

Myer v Antis Contr. Corp.

2021 NY Slip Op 32131(U)

November 4, 2021

Supreme Court, New York County

Docket Number: Index No. 151246/2017

Judge: Shawn T. Kelly

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHAWN TIMOTHY KELLY PART IAS MOTION 57

Justice

-----X

ARLYNE MYER,

Plaintiff,

- v -

ANTIS CONTRACTING, CORP., THE BRODSKY ORGANIZATION, LLC., BRODCOM WEST DEVELOPMENT COMPANY, LLC., WEST END TOWERS, LLC., ANTIQUE MARBLE INC.,

Defendants.

-----X

ANTIS CONTRACTING, CORP.

Third-Party Plaintiff,

-against-

ANTIQU MARBLE INC.

Third-Party Defendant.

-----X

DECISION + ORDER ON MOTION

Third-Party
Index No. 595884/2017

INDEX NO. 151246/2017

MOTION DATE 09/18/2020,
09/22/2020

MOTION SEQ. NO. 001 002

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 82, 84, 85, 86, 87, 88, 89, 90, 97, 103, 105, 106, 107, 108, 110

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 104, 109

were read on this motion to/for JUDGMENT - SUMMARY

Motion sequence nos. 001 and 002 are consolidated for disposition.

In motion sequence no. 001, defendant/third-party defendant Antique Marble Inc. (herein Antique) moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint, the third-party complaint, and the cross claims against it. In motion sequence no. 002 defendants The Brodsky Organization LLC. (herein Brodsky), Brodcom West Development Company LLC.

(herein Brodcom), and West End Towers LLC. (herein West End Towers) (collectively herein, the Brodsky Defendants) move under CPLR § 3212 for summary judgment dismissing the complaint and the cross claims against them.

Background

This personal injury action arises out of an accident that occurred on August 8, 2016 at 9:45 a.m. Plaintiff Arlyne Myers tripped and fell in the vestibule of the building where she resides, located at 75 West End Avenue, New York, New York (herein the Building). According to the verified bill of particulars, plaintiff “tripped on the gap between the plywood boards laid on the floor of the lobby and the lobby floor tiles” (NYSCEF Doc No. 50, Susan B. Owens [Owens] affirmation exhibit G, ¶ 2 [f]).

West End Towers owns the Building (NYSCEF Doc No. 48, Owens affirmation, exhibit E, ¶ 6), and Brodcom is the landlord (NYSCEF Doc No. 103, William C. Neves [Neves] affirmation, exhibit A at 33). Prior to the accident, Brodsky hired defendant/third-party plaintiff Antis Contracting, Corp. (Antis) to renovate the Building’s lobby.¹ Antis retained Antique as its subcontractor for the floor tile installation portion of the work (NYSCEF Doc No. 56, Owens affirmation, exhibit M at 1).

Plaintiff testified that the accident occurred on her way to work (NYSCEF Doc No. 73, Spiro affirmation, exhibit M [plaintiff 3/16/18 tr] at 16]). To exit the Building, she had to walk through one set of doors from the lobby into a vestibule, and then through another set of doors from the vestibule onto the street (*id.* at 11, 24 and 41). The lobby was under construction at the time (NYSCEF Doc No. 74, Spiro affirmation, exhibit N [plaintiff 3/29/18 tr] at 94). Plaintiff testified that she entered the vestibule and turned to her right to look at a mirror (NYSCEF Doc

¹ The written contract between Brodsky, nonparty Peter Hosier Design and Antis identifies Antis as “Antis Construction Corp.” (NYSCEF Doc No. 80, A. Jeffrey Spiro [Spiro] affirmation, exhibit at 1).

No. 73 at 17). When she turned to walk out of the vestibule, she fell to the ground (*id.* at 46). She could not recall if her foot had caught on something (*id.*) but stated that she fell on a “ridge” between two “big construction boards” on the floor, or on the area between the floor and a black rug laid down on the floor during inclement weather (*id.* at 27, 31 and 46-47). She did not recall seeing the rug or the boards before she fell (*id.* at 27 and 34) but later testified that she “assume[s]” she saw the boards when she entered the vestibule (*id.* at 53). Although she did not know each board’s thickness or dimensions (*id.* at 32-33), she believed there was a one-inch height differential between the bottom and top of the boards (NYSCEF Doc No. 74 at 101). Plaintiff testified that a concierge, Fabian Smith (Smith), and an unnamed employee helped her up off the ground (NYSCEF Doc No. 73 at 48 and 52). She told the unnamed man that she had “tripped over those uneven boards” (NYSCEF Doc No. 74 at 97). When plaintiff took photographs of the vestibule later that day, caution tape had been put up around the accident area (*id.* at 30 and 41).

Smith testified that he had an unobstructed view of the front door from his desk in the lobby (NYSCEF Doc No. 53, Owens affirmation, exhibit J at 10). He stated that prior to the accident, plaintiff and two other tenants were standing in the vestibule (*id.* at 30). He saw plaintiff step towards the front door and fall (*id.* at 32-33). Smith did not see if plaintiff’s foot had caught on anything (*id.* at 32). He helped plaintiff up off the ground (*id.* at 39), and Peter Perrachio (Perrachio), the Building manager, also offered his assistance (*id.* at 100-102).

Smith stated that construction work in the vestibule began one month before the accident (*id.* at 76), but there was no work taking place that day (*id.* at 17). He did not know who placed the half-inch thick piece of plywood on the floor (*id.* at 51 and 85) or who put up the caution tape after the accident (*id.* at 80). He did not see anyone put tape down on the plywood, pull the tape up, or replace the plywood (*id.* at 117-118). Smith testified that he did not know if porters, who

cleaned the Building, ensured that contractors cleaned their areas at the end of the day (*id.* at 80). Smith testified that he had never received any complaints about the vestibule or the boards before the accident (*id.* at 85 and 116). Had someone complained, he would have reported it (*id.* at 117). Smith testified that he last walked through the vestibule two to two and one-half hours before the accident and did not see anything wrong on the right side of the vestibule (*id.* at 87). Smith also testified that he did not look around the vestibule when he walked through it, and he was not sure if he saw any caution tape in the area (*id.* at 88).

Smith spoke to plaintiff's attorney three to four weeks after the accident (*id.* at 50). His sworn statement reads, in pertinent part:

“Arlyne Myer ... was walking out from the vestibule when she tripped on construction material on the floor. There were hard boards on the vestibule floor, leaving about an inch gap to the floor tiles. The gap was about ¾” deep. I saw Arlyne Myer trip in this gap and fall forward. She was disoriented and hurt. There were no warning signs or cones or tape placed there to warn of the gap”

(NYSCEF Doc No. 106, Charles J. Rappaport [Rappaport] affirmation, exhibit 1 at 1).

Perrachio testified that he worked for nonparty Urban Associates LLC (Urban), which is part of Brodsky (NYSCEF Doc No. 103 at 11). In 2016, he was a senior property manager for the Building (*id.* at 14-15). He learned of the accident from a notice of claim Maria Mazza (Mazza), the assistant property manager, had prepared for an insurance broker (*id.* at 18). He did not discuss the claim with Mazza or ask where she had obtained the information (*id.* at 20), and he took no steps to investigate (*id.* at 22). He denied assisting plaintiff, stating “that did not happen,” and added that he was not in the area when she fell (*id.* at 26). Perrachio testified that the old floor was visible in a photograph of the vestibule taken shortly after the accident (*id.* at 44).

Perrachio explained that it was the contractor's responsibility to protect its work area (*id.* at 31), and if the contractor left for the day, he “would imagine” the Building would take additional

measures to ensure that the area was safe (*id.* at 31). Perrachio did not know who placed the masonite boards in the vestibule, but he believed it may have been the contractor (*id.* at 39). He stated that if tape at the edge of the masonite was “lifted,” then someone from Brodcom, Brodsky, or Urban would fix it (*id.* at 40). Perrachio did know if the vestibule floor had been replaced by August 2016 (*id.* at 42). He was also “sure” that he had received complaints about the construction work (*id.* at 25), but he could not recall any specific complaints about the vestibule (*id.* at 26).

Andrzej Moroch (Moroch), the Building’s superintendent (NYSCEF Doc No. 90, Neves affirmation, exhibit F at 6-7), testified that porters cleaned the vestibule (*id.* at 98), but “[i]t’s not [the] porter[’s] responsibility to inspect anything” (*id.* at 99). Doormen also were not required to look for dangerous conditions (*id.* at 87). Moroch added that there was no specific procedure for employees to report a dangerous condition other than to tell a supervisor (*id.* at 101). It would then be “up to” the supervisor to take the next step (*id.*). If Moroch saw a dangerous condition or received a complaint that fell outside of his department, he would tell Perrachio (*id.* at 14 and 44). Moroch did not know who was responsible for inspecting the vestibule for dangerous conditions or for tripping hazards when contractors were not present (*id.* at 14, 44 and 100). However, he acknowledged that it was the building’s responsibility to ensure that tenants had a safe means of ingress and egress (*id.*).

Moroch testified that he did not supervise the contractors who renovated the lobby (*id.* at 54) and did not know who did supervise them (*id.* at 42). He recalled that the contractor had placed masonite on the floor for tenants to walk on (*id.* at 38 and 53). Moroch did not personally inspect the masonite boards to ensure they were safe, and no one who worked for him inspected them (*id.* at 39). Neither his staff nor the Building tenants complained about the masonite to him (*id.* at 43). Moroch did not know if he reported any type of condition regarding the masonite in the vestibule

in August 2016 (*id.* at 15). He could not recall seeing any unevenly placed masonite in the lobby (*id.* at 53).

Moroch testified that photographs of the accident location appeared to depict one of the Building's black rugs in the vestibule and that "it would be whoever was on duty in the lobby for XYZ reason to put it up to protect the tile floor" (*id.* at 78). He acknowledged that the rugs were used for the safety of the tenants as they walked in and out of the Building (*id.* at 79). He denied ever consulting with the contractor about putting rugs down in the vestibule (*id.* at 99). Moroch stated that he would use caution tape to block off areas at the Building (*id.* at 102). He could not recall using caution tape to block off the vestibule or seeing his employees put up caution tape in that area (*id.* at 102-103).

Konstantinos Galitos, Antis's principal, testified that Antis contracted to renovate the lobby (NYSCEF Doc No. 54, Owens affirmation, exhibit K at 8 and 21). By August 2016, the left and right sides of the vestibule were complete except for the middle "door section" (*id.* at 46 and 75). He stated that at that time, "[e]verything was at the same level, except the floor wasn't replaced ... due to the fact that they were debating if it was going to be a revolving door there or a sliding door" (*id.* at 47). Galitos testified that Antique did not supply any masonite (*id.* at 93) and admitted that it was "[p]robably us" (*id.* at 69) that placed the one-eighth inch thick masonite boards on the vestibule floor (*id.* at 67). Galitos later testified that "[i]t might have been us [who put the masonite on the floor]. It might have been the floor guys, too, but I can't, you know, I can't say right now" (*id.* at 75).

Galitos testified that he and Moroch had discussed placing a black runner in the vestibule while the construction was ongoing (*id.* at 100). Galitos explained, "the runner should be where it's supposed to be all the time. That was the understanding" (*id.* at 99), and that "we had to protect

– everything had to do with safety, so this runner was protecting anything from happening” (*id.* at 100). When shown a photograph of the vestibule taken after the accident, Galitos observed that “the runner carpet is not where it’s supposed to be” (*id.* at 72). He stated, “when we installed the carpet, it was covering both ends ... [so] [y]ou shouldn’t be seeing the tile underneath” (*id.* at 72). Galitos made it a point to cover any gap between the runner and the new tiles (*id.* at 114) so the runner would “overlap the new with the old floor” (*id.* at 98). Galitos also stated that the caution tape depicted in the photograph “was supposed to be there all the time” (*id.* at 77). Use of the caution tape was not part of Antis’s contract, but Antis put up the tape because “it’s just safety and, you know, by our company” (*id.*). Galitos stated that the caution tape “was supposed to be maintained by whoever. If somebody took it down, they have to put it back” (*id.* at 77-78).

Galitos testified that he first learned of the accident from Antis’s insurance company (*id.* at 105). He then contacted Jani Pando (Pando), who told him that he knew nothing about the accident (*id.* at 108). The last time Galitos visited the Building before the accident was August 5, 2016 (*id.* at 111). He believed that the runner was in the middle over the vestibule “covering ... the two [finished] sides, the sides on both sides, the edging” at that time (*id.* at 112). He could not recall whether the masonite covered any part of the vestibule on that visit (*id.*).

Pando, Antique’s owner (NYSCEF Doc No. 55, Owens affirmation, exhibit L at 10), testified that its subcontract with Antis did not include any plans or specifications (*id.* at 13). When he and Galitos discussed the project, Galitos “promised me he’s going to give – I guess he’s going to have a crew every day with me, guys to – in front of me to do the demolition and the protection. This is the deal between me and [Galitos]” (*id.* at 36). He explained that Antis supplied Antique with materials (*id.* at 15), and that Antique installed the new floor in the vestibule in June 2016 (*id.* at 20). Antique last worked in the lobby or vestibule on June 16, 2016 (*id.* at 24). Pando

testified that Antis placed the masonite over the floor in the vestibule (*id.* at 20) and that Antique had nothing to do with the masonite boards after they were put in place (*id.* at 24). He never saw his employees install any masonite (*id.* at 65). He never discussed floor protection with anyone at Antis (*id.*), and he never discussed placing a mat over the gap between the tiles in the vestibule with Antis or anyone at the Building (*id.* at 66). Pando added that Antique was not responsible for putting up caution tape as “it’s not part of the deal as I said it. Protection is Antis” (*id.* at 64).

Procedural History

Plaintiff commenced this action against Antis and the Brodsky Defendants by filing a summons and complaint seeking damages for negligence (NYSCEF Doc No. 62, Spirio affirmation, exhibit B). Antis filed a third-party summons and complaint against Antique for common-law indemnification and contribution (NYSCEF Doc No. 44, Owens affirmation, exhibit A). Plaintiff then filed a supplemental summons and amended verified complaint and added Antis as a defendant in the main action (NYSCEF Doc No. 46, Owens affirmation, exhibit C). Plaintiff filed a note of issue on February 7, 2020 (NYSCEF Doc No. 58, Owens affirmation, exhibit O). Antique and the Brodsky Defendants now move separately for summary judgment.

Discussion

It is well settled that the party moving for summary judgment “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR* § 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of

fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to meet its *prima facie* burden, the motion must be denied without regard to the sufficiency of the opposing papers (*see Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

A. Antique's Motion for Summary Judgment

On its motion, Antique asserts that it was not responsible for laying down the masonite or the runner on which plaintiff allegedly tripped, and therefore, it did not owe plaintiff a duty of care under *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]). Antique also claims that it completed its work in the vestibule two months before the accident.

“In order to prevail on a negligence claim, ‘a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom’” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal citation omitted]). The question of whether a duty exists (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]), and the scope of that duty is an issue for the court to determine, as there can be no liability in the absence of a duty (*see Pasternack*, 27 NY3d at 825). “Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005], citing *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied, lv dismissed* 73 NY2d 783 [1988]). It is undisputed that Antique does not own, occupy or control the Building.

Ordinarily, a contractor does not owe a duty of care to noncontracting third parties except under three circumstances. A contractor may be held liable to a third party in tort:

“(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, ‘launche[s] 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"

(*Espinal*, 98 NY2d at 140 [citations omitted]). While there is conflicting testimony as to whether Antique had completed its work in the vestibule before the accident, Antique has established that none of the *Espinal* exceptions are applicable.

The first *Espinal* exception applies where the contractor "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Here, there simply is no evidence that Antique created, or increased, an unreasonable risk of harm to others. The second exception is inapplicable since the record does not show that plaintiff had actual knowledge of the subcontract between Antis or Antique (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]). The third exception is also inapplicable because Antique's one-page subcontract is not so comprehensive as to totally displace the owner's duty to maintain the Building (*see Church*, 99 NY2d at 113). Thus, Antique has met its burden on summary judgment.

Plaintiff fails to raise a triable issue of fact in opposition. Her assertion that Antique launched an instrument of harm is unconvincing. In view of Galitos's testimony that the old and new floor tiles were level, plaintiff has not shown how Antique's work made the vestibule less safe or created an unreasonable risk of harm (*see Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 456 [1st Dept 2018], *appeal withdrawn* 32 NY3d 1168 [2019]). Notably, plaintiff alleges that she fell on the masonite boards over the new floor. Her contentions that the second and third *Espinal* exceptions have been satisfied are also speculative. Plaintiff does not point to any passage in her deposition to show that she relied on Antique's continued performance of its subcontract to her detriment (*see Espinal*, 98 NY2d at 141), and her claim that there was ongoing construction is too general to establish reliance. As to the third exception, the subcontract did not impose any

contractual obligations upon Antique to secure its work (NYSCEF Doc No. 56 at 1). Thus, plaintiff's claim that Antique assumed a duty to inspect and manage the site is not supported.

Antis also fails to raise a triable issue of fact. Its argument that Antique's answer and three deposition transcripts submitted on the motion are not in admissible form is unconvincing. First, the deposition transcripts are admissible (*see Castano v Wygand*, 122 AD3d 476, 477 [1st Dept 2014]). Each transcript was certified by the court reporter (NYSCEF Doc No. 53 at 123; NYSCEF Doc No. 54 at 139; NYSCEF Doc No. 55 at 73), and Antique has submitted the CPLR § 3116 notices in reply (NYSCEF Doc Nos. 100-101, Owens reply affirmation, exhibits A-B). Galitos's transcript is also admissible (*see Morchik v Trinity Sch.*, 257 AD2d 534, 536 [1st Dept 1999] [stating that "[a]n unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion"]; *Saito v Delia*, 2020 NY Slip Op 31067[U], *3 [Sup Ct, NY County 2020], citing *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]). Importantly, Antis does not challenge the accuracy of the transcript and quotes extensively from it in its opposition. Antique has also furnished the signature page for plaintiff's transcript (NYSCEF Doc No. 102, Owens reply affirmation, exhibit C).

The argument that Antique's answer to the amended verified complaint is inadmissible is unpersuasive. CPLR § 3212 (b) states that a summary judgment motion shall be supported by a copy of the pleadings. Although the answer is not verified, Antis has not proffered any evidence that plaintiff served Antique with a notice in accordance with CPLR § 3222 stating that she intended to treat the unverified answer as a nullity (*see Forty Cent. Park S., Inc. v Kiss*, 40 AD3d 236, 236 [1st Dept 2007]). Thus, it constitutes a pleading for purposes of CPLR § 3212 (b).

Antis also argues that Pando has no personal knowledge of whether his employees laid down the masonite since he was not present at the Building each day. However, Galitos testified repeatedly that Antis supplied, owned, and installed the masonite used at this location. Galitos's testimony that "[i]t might have been the floor guys, too, but I can't, you know, I can't say right now" is too speculative to conclude that Antique was responsible. Even if plaintiff had tripped on a gap between the masonite and the runner, neither plaintiff nor Antis have demonstrated that it was Antique's contractual obligation to ensure that the masonite or the runner covered any part of the vestibule. Significantly, Antis has not refuted Pando's testimony that Antis agreed to furnish protection or Galitos's testimony that he and Moroch had agreed on where to place the runner.

Claims for contribution and common-law indemnification are generally predicated upon proof that the party from whom indemnification or contribution is sought was negligent (*see Astrakan v City of New York*, 184 AD3d 444, 445 [1st Dept 2020]; *Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). As discussed above, Antique has demonstrated that its actions did not cause or contribute to the happening of the accident, and Antis has failed to raise a triable issue of fact. Consequently, Antique's motion for summary judgment dismissing the complaint, the third-party complaint, and the cross claims asserted against it is granted.

B. The Brodsky Defendants' Motion for Summary Judgment

On their motion, the Brodsky Defendants argue that they did not create or have actual or constructive notice of a dangerous condition in the vestibule. As such, they submit that summary judgment is warranted. These defendants also posit that the allegedly dangerous condition on which plaintiff tripped was open and obvious, and that it was not reasonably foreseeable that she would leave a safe, unobstructed pathway to venture onto the masonite.

“[A] defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it” (*Madden v 3240 Henry Hudson Parkway, LLC*, 192 AD3d 1095, 1095-1096 [2d Dept 2021] [internal citation omitted]; *accord Leavy v Key Food Stores Co-Operative, Inc.*, 188 AD3d 532, 532 [1st Dept 2020]). As applied here, the Brodsky Defendants have demonstrated their lack of actual notice as their witnesses testified that they did not receive any complaints about the masonite prior to the accident (*see Aberger v Camp Loyaltown, Inc.*, 193 AD3d 195, 198 [1st Dept 2021]). However, the Brodsky Defendants have failed to meet their *prima facie* burden on their lack of constructive notice. “A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). The Brodsky Defendants have not proffered any evidence of when the vestibule was last inspected before the accident (*see Solomon v Diego Beekman Mut. Hous. Dev. Corp.*, 190 AD3d 660, 660 [1st Dept 2021]). Importantly, Smith testified that he did not look around the vestibule when he walked through it that morning, and Moroch testified that he did not know who was responsible for inspecting the vestibule.

Similarly, although the Brodsky Defendants’ contend that the condition on which plaintiff tripped was open and obvious, whether the condition is open and obvious does not relieve them of their duty to maintain the premises in a reasonably safe condition (*see Lopez v 1355 Morris Ave.*, — AD3d —, 2021 NY Slip Op 03665, *1 [1st Dept 2021]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 74 [1st Dept 2004] [stating that “[a] landlord’s duty to maintain premises in a

reasonably safe condition ... is not satisfied by permitting a highly dangerous – but correctible – condition to remain, simply because the dangerous condition is obvious”). An open and obvious condition “merely eliminates the property owner’s duty to warn of the hazard” (*Westbrook*, 5 AD3d at 70). The Brodsky Defendants have not refuted plaintiff’s testimony that there was no caution tape or other warning in place in the vestibule.

The Brodsky Defendants also maintain that it was unforeseeable that plaintiff would leave a safe path for egress to walk atop the masonite, but Smith testified that tenants “normally stand here to the right side [of the vestibule] to wait for the bus” (NYSCEF Doc No. 76 at 107). Plaintiff testified that there was a mirror and a “shelf ... [where] [y]ou could put down your bag” on the left and right sides of the vestibule at the time of the accident (NYSCEF Doc No. 73 at 17). Thus, the Brodsky Defendants have not shown it was unforeseeable that plaintiff would have walked across the masonite. The case cited by the Brodsky Defendants on the issue of foreseeability is inapposite (*see Quintana v New York City Hous. Auth.*, 91 AD3d 578, 578 [1st Dept 2012] [reasoning that it was unforeseeable that the plaintiff would climb over a mound of snow to cross the street when the snow did not block his access to a crosswalk and where other options for crossing the street were available]).

Accordingly, it is

ORDERED that the motion of defendant/third-party defendant Antique Marble Inc. for summary judgment dismissing the complaint, the third-party complaint and the cross claims against it (motion sequence no. 001) is granted, and the complaint, the third-party complaint and the cross claims are dismissed against said defendant; and it is further

ORDERED that the said claims and cross claims against defendant/third-party defendant Antique Marble Inc. are severed and the balance of the action shall continue against the remaining defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant/third-party defendant Antique Marble Inc. dismissing the complaint, the third-party complaint and the cross claims against it, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendants Brodsky Organization LLC., Brodcom West Development Company LLC., and West End Towers LLC. for summary judgment dismissing the complaint and the cross claims against them (motion sequence no. 002) is denied.

11/04/2021

DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE