SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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KOY THAN,

Plaintiff,

- v -

BNY CONSTRUCTION INC.,
BEE LING THAM, and KHAI MENG THAM,

Defendants.

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INDEX NO. 154419/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38-52 were read on this motion for summary judgment.

By notice of motion, defendant BNY Construction Inc. moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims asserted against it. Only plaintiff opposes.

This action arises from an accident sustained by plaintiff on February 1, 2017 while descending stairs at 127 East 62nd Street in Manhattan.

I. BACKGROUND

At her deposition, plaintiff testified that she had been employed as a housekeeper by Tham defendants for five and a half years at their previous residence in Manhattan. From January 30, 2017 through February 1, 2017, while moving to a new six-floor residence at 127 East 62nd Street in Manhattan, the Thams directed plaintiff to help them unpack.

On January 30, 2017, the first day of the move, plaintiff visited the Thams' new residence for the first time and observed that the building was undergoing renovations on the first three

floors, containing construction materials, debris, and workers. According to plaintiff, however, the work was almost complete, and the Thams started sleeping there that night. There was an elevator in the building, but the Thams told her that she could not use it, as it was not yet fully operational.

The Thams also told plaintiff that while she was in the building, she needed to wear shoe covers, which she described as sock-like covers with an elastic band that she put over her sneakers. The shoe covers were slippery, making it difficult to walk. On the first day of moving, plaintiff complained to Mrs. Tham that the shoe covers were "very slippery," and Mrs. Tham responded by scolding her and telling her to, among other things, "[w]ork faster." Plaintiff is not certain that Mrs. Tham heard her complaint about the shoe covers.

Each floor including the stairs and not including those in the bedrooms, was covered with paper installed by the workers. The covering was not tightly taped to the stairs, as plaintiff felt it move when she stepped on it. She walked up and down the stairs many times and never complained about the paper cover moving.

As she picked up a box of clothing in the fourth-floor master bedroom, plaintiff slipped, which she attributes to the weight of the box and the slippery, recently polished floor. She did not fall as one of the workers caught her, and she sustained no injury. Plaintiff did not tell Mrs. Tham that she had slipped, fearing that she would be scolded.

On February 1, 2017, at approximately 2:00 pm, she was again unpacking boxes in the fourth-floor master bedroom. To use the first-floor bathroom, as required by the Thams, she began to descend the stairs and as she put her left foot on the first step between the second and first floors, she slipped and fell down the remainder of the stairs until she hit the first floor. On being shown a photograph of the stairs (NYSCEF 46), plaintiff confirmed its fairness and

accuracy and circled the step on which she had slipped, although she stated at her deposition that the photograph does not depict the paper covering on the stairs and the plastic covering that was on the top landing of the stairs at the time, and that while the photograph reflects a handrail along the stairs, there is none at the top landing, where a worker stood on a ladder painting the wall approximately about one foot from the steps. As the worker on the ladder blocked the stairs, plaintiff walked sideways to get around him. (NYSCEF 45).

At his deposition, a BNY carpenter who worked at the building on the day of plaintiff's accident testified that the floors of the building were covered with paper to protect them from dirt. He was not certain that the stairs were covered. BNY provided the shoe coverings that plaintiff wore, and all BNY workers wore them. When asked about the contract between BNY and the Thams, he denied having seen it or knowing about it. (NYSCEF 50).

By summons and verified complaint dated May 11, 2017, plaintiff commenced this action, alleging that defendants were negligent, and that as a result, she slipped, fell, and sustained injury. (NYSCEF 40).

By verified answer dated June 23, 2017, the Thams advance cross claims against BNY for contribution, common-law indemnity, contractual indemnity, and breach of contract for failure to procure insurance. (NYSCEF 41).

In her verified bill of particulars dated July 31, 2017, plaintiff alleges that, *inter alia*, there was no handrail, that there was a covering on the stairs, and that defendants required her to wear "footwear." She alleges that she fell the day before her accident due to the same improper footwear. (NYSCEF 43).

II. CONTENTIONS

A. BNY (NYSCEF 38-49)

BNY contends that there was no dangerous condition at the premises on the date of plaintiff's accident, and that even if there was, it did not create it. It argues that plaintiff's fall was caused solely by the allegedly slippery shoe coverings, that the coverings are routinely used indoors, and that there is nothing inherently negligent about wearing them regardless of who directed plaintiff to wear them. It observes that there is no allegation that the shoe covers were defective and that plaintiff offers no expert evidence about a defect.

Even if there was a dangerous condition, BNY asserts, it lacked actual and constructive notice, as plaintiff testified that she traversed the stairs without issue for the two days before her accident, and she never notified BNY that either the floors or shoe coverings were slippery. Moreover, as she testified that she previously slipped in the master bedroom, where there was no paper on the floor, the paper on the stairs cannot be considered a dangerous condition.

BNY argues that the Tham's cross claims for indemnification are advanced prematurely, absent a finding of liability, and thus, their cross claims should be dismissed.

B. Plaintiff (NYSCEF 50)

Plaintiff argues that an issue of fact exists as to the cause of her accident, as the evidence reflects that there were two layers of protective covering on the stairs, that the stairs were blocked by a BNY worker on a ladder, and that there was no handrail where she slipped. Moreover, these dangerous conditions were exacerbated by the requirement that she wear shoe coverings. She asserts that BNY had notice of the dangerous conditions, as it installed the two layers of covering on the stairs, which were present for a few days before plaintiff's slip, and a BNY employee obstructed the stairs.

C. Reply (NYSCEF 52)

BNY argues that plaintiff's testimony reflects that she does not know the cause of her fall, and it observes that she does not allege that floor coverings were the cause of her fall in her bill of particulars. It denies that the floor coverings constitute a dangerous condition, relying on testimony that they were taped down, and there is no mention of it being slippery or anyone falling on it. It reiterates that plaintiff's claim concerns her slippery shoe coverings only, and it denies that the lack of a handrail caused her fall, as a handrail is depicted in the photograph. It denies having a duty to move the ladder near the staircase and maintains that there is no evidence that the ladder was placed in a precarious location and that plaintiff did not ask the worker to move the ladder. It had no notice of a dangerous condition, as plaintiff traversed the stairs without issue for days, and there is no evidence that it was aware of any hazardous condition.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Duty

Landowners have a duty to maintain their property in "a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk." (*Musano v City of New York*, 182 AD3d 491, 491-92 [1st Dept 2020], citing *Basso v Miller*, 40 NY2d 233, 241 [1976]). A contractor, however, may be held to have assumed a duty of care to nonparties to the contract only:

> (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.

(*Medinas v MILT Holdings LLC*, 131 AD3d 121, 126 [1st Dept 2015], quoting *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002] [internal marks omitted]).

For a defendant-contractor to meet its *prima facie* burden of demonstrating that it owed no duty of care to plaintiff, the defendant need only offer proof that plaintiff was not a party to the contract between it and the property owner. (*See Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901 [2d Dept 2011] [defendant-contractor demonstrated *prima facie* entitlement to summary judgment with proof that plaintiff was not party to contract]). As BNY fails to produce its contract with the Thams, or evidence of the terms thereof, it does not satisfy its *prima facie* burden. (*See Colbourn v ISS Int'l Serv. Sys., Inc.*, 304 AD2d 369, 369 [1st Dept 2003] [failure to produce contract with premises owner constitutes defect in defendant's *prima facie* showing, requiring denial of summary judgment regardless of sufficiency of plaintiff's opposition]).

B. Causation

A defendant also may establish its *prima facie* entitlement to summary judgment by demonstrating that the plaintiff cannot identify the cause of her fall. (*Moiseyeva v New York City*

Hous. Auth., 175 AD3d 1527, 1528 [2d Dept 2019]). Here, however, plaintiff alleged both in her bill of particulars and at her deposition that the slippery shoe covers, the BNY worker on the ladder blocking the stairs, the absence of a handrail, and the protective covering on the floors and stairs all contributed to her fall, and while she may not know the precise cause thereof, viewing the evidence in the light most favorable to plaintiff, defendant fails to establish that plaintiff cannot identify the cause of her fall. (*Compare Zanki v Cahill*, 2 AD3d 197 [1st Dept 2003], *affd* 2 NY3d 783 [2004] [dismissing complaint where plaintiff testified that she saw nothing on the stairs both before and after accident], *with Chimilio-Ramos v Banguera*, 62 AD3d 538, 538–39 [1st Dept 2009] [denying summary judgment where, despite plaintiff's inability to remember precise details of fall, evidence sufficient to permit reasonable inference as to cause of fall]).

C. Cross claims

Absent a finding of liability, dismissal of the Tham's cross claims for indemnification is premature. (*See Iurato v City of New York*, 18 AD3d 247, 248 [1st Dept 2005], *lv denied* 6 NY3d 806 [2006] [dismissal of indemnification claim premature absent determination of liability]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant BNY Construction Inc.'s motion for summary judgment is denied in its entirety.

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5/28/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE