SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:
Hon. Carmen Victoria St. George
Justice of the Supreme Court

LORI SAPORITO-ELLIOT,

Plaintiff,

-against-

THE COUNTY OF SUFFOLK, TOWN OF ISLIP INDUSTRIAL DEVELOPMENT AGENCY and COURTHOUSE CORPORATE CENTER LLC,

Defendants.

Index No. 619043/17

Motion Seq: 002 MD

Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	28-34
Answering Papers.....	36-40
Reply.....	42
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendant County of Suffolk (the County) moves for summary judgment dismissal of the complaint in this personal injury action on the basis that it does not owe a duty of care to the plaintiff, a court reporter employed by New York State Courts (the State). Plaintiff opposes the requested relief.[1].

On November 21, 2016, plaintiff tripped and fell on a piece of ripped carpeting in the court reporter's office located on the fourth floor of the Cohalan Court Complex, Central Islip, New York. Plaintiff alleges that she sustained injuries to her knees, particularly her right knee as a result of the trip and fall.

---

[1] By stipulation dated February 6, 2018, all claims and cross-claims alleged against defendant Courthouse Corporate Center LLC have been discontinued with prejudice. Defendant Town of Islip Industrial Development Agency has not appeared; however, the plaintiff has not taken a default judgment against the IDA.

Summary Judgment Standard

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

The Question of the Duty Owed to Plaintiff

"In order to establish a prima facie case of negligence, a plaintiff must demonstrate (1) the existence of a duty on the defendant's part as to the plaintiff, (2) a breach of this duty, and (3) an injury to the plaintiff as a result thereof" (***Gaeta v City of New York***, 213 AD2d 509, 510 [2d Dept 1995], *citing* ***Akins v Glens Falls City School District***, 53 NY2d 325, 333 [1981]; *see also* ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565 [2011]; ***Kevin Kerveng Tung, P.C. v JP Morgan Chase & Co.***, 105 AD3d 709 [2d Dept 2013]).

"It is well established that before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to plaintiff (***Palsgraf v. Long Island Railroad Co.***, 248 NY 339, 342). In the absence of duty, there can be no breach of duty and without a breach there is no liability" (***Purdy v Public Administrator of the County of Westchester***, 127 AD2d 285, 288 [2d Dept 1987]). Moreover, the determination of whether a defendant owed a duty to the plaintiff is a question of law (***Purdy***, ***supra*** at 288.). "Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" (***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 710 [2d Dept 2012]). More specifically, a municipality will generally not incur liability for failure to maintain property in a reasonably safe condition when it does not own or control such property, unless it affirmatively undertakes such a duty (*see* ***Carlo v. Town of East Fishkill***, 19 AD3d 442 [2d Dept 2005]).

Here, it is undisputed that the County owns and operates the subject courthouse, and that there is a written lease/agreement between the County and the State. The State rents space in the Cohalan Court Complex, including the offices of the court reporters, who are State employees.

Based upon the evidence submitted in support of its motion consisting of the pleadings and the deposition testimony of the plaintiff and the County's two witnesses, the picture that emerges concerning responsibility for remedying defective/hazardous conditions in the State-leased areas is murky. The procedure for repairs described by the County's witnesses is, at best, byzantine, and apparently untethered to the written lease/agreement existing between the State and the County.

At deposition, the County's Assistant Director of the Department of Public Works, Edward Barnes, was shown the written lease/agreement executed by the County and the State. Mr. Barnes acknowledged that the document applies to the subject Cohalan Court Complex. Mr. Barnes conceded that he does not refer to the lease/agreement in the course of his duties encompassing oversight of 100 employees, 500 buildings, and general maintenance of all buildings in Suffolk County. When a portion of the agreement was read to him concerning the County's responsibility for "all minor repairs to the interior court facilities as are required to replace a part, to put together what is torn or broken, or to restore a surface or finish, where such repairs needed [sic] to preserve and/or to restore the court facilities to full functionality," Mr. Barnes stated, "I've never seen this document prior to today." Mr. Barnes then testified as to his understanding of "minor repairs," stating that the "word 'torn' is not a minor repair." According to his testimony, however, changing a light bulb is a "minor repair." Mr. Barnes further expressed his disagreement with the terminology used in the written agreement concerning "torn and broken," again stating that he had "never seen this before, this document—this terminology is new to me. I do not agree with that. No sir;" "I've never seen 'torn' and 'broken.' That is never terminology I've ever used in my 22 years."

In essence, Mr. Barnes explained that there are areas of the courthouse complex open to the public and areas he referred to a "private areas" occupied by State employees, i.e., back offices. According to Mr. Barnes' testimony, the County engages in routine cleaning and maintenance of all of the Complex. The County will also repair dangerous conditions in public areas, or call a vendor with expertise in a certain trade to remedy any such conditions without State approval; however, in the "private areas," it is unclear how repairs of such conditions are made. In some cases, the County will simply address the matter, such as when a ceiling tile may be hanging down, or a leak develops, or a light bulb needs changing, or the power and/or air conditioning is not working in a certain section of the building. In other cases, there is a process by which the State fills out a document identified as a Building Service Request (BSR), sends the BSR to Mr. Barnes, who then sends the job out for estimates. Upon receipt of an estimate, the BSR is sent back to the State to get approval for the work. The carpeting vendor is the County's vendor, and the County hires the carpeting vendor after the work is approved and paid for by the State.

When specifically asked if he would take remedial action vis a vis a carpet that poses a tripping hazard without requiring the State to submit a Building Service Request (BSR), Mr. Barnes answered, "If I knew about it, I'd tell the agency to submit a BSR, and depending on the severity of the complaint then I'd take immediate action to fix it. Yes sir." Thus, the County witness's own testimony demonstrates that the lengthy process involved in replacing carpets in

the private areas occupied by State employees is not necessarily followed when a dangerous or hazardous condition exists, depending on the "severity" of the situation. Mr. Barnes also testified that he was never given instructions from the time he started working at the subject building as to what the County maintenance department would or should fix as opposed to what an outside vendor should fix.

At another juncture in his deposition, Mr. Barnes testified about the quarterly inspections of the entire courthouse conducted jointly by a County maintenance worker and a representative of the State. Mr. Barnes was asked about an entry in a quarterly inspection report concerning loose threads from a carpet causing a hazard in front of the second floor elevator on the private side of the courthouse and a note stating, "maintenance to repair." Mr. Barnes testified that he was unsure about the meaning of the note, although it is reasonable to conclude that the County's maintenance staff was designated to repair that condition. In an earlier quarterly inspection report, there was an entry concerning a hazard caused by loose threads in front of a second floor elevator on the private side, and that the threads were cut as a "precautionary" measure. When asked if County maintenance staff cut the loose threads, Mr. Barnes answered that he did not know; he was not there, and that he had "no idea." Although not specifically referencing the carpet in plaintiff's office, based upon these notes, there is a question of fact raised as to whether the County's maintenance staff at the courthouse might repair certain conditions related to carpeting in the State-occupied private/office areas.

The County's maintenance mechanic at the courthouse, Edward Farrell, testified that he is present with the State representative when she performs these quarterly inspections; therefore, he would be aware of any issues that she detects. Moreover, according to his testimony, there are no State maintenance employees on the subject premises, but the County maintains a maintenance office at the courthouse. In fact, it is Mr. Farrell's office at the courthouse, and he is present there Monday through Friday, as are the two other County workers that he supervises.

Mr. Farrell also testified that he and his staff perform some maintenance and repair activities in the State offices, such as painting, repairing broken door hardware, thermostat replacement, replacing ceiling tiles, lighting repairs, and HVAC issues without State approval or State funding. When asked if County maintenance staff would repair a tripping hazard created by a rip in the carpeting prior to the State issuing the funds necessary to replace the carpeting, Mr. Farrell responded, "I'm not sure. You know, I don't know. I don't – I don't know what we would do. But the only thing I would do is go there, look at it and notify the state that they need to replace this carpet." Mr. Farrell further testified that he would not tape a ripped carpet because "I'm liable now. Now I tape it and someone trips on the tape, so now it's my problem." He further admitted that his custom and practice would be to leave the ripped carpet as is until the State replaced the carpeting. There is no testimony that any of the County maintenance staff would place a sign waring of a dangerous/hazardous condition. Also, Mr. Farrell clarified that the County would not need the State's consent to replace the carpeting, but that the County requires the State's money before the County hires a carpet vendor.

Mr. Farrell was also asked why some repairs are made on the State/private side of the building without state funds, but carpet issues are not repaired without State funding; he

answered, "It's not a question for me." He was also asked if he ever received any instruction on what to do if an emergency repair of a tripping hazard was needed in the private portion of the building, to which Mr. Farrell replied, "no." Regarding any other type of emergency repairs, Mr. Farrell acknowledged that he did not receive any formal training, just "[k]ind of do it on my own as I feel needed." Mr. Farrell unequivocally stated, "I just don't do carpet."

Mr. Farrell was shown a photograph of the carpeting in plaintiff's office, and he identified the tear, commenting that the "carpet looks completely worn and it looks like it's been neglected for years. It probably should have been replaced years before that tear was there." Moreover, Mr. Farrell acknowledged that he had been advised of a tear similar to a long tear in one of the court reporter's offices: "I'm sure I was, and when we went on inspection—sure. I think at that point, the state was notified and they should have addressed it and replaced." As far as Mr. Farrell was concerned, even if he saw a tripping hazard on the State/private side of the building, he would advise the state to "do a BSR and get this thing rolling and replace the carpet. Whether or not they would, it wouldn't be on me. It would be on them;" "[w]hy wouldn't they just take care of the carpet?" On the other hand, Mr. Farrell clearly testified that he had no knowledge if the lease actually requires the State to take care of the carpet, and at no time during his fifteen-year tenure had anyone from the County ever told him the terms of the lease between the County and the State.

The testimony of the two County witnesses fails to establish that the County does not owe a duty to the plaintiff as the owner and operator of the courthouse complex in which the plaintiff's office is located. The testimony raises questions of fact as to which repairs of dangerous or hazardous conditions are promptly attended to by County maintenance employees, including what may be remediating dangerous carpeting conditions (e.g., cutting loose threads), and under what circumstances those conditions may be remediated. There appears to be a large amount of discretion exercised by the County's Department of Public Works employees, who are apparently utterly unfamiliar with the terms of the written lease existing between the County and the State that outlines, in pertinent part, the minor repairs to be made by the County to court facilities, including "to put together what is torn or broken." Accordingly, the County has failed to establish its *prima facie* entitlement to summary judgment as a matter of law.

Notably, the County did not provide the written lease agreement executed between itself and the State with its moving papers, but the plaintiff has provided the entire agreement that covers the relevant time period. The County further fails to specifically address the written agreement in its reply papers. The written agreement between the State and the County provides in relevant part not only that the County is required to "replace a part, to put together what is torn or broken," but that the County "shall be responsible for the performance of emergency repairs to the interior of the Court Facilities." The agreement also states that the County "shall maintain and operate the Court Facilities in accordance with 22 NYCRR Parts 34.1 and 34.2."

22 NYCRR, Part 34.1, IV Buildings, D. Interior of Facility, 2. Floors requires the County to "look at floors noting scars, worn areas, broken or loose tile, *torn or worn carpet*, condition of linoleum. . ." (emphasis added). Part 34.1, VII Maintenance Contracts, B. Leased Space—Privately Owned Property provides in subsection 6 thereof that, "[i]n the event any repair is

found to be necessary, the building manager is to apprise the court in writing. The work should be progressed in stages and in such manner as to not interfere with the functioning of the courts and with the utmost regard for the safety and convenience of its personnel and the general public." There is no evidence that Mr. Farrell apprised the State in writing of the torn carpet that he identified in the photograph; rather, he apparently assumed that the State must have seen it during a quarterly inspection. In fact, Appendix 9 for Part 34.1 relating to the offices of court reporters requires that the County maintenance personnel report with daily frequency any damage or hazards, and "clean and rectify problem."

Furthermore, 22 NYCRR, Part 34.2 defines the term "minor repairs" as "such repairs as are required to replace a part, to put together what is torn or broken. . . where such repairs will preserve and/or restore a court facility to full functionality; and shall include only: (a) painting, carpeting, and other resurfacing of, or finish work related to, or renovation of, the interiors of spaces used by the unified court system. . ."

The lease also provides for the County to obtain reimbursement for actual expenses incurred in the provision of services to the State: "No later than thirty (30) days after the end of every quarter during which this Agreement is in effect, MUNICIPALITY shall submit a Claim for Payment to UCS, showing the actual expenses incurred by MUNICIPALITY during the immediately preceding quarter and the amount of reimbursement claimed." Thus, it appears not only that the County could have performed expedient carpet repairs to remedy a hazardous condition, but that it had a duty to do so pursuant to the terms of the written agreement between it and the State. Also, the written agreement between the County and the State appears to contradict the testimony of the County witnesses as to whether they had a duty to make an emergency/minor repair to the torn carpet.

Accordingly, the County's summary judgment motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 2, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]