SHORT FORM ORDER ORIGINAL

INDEX No. 609470/2016
CAL. No. 201902075OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

***PRESENT:***

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6/25/20 (005, 006 & 007)
MOTION DATE 8/20/20 (008)
ADJ. DATE 8/20/20
Mot. Seq. # 005 MD
# 006 MotD
# 007 MotD
# 008 MD

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JINO MUCKADACKAL,

Plaintiff,

- against -

CLK-HP 275 BROADHOLLOW LLC, CAPITAL ONE FINANCE CORP. and JONES LANG LASALLE NORTHEAST, INC.

Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers (mot. seq.005) by Capital One, dated May 21, 2020 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers by Jones Lang LaSalle, dated July 9, 2020 and by plaintiff dated July 23, 2020; Replying Affidavits and supporting papers by Capital One, dated July 22, 2020 ; Notice of Motion/ Order to Show Cause and supporting papers (mot. seq.006) by Jones Lang LaSalle, dated May 25, 2020 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers by plaintiff, dated July 23, 2020; Replying Affidavits and supporting papers by

Jones Lang LaSalle, dated August 27, 2020 ; Notice of Motion/ Order to Show Cause and supporting papers (mot. seq.007) by CLK-HP, dated May 25, 2020 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers by Jones Lang LaSalle ,dated July 9, 2020, and by plaintiff, dated July 23, 2020; Replying Affidavits and supporting papers by CLK-HP, dated August 27, 2020 ; Notice of Cross Motion and supporting papers (mot. seq. 008) by CLK-HP, dated July 8, 2020 ; Answering Affidavits and supporting papers by Jones Lang LaSalle, dated August 19, 2020, and by plaintiff, dated August 18, 2020; Replying Affidavits and supporting papers by CLK-HP, dated August 27, 2020 Other ___; it is

***ORDERED*** that the motion and cross motion by defendant CLK-HP 275 Broadhollow LLC, the motion by defendant Capital One Financial Corp., and the motion by defendant Jones Lang LaSalle Americas, Inc. are consolidated for the purposes of this determination; and it is

***ORDERED*** that the motion (005) by defendant Capital One Financial Corp. pursuant to CPLR 3212 for summary judgment in its favor with respect to its cross claims is denied as moot; and it is

***ORDERED*** that the motion (006) by defendant Jones Lang LaSalle Americas, Inc. pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint and the cross claims against it is decided as indicated herein; and it is

***ORDERED*** that the motion (007) by defendant CLK-HP 275 Broadhollow LLC pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint and the cross claims against it is decided as indicated herein; and it is further

***ORDERED*** that the cross motion (008) by defendant CLK-HP 275 Broadhollow LLC pursuant to CPLR 3212 for summary judgment in its favor with respect to its cross claims is denied as moot.

The plaintiff commenced this action to recover damages for injuries that he allegedly sustained when a door fell on him while he was attending a meeting inside a building leased by his employer, defendant Capital One Financial Corp. ("Capital One")[1]. The subject building was owned by defendant CLK-HP 275 Broadhollow LLC ("CLK"), and defendant Jones Lang LaSalle Americas Inc. s/h/a Jones LaSalle-Northeast, Inc. ("JLN") maintained the building on behalf of Capital One. The plaintiff alleges, among other things, that the defendants created a dangerous condition on the premises and that their failure to maintain the premises in a reasonably safe condition caused him to be injured. In its answer to the plaintiff's complaint, Capital One asserted cross claims for indemnification and breach of contract against JLN and CLK. Similarly, both CLK and JLN asserted indemnification claims against each other and against Capital One.

By stipulation dated February 13, 2020, the plaintiff's action against Capital One was discontinued. Capital One now moves for summary judgment dismissing the remaining claims against it, and for summary judgment on its cross claims for indemnification. JLN moves for summary judgment dismissing the plaintiff's complaint and the cross claims against it, arguing, among other

[1] Although it is sued here as Capital One Financial Corp., it appears that Capital One operates as several separate entities, including Capital One, N.A. and Capital One Services, LLC. Capital One does not make a distinction between Capital One Financial Corp. and these other entities.

things, that it did not create a dangerous condition, nor did it have actual or constructive notice of a dangerous condition on the premises. CLK moves for summary judgment on similar grounds as JLN, and it cross-moves for summary judgment on its claim for indemnification against Capital One.

The record shows that the plaintiff was an employee of Capital One, and that the accident occurred while he was at work at an office located at 275 Broadhollow Road in Melville, New York. The plaintiff was in a conference room inside the building when a door fell off its hinges and struck him. CLK owned the subject building, and Capital One, as the successor in interest to the building's previous tenant NorthFork Bank, leased the building from CLK. In October 2014, Capital One entered into a service agreement with JLN in which JLN agreed to perform general maintenance of the building, among other things.

The plaintiff testified that he was a manager at Capital One, and that he was in a meeting inside of a third floor conference room when the accident occurred. He testified that he visited the building on prior occasions but he could not recall whether he had entered the subject conference room. When he arrived to the meeting room, the door was open and he sat with his back to the door. He could not recall whether the door was closed at some point during the meeting, and when the meeting was over, he stood to exit and the door fell on him. The plaintiff was not aware of any complaints concerning the door prior to the accident.

John Burke testified on behalf of CLK. He testified that Capital One was the sole tenant in the building during the relevant period. As per the lease agreement with Capital One, CLK was not responsible for the maintenance or repair of the conference room, including the conference room doors. Burke testified that he observed that the subject door was installed after Capital One's predecessor moved into the building in 2007. Burke further testified that he did not receive any complaints about the door that fell on the plaintiff prior to the happening of the accident.

At his deposition, Kyle Middleton, a representative of Capital One testified that JLN operated as the facilities manager for Capital One buildings in New York, including the subject building. According to Middleton, a JLN representative generally accompanied a Capital One employee when an annual inspection was conducted at the building. The inspection included a three-hour walkthrough of the interior and exterior of the building, and notation of any maintenance or safety issues that needed to be addressed. Upon completion of the inspection, JLN was responsible for any necessary remediation. When he conducted inspections with JLN, Middleton did not observe any issue or defect in the conference room door, and he was not aware of any complaints about the door. Middleton testified that pursuant to the agreement between the parties, JLN was responsible for maintaining and repairing the doors and partitions of the conference room where the accident occurred. The agreement permitted JLN to make repairs up to $10,000.00 without seeking authorization from Capital One, and to hire outside contractors or vendors to make such repairs. The incident report of the accident revealed that a pin dropped out of the pivot of the door, causing it to fall.

With respect to the lease agreement between Capital One and CLK, Middleton testified that Capital One was permitted to make alterations to the interior of the building with approval from CLK. He further testified that CLK was not responsible for the maintenance, inspection, or repair of doors at

the premises. Middleton was not aware whether Capital One or CLK designed or made changes to the area where the plaintiff's accident occurred.

Cesare Arici, who was employed by JLN as a regional facilities manager during the relevant period, testified that his job duties included the day-to-day operation of the facilities managed by JLN. Arici testified that under the master services agreement with Capital One, JLN was responsible for the maintenance of the doors inside the subject premises. Part of his duties as the facilities manager included conducting quarterly inspections on the properties that the company managed. The inspections involved observing the lighting fixtures and opening and closing the doors to the conference rooms to determine whether they functioned properly. Staff that was located at the subject premises conducted a monthly inspection at the building, which included the subject conference room and the conference room door. If there was an issue with the door, a work order would have been created so that JLN could address the issue. Arici was not aware of any issues concerning the door that fell on the plaintiff, no work order was generated concerning the door, and he had not received any complaints about the door.

The master services agreement between Capital One and JLN provided, in part, that JLN would provide maintenance and repair programs for the Capital One buildings that it managed, including general building maintenance of the subject property. JLN agreed to perform preventative maintenance on structures used by Capital One, and provide various handyman services, such as repairing doors and door furniture. The master services agreement also contained an indemnity clause, in which JLN promised to indemnify Capital One from any "third party claim arising out of, or in connection with, [JLN's] negligence or willful misconduct in performance of the Services" under the agreement. Capital One also promised to indemnify JLN from any third party claim arising out of Capital One's negligence.

The lease agreement between Capital One and CLK indicated that as the tenant, Capital One "shall take good care of, and make all interior, non-structural repairs to, the demised premises." Capital One was also responsible for making "all repairs, interior or exterior, structural and non-structural . . . as when needed to preserve the Building."

In its answer, Capital One asserted cross claims against CLK and JLN for common-law indemnification and contribution, contractual indemnification, and failure to procure insurance naming it as an additional insured. Although the complaint against Capital One was withdrawn by the plaintiff, Capital One seeks summary judgment in its favor with regard to its cross claims. In its answer, CLK asserted that it is entitled to indemnification from Capital One and JLN. JLN makes similar claims against CLK and Capital One in its pleadings. The court will first address the dispositive motions of CLK and JLN for summary judgment dismissing the plaintiff's complaint.

The proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment as a matter of law by offering admissible evidence sufficient to eliminate any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party,

requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). Generally, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also*, ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). Thus, an out-of-possession landlord who has relinquished control over the premises will not be liable for personal injuries caused by a dangerous condition on the leased premises unless the landlord had a duty imposed by statute, by contract, or by a course of conduct (*see* ***Iturrino v Brisbane S. Setauket, LLC***, 135 AD3d 907, 907, NYS3d 386 [2d Dept 2016] ***Vialva v 40 W. 25th St. Assocs., L.P.***, 96 AD3d 735, 945 NYS2d 723 [2d Dept 2012]; ***Butler v Rafferty***, 100 NY2d 265).

CLK has established its entitlement to judgment as a matter of law dismissing the plaintiff's claims against it. The record shows that CLK leased the subject property to Capital One, and that the lease agreement between the parties dictated that Capital One was responsible for maintenance of the space where the accident occurred (*see* ***Bartels v Eack***, 164 AD3d 1202, 1202, 83 NYS3d 657 [2d Dept 2018]). In opposition, the plaintiff fails to raise an issue of fact whether CLK, as an out-of-possession landlord, had a duty to maintain the premises in a reasonably safe condition pursuant to a statute or regulation, or the terms of the lease, or through its own course of conduct. Accordingly, the plaintiff's claims against CLK are dismissed.

With respect to JLN's motion for summary judgment, generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Perkins v Crothall Healthcare, Inc.***, 148 AD3d 1189, 51 NYS3d 118 [2d Dept 2017]; ***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). The Court of Appeals has recognized several exceptions to this general principal whereby a party who enters into a contract may have assumed a duty of care to non-contracting third persons when (1) the contracting party fails to exercise reasonable care while performing his or her duties and launches a force or instrument of harm, (2) a plaintiff detrimentally relied on the continued performance of the contracting party's duties, or (3) the contracting party entirely displaced another's duty to maintain the premises safely (***Espinal v Melville Snow Contrs.***, *supra*; ***Yvars v Marble Hgts. of Westchester, Inc.***, 158 AD3d 850, 73 NYS3d 246 [2d Dept 2018]; ***Koslosky v Ross-Malmut***, 149 AD3d 925, 52 NYS3d 400 [2d Dept 2017]; ***Santos v Deanco Servs., Inc.***, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]; *see also* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 557 NYS2d 286 [1990]; ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160 [1928]). Here, the parties do not dispute that JLN was contractually obligated to maintain the premises in reasonably safe condition pursuant to the master services agreement between JLN and Capital One.

In that vein, as the defendant moving for summary judgment, JLN must show, prima facie, that it did not create the defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discovery and remedy it to avoid liability (***Williams v Island Trees Union Free Sch. Dist.***, 177 AD3d 936, 414 NYS2d 718 [2d Dept 2019]; ***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]; ***Ariza v Number One Star Mgt. Corp.***, 170 AD3d 639, 93 NYS3d 603 [2d Dept 2019]; ***Witkowski v Island Trees Pub. Lib.***, *supra*). To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the landowner to discovery and remedy it, and it will not be imputed where the defect is latent or would not, upon reasonable inspection, be discovered (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Williams v Island Trees Union Free Sch. Dist.***, *supra*; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]; ***McDermott v Santos***, 171 AD3d 1158, 98 NYS3d 646 [2d Dept 2019]; ***Radosta v Schechter***, 171 AD3d 1112, 97 NYS3d 664 [2d Dept 2019]). To meet the prima facie burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the accident (***Kelly v Roy C. Ketcham High Sch.***, 113 NYS3d 572, 2020 NY Slip Op 00111 [2d Dept 2020]; ***Williams v Island Trees Union Free Sch. Dist.***, *supra*; ***Coker v McMillan***, 177 AD3d 680, 112 NYS3d 272 [2d Dept 2019]).

JLN contends that it did not create a dangerous condition on the leased premises nor did it have actual or constructive notice of the dangerous condition complained of. JLN has met its burden on the motion. The evidence proffered shows that JLN and Capital One entered into the master service agreement in 2014, some years after Capital One's predecessor had possession of the building. The conference room and door were installed prior to the execution of that agreement. The record further establishes that JLN employees conducted a monthly and quarterly inspection on the premises–an inspection that included the conference room where the door was located. Importantly, the plaintiff does not dispute that the monthly inspection occurred prior to the accident. JLN's representative testified that the inspection involved opening and closing the door, and that staff who conducted the inspection did not observe any defect in the door. Neither Capital One nor JLN received complaints about the subject door prior to the plaintiff's accident.

In opposition, the plaintiff failed to raise a triable issue of fact warranting denial of summary judgment (***Zuckerman v City of New York***, *supra*). The plaintiff contends that JLN failed to conduct a reasonable inspection of the door, and that opening and closing the door was not sufficient. The plaintiff has failed to proffer any evidence to show that the inspection that JLN conducted was insufficient or that a more diligent inspection was required under the circumstances (*see* ***Lee v Bethel First Pentecostal Church of Am.***, 304 AD2d 798, 762 NYS2d 80 [2d Dept 2003]; ***Bean v Ruppert Towers Hous. Co., Inc.***, 274 AD2d 305, 308, 710 NYS2d 575 [1st Dept 2000]; ***Ferris v County of Suffolk***, 174 AD2d 70, 75, 579 NYS2d 436 [2d Dept 1992]). Accordingly, the motion by JLN for summary judgment dismissing the compliant against it is granted.

In light of the Court's granting of summary judgment in favor of both JLN and CLK dismissing the complaint, and in light of fact that the action was discontinued against Capital One by the plaintiff, the motion by Capital One for summary judgment in its favor with respect to the claims against it and its cross claims is denied as moot. The branch of the motion of JLN for indemnification is denied as moot,

and the branch of the motion by CLK for summary judgment on its claim for indemnification and contribution is denied as moot. Finally, CLK's cross motion for summary judgment is denied.

Dated: OCT 26 2020

HON. JOSEPH A. SANTORELLI
J.S.C.

**__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION**