SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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PEDRO SERRANO,

Plaintiff,

DECISION AND ORDER (Motion # 2)

-against-

Index No.: 036057/2017

WESLEY HILLS CENTER, LLC,

Defendant.

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WESLEY HILLS CENTER, LLC,

Defendant/Third-Party Plaintiff,

-against-

JOSEPH HERSHKOWITZ and JOSEPH HERSHKOWITZ d/b/a WESLEY KOSHER SUPERMARKET, WESLEY KOSHER INC. and WESLEY KOSHER INC. d/b/a WESLEY KOSHER SUPERMARKET,

Third-Party Defendants.

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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 7, were considered in connection with Defendant Wesley Hills Center, LLC's, (hereinafter "Defendant") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in its favor, dismissing the action; or in the alternative, for indemnity against third-party defendant Wesley Kosher Supermarket:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF DOMINIC CAPIO/EXHIBITS "A-R"	1-3
PLAINTIFF'S AFFIRMATION IN OPPOSITION/AFFIDAVIT OF NICLAS GOMEZ	4-5
AFFIRMATION IN PARTIAL OPPOSITION OF THIRD-PARTY DEFENDANTS	6
AFFIRMATION IN REPLY	7

Upon the foregoing papers, the Court now rules as follows:

This personal injury action was commenced by Plaintiff with the filing of the Summons and Complaint on December 13, 2017. Issue was joined by Defendant with the service of an Answer on February 23, 2018. A Third-party action was filed on March 13 2018, and an Amended Third-Party Complaint was filed on May 7, 2018. An Answer to the Amended Complaint was filed by Defendants Wesley Kosher, Inc. and Wesley Kosher Inc d/b/a Wesley Kosher Supermarket, on May 10, 2018. Although a default motion was brought against defendants Joseph Hershkowitz and Joseph Hershkowitz, same was denied by this Court in an Order dated September 26, 2018, for failure to properly serve the parties and provide an affidavit of merit in support of its motion. Discovery proceeded and a Note of Issue was filed on June 26, 2019.

This action arises out of a trip and fall accident alleged to have occurred on March 17, 2016, on the premises located at the Wesley Kosher Supermarket. Plaintiff claims to have tripped and fallen due to the presence of a raised metal handle on a metal door leading to the basement, which was normally flush with the floor of the premises. Plaintiff, who worked in the store, was not aware of how long the raised handle was in that condition. He testified that his co-worker, Niclas Gomez, was a witness to his accident.

Defendant produced its managing agent, Dominic Capio, for an examination before trial, and Mr. Capio also provided an affidavit in support of the summary judgment motion. Mr. Capio testified that he would occasionally go into the tenant space to respond to or complaint or to just "say hello" but that he never observed the handle of the subject metal door raised, nor did he receive any complaints regarding this condition. Mr. Capio further states that the tenant is responsible for repairs in this area.

Third-party defendant Wesley Kosher produced Moti Feder, who supervised employees at the supermarket at the time of the subject occurrence. Mr. Feder testified that Plaintiff told him he tripped and fell due to the raised trapdoor handle but Feder does not know

if he ever saw the handle in a raised condition before[1] or for how long the handle had been bent. He says no one ever complained about the door handle before and there were no prior similar accidents. Later in his deposition, he claims that he was in that area a half an hour before the accident and did not see the handle raised.

Defendant files the instant Notice of Motion seeking an Order granting summary judgment, and/or indemnification from third-party defendants. The sole ground asserted by Defendant in support of its motion to dismiss Plaintiff's complaint is that there is no actual or constructive notice by defendant of the raised handle condition on the trap door. Defendant asserts that "as Plaintiff is unable to demonstrate notice, this action must be dismissed." In the event that summary judgment is denied, Defendant moves for a finding that third-party Wesley Kosher Inc. must indemnify them pursuant to an assigned lease which states that Wesley Kosher agreed to assume all the responsibilities to the landlord, including "insurance or any other obligation." Additionally, Defendant contends that the tenant agreed to indemnify the landlord for all accidents on the premises.

In opposition to the motion, Plaintiff argues that Defendant failed to establish that it lacked notice of the defective condition of the raised and bent handle on the trap door or that it did not have a duty with respect to same. Plaintiff notes that Mr. Capio did not fully address the issue of notice, nor did Defendant submit any affidavit from the owner and/or staff at the managing agent's office regarding a purported lack of notice.

Additionally, Plaintiff submits the notarized statement[2] of Plaintiff's co-worker Niclas Gomez. He states that in approximately October 2015, he noticed that a handle on a trap door by the receiving gate was broken, in that it could not be pushed into place, causing

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[1]At other times throughout his deposition, Mr. Feder testifies that he had not seen the raised handle before.

[2] Although the notarized statement does not state that it was sworn under penalty of perjury, it does contain the notation "sworn to before me."

it to stick out of the ground. The same day he noticed it, he told his manager Abraham Feder that the handle needed to be fixed because it almost caused him to trip. His employer told him to fix it but he reported that he was unable to do so. Mr. Gomez states that he personally fell over the handle and uneven trap door twice in the next months, both of which he reported to Mr. Feder. While in his presence, Mr. Feder called Moshe Mendlowitz, one of the owners of the building, and he heard him report the problem with the handle and need for it to be fixed. Mr. Gomez witnessed Plaintiff's fall when his foot caught the broken handle which caused him to fall to the ground. Thus, Plaintiff argues that there is constructive notice of at least five months.

Plaintiff also argues that the subject lease contains language including reservation of a right of reentry and that the Tenant shall "suffer the Landlord to erect, use, maintain, repair and replace pipes, conduits in the demised premises and to the floors above and below..." He argues that the common understanding of "floors" would include the trap doors flush to it which provide access to the basement, and thus the landlord had a responsibility to keep the floors in good repair. Third-Party Defendant argues that in the event this Court denies Defendant's summary judgment motion because there are triable issues of fact as to Defendant's negligence, that the indemnity motion must be denied because a party seeking contractual indemnification must prove itself free from negligence.

For the first time, in Reply, Defendant argues that summary judgment is warranted because it is an out-of-possession landlord who owes no duty to plaintiff injured by a condition on the premises in the possession of the tenant. Defendant asserts that after the fact, is was Wesley Kosher that repaired the trap door. Defendant also argues that the notarized Gomez statement does not constitute admissible evidence based upon an 1881 case and a 1973 criminal case which this Court finds is inapplicable to the matter at bar. Lastly, Defendant argues that if the statement is considered, it does not establish issues of notice but rather that the tenant maintained the trap door.

The proponent of a summary judgment motion must establish his or her claim

or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

As an initial matter, the Court will not consider Defendant's argument that it cannot be held liable because it is an out-of-possession landlord, as such a contention was first raised in Reply, and was not a ground upon which Defendant moved for summary judgment. See Rhodes v. City of New York, 88 A.D.3d 614, 931 N.Y.S.2d 595, 597 (1st Dept. 2011)(arguments raised for the first time in reply are entitled to no consideration by a court entertaining a summary judgment motion.) Thus, Defendant failed to make the requisite prima facie showing with regard to this argument.

A defendant who moves for summary judgment in a trip 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. Jackson v. Jamaica First Parking, LLC, 91 A.D.3d 602, 936 N.Y.S.2d 278 (2d Dept. 2012); Mantzoutsos v. 150 Street Produce Corp., 76 A.D.3d 549, 907 N.Y.S.2d 34 (2d Dept. 2010); Austin v. Town of Southampton, 113 A.D.3d 711, 712, 979 N.Y.S.2d 127 (2d Dept.

2014); Walsh v. Super Value, Inc., 76 A.D.3d 371, 375, 904 N.Y.S.2d 121 (2d Dept. 2010). To meet its prima facie burden on the lack of constructive notice, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell. Rong Wen Wu v. Arniotes, 149 A.D.3d 786, 787, 50 N.Y.S.3d 563 (2d Dept. 2017). See also Levine v. Amverserve Association Inc., 92 A.D.3d 728, 938 N.Y.S.2d 593 (2d Dept. 2012).

Here, although Mr. Capio testified that he would occasionally go to the premises, he nonetheless failed to give testimony as to when he was last at the supermarket or when he last inspected it. Thus, Defendant failed to meet its prima facie burden with respect to the lack of constructive notice. As Defendant did not meet its burden, the Court need not consider the sufficiency of the opposition papers. However, the Court nonetheless notes that the affidavit of Mr. Gomez raises triable issues of fact as to both constructive and actual notice. Mr. Gomez testified that the condition lasted for at least five months before Plaintiff's fall, and that he was present and heard Mr. Foti communicate the allegedly defective condition to one of the owners. As such, Defendant's motion for summary judgment and dismissal of the complaint is denied.

With respect to that portion of the motion which seeks an order granting contractual indemnification, "[A] party is entitled to contractual indemnification when the intention to indemnify is 'clearly implied from the language and purposes of the entire agreement and the surrounding circumstances.'" Torres v. LPE Land Development & Const. Inc., 54 A.D.3d 668, 669, 863 N.Y.S.2d 477 (2d Dept. 2008). However, General Obligations Law Sec. 5-322.1 voids any indemnification clause to the extent that a party seeks indemnity for its own acts of negligence. Kennelty v. Darlind Const. Inc., 260 A.D.2d 443, 446, 688 N.Y.S.2d 584 (2d Dept. 1999). To any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefore. O'Connor v. William Metrose Ltd. Builder/Developer, 38 A.D.3d 1207, 1208, 832 N.Y.S.2d 711 (4th Dept. 2007). Thus, "[A] party seeking contractual indemnification must establish that it was free from negligence and that

it may be held liable solely by virtue of statutory or vicarious liability." Jardin v. A Very Special Place, Inc., 138 A.D.3d 927, 931, 30 N.Y.S.3d 270 (2d Dept. 2016).

In the instant matter, the subject lease contains language including reservation of a right of reentry and that the Tenant shall "suffer the Landlord to erect, use, maintain, repair and replace pipes, conduits in the demised premises and to the floors above and below..." Such language creates a triable issue of fact as to whether Defendant was contractually obligated to repair the subject floor and maintain them in a reasonably safe condition. Given that triable issues of fact exist as to whether Defendant was negligent, the motion for indemnification must also be denied.

Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Defendant for summary judgment dismissing the Complaint, or in the alternative, for contractual indemnification against Third-Party Defendant is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear in the Trial Readiness Part for a conference on **WEDNESDAY, MARCH 11, 2020, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York
February 20, 2020

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: (all parties via NYSCEF)