, in admissible form, in support of their position.

In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it, (*Sawicki v GameStop Corp.*, 106 AD3d 979; *Armijos v Vrettos Realty Corp.*, 106 AD3d 847, 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds that Cushman has met its burden and has made a prima facie showing of entitlement to judgment as a matter of law against the plaintiff..

The Court finds that Cushman has established that it neither created the condition, nor had actual or constructive notice of the condition that caused Murphy's injuries. Further, Cushman did not owe a duty of care to the plaintiff and none of the exceptions to the duty requirement, apply to this action, since Cushman did not launch a force or instrument of harm, the plaintiff did not detrimentally rely on the continuing performance of Cushman's duties and Cushman did not entirely displace 44 SBP nor Temco in the duty to maintain the premises safely. Temco was the company responsible for cleaning the building and the company that hired Villalona, who mopped the floor and allegedly created

the condition. Therefore, that part of Cushman's motion seeking summary judgment dismissing the complaint and all cross-claims against it, is granted.

Cushman also seeks to amend its answer, pursuant to CPLR 3025(b), to assert cross-claims against Temco. Under CPLR 3025(b), leave to amend a pleading shall be freely granted absent prejudice to the adverse party. On a motion for leave to amend a pleading before trial, the opposing party cannot successfully claim prejudice where the proposed amendment would not change the fundamental nature of the allegations in the original pleading (*Pepe v Tannenbaum*, 262 AD2d 381 [2d Dept 1999]), or where the opposing party has had full knowledge of the facts (*Pejcinovic v City of New York*, 258 AD2d 365 [1st Dept 1999]) and an opportunity to present an opposing theory of the case is allowed. (*Stow v City of New York*, 122 AD2d 45 [2d Dept 1986]).

Here, although there was no opposition, this part of Cushman's motion is denied, since Temco is no longer a party to the action and thus, Cushman cannot assert cross-claims against it. Additionally, a Stipulation of Discontinuance has been filed with regard to the third-party complaint against Temco. Therefore, that part of Cushman's motion seeking to amend its answer to assert cross-claims against Temco and for a grant of summary judgment against Temco, is denied.

Accordingly, based on the foregoing, it is

ORDERED that the part of the motion seeking an order granting summary judgment to dismiss all claims against Cushman, is granted; and it is further

ORDERED that the part of the motion seeking an order granting leave to amend its answer to assert cross-claims against Temco and for a grant of summary judgment against Temco, is denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 25, 2020

HON. SAM D. WALKER, J.S.C.