O'Toole v Marist Coll.
2021 NY Slip Op 33918(U)
June 11, 2021
Supreme Court, Ulster County
Docket Number: Index No. EF2018-3799
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY

MARIANNE T. O'TOOLE AS TRUSTEE FOR
MOHAMED CHARAFEDDINE AND
JILL CHARAFEDDINE, HIS WIFE,
Plaintiffs,

DECISION & ORDER

- against -

Index No.: EF2018-3799

MARIST COLLEGE,
Defendant.

MARIST COLLEGE,
Third-Party Plaintiff,

- against -

SODEXO, INC.,
Third-Party Defendant.

PRESENT: HON. LISA M. FISHER:

APPEARANCES:

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FISHER, J.:

This premises liability action was commenced by Plaintiffs Marianne T. O'Toole, Trustee, for Mohamed Charafeddine and Jill Charafeddine to recover damages for alleged personal injuries sustained by Plaintiff Mohamed Charafeddine (hereinafter "Plaintiff") when he fell down a stairway while working as a General Manager for Third-Party Defendant Sodexo, Inc., (hereinafter "Sodexo") at the Defendant/Third-Party Plaintiff Marist College (hereinafter "Marist"). Marist filed a Third-Party Complaint against Sodexo and asserted four causes of action: contractual indemnity, common-law indemnity, contribution, and breach of contract for failure to procure insurance.

Sodexo moved for summary judgment dismissing the third-party complaint filed against it by Marist. Marist opposed the motion. Plaintiff filed an affidavit in response and Sodexo submitted a reply. Defendant Marist has also moved for summary judgment to dismiss the Plaintiff's complaint. Plaintiff filed opposition to the motion and Marist submitted a reply.

On September 23, 2017 Plaintiff was employed by Sodexo as a General Manager of Food Services at Marist. Plaintiff was walking from the kitchen towards the stairs with Executive Chef Anthony Legname, who was walking behind him. The stairway led from the kitchen to the loading dock and Plaintiff was going downstairs to supervise the loading of food and products going to the football stadium for a parent's weekend event. Plaintiff opened the door from the kitchen and walked to the stairs. Upon reaching the stairs, Plaintiff put his right hand on the railing, he felt his foot catch on something and he fell to the bottom of the staircase. Plaintiff was knocked unconscious and suffered multiple injuries as a result of the fall.

On August 21, 2013, Marist (referred to in the Agreement as the "Client") and Sodexo entered into a Management Agreement.

Under Article V titled "Inventories, Premises, Equipment and Maintenance" section 5.2 titled "Condition of Premises and Equipment" stated: "The Premises and equipment provided by Client for use in the Food Service operation shall be in good condition and maintained by Client to ensure compliance with applicable laws concerning building conditions, sanitation, safety and health (including, without limitation, OSHA regulations). Client agrees to indemnify Sodexo against any liability or assessment, including related interest and penalties, arising from Client's breach of the aforementioned obligations, and Client shall pay reasonable collection expenses, attorneys' fees and court costs incurred in connection with the enforcement of such indemnity. Client further agrees that any modifications or alterations to the workplace or the Premises (whether structural or non-structural) necessary to comply with any statute or governmental regulation shall be the responsibility of Client and shall be at the Client's expense. This provision shall survive the termination of this Agreement."

Section 5.3 titled "Sanitation and Janitorial Service: outlined the responsibilities of the parties into subsection A for Sodexo and subsection B for Marist.

5.3 Subsection A stated, in pertinent part: "Sodexo shall be responsible for housekeeping and sanitation in food preparation, storage and serving areas in the resident dining hall and Cabaret and shall provide basic housekeeping services to all areas of operation during the course of the operating day, including dust and spot mopping, dusting and vacuuming in all Food Service offices and customer traffic areas."

5.3 Subsection B stated in pertinent part: "Notwithstanding, items listed in Section 5.3(A) above, Client shall, at Client's expense, be responsible for all heavy and extraordinary cleaning including, but not limited to, window treatments, air ducts, hood vent systems (per local ordinance), window cleaning, floor refinishing, carpet extraction and shampooing as needed, and

regular kitchen hood maintenance. Client, at Client's expense, shall provide basic housekeeping services to all areas of operation during the course of the operating day, including dust and spot mopping, dusting, and vacuuming in all offices and public areas of operation."

The Management Agreement was amended on December 8, 2014, July 16, 2015, and September 6, 2016. The Amendment on December 8, 2014, addressed Section 5.3(B) which amended that subsection by deleting it in its entirety and the following pertinent part substituted therefor:

"B. Notwithstanding, items listed in Section 5.3(A) above, Client shall, at Client's expense, be responsible for all heavy and extraordinary cleaning, including, but not limited to, window treatments, air ducts, hood and vent systems (per local ordinance), window cleaning, floor refinishing, carpet extraction and shampooing as needed, and regular kitchen hood maintenance. Client, at Client's expense, shall provide basic housekeeping services during the course of the operating day, including, but not limited to, vacuuming, spot mopping, dusting, spot cleaning for areas outside of the main resident dining hall and outside of the Cabaret retail facility, and cleaning of public bathrooms."

Plaintiff at his deposition indicated that he and Steve Sansola would perform walk throughs of the dining and kitchen area every two weeks, which included the staircase because Steve wanted to check every area. Steven Sansola was described as Plaintiff's direct contact with Marist who he was to report any issues to. When describing the fall, Plaintiff stated that he put his right hand on the railing and his foot slipped because the step was curved and then he remembered falling. Plaintiff stated that he was not holding anything in his hands, he was looking straight ahead and had on safety shoes. Plaintiff testified that his foot slipped because the stairs were worn out and curved. Plaintiff stated that the stairs had been this way since he began working at Marist, 10 years

earlier, but he had never made a complaint. Plaintiff stated he had requested that Mr. Sansola apply non-skid paint to the steps after an OSHA inspection required it. Plaintiff stated Marist painted the steps, but that was two or three years prior to his accident.

In his affidavit in opposition to the motion, Plaintiff stated that at the top of the stairs, he reached for the handrail and as he did, his foot slipped on the top landing because the stairs are curved and smooth. Plaintiff indicated "The stairs look like they were flat at one point in time, but they had become worn and curved due to years of foot traffic." Plaintiff also stated that the handrail was too low to grab before walking on the stairs. Plaintiff stated that there were no traction strips or anything on the stair treads to provide traction at the time of the accident. Plaintiff asserted that he fell down the stairs because they were worn, curved and slippery, and the handrail was too low. Plaintiff indicated that he recalled the staircase being worn for quite some time before his accident.

At his deposition, Justin Butwell, the Director of the Physical Plant at Marist stated that the staircase was original to the building. He stated that when renovations occurred, they did not include the staircase. Mr. Butwell did not know when the stairs had last been painted and knew that the stairs were painted and had treads installed after the Plaintiff's accident. Mr. Butwell stated that the stairs were not used by Marist employees on a daily basis but were used daily by Sodexo. He indicated that Sodexo was responsible for reporting a problems or conditions and that no reports had ever been received regarding the stairs. Mr. Butwell indicated that Sodexo was responsible for the sweeping and cleaning of the staircase and were an area under Sodexo's control. He reviewed the management agreement between the parties and acknowledged that Marist was to make sure the premises were in good condition and in compliance with applicable laws regarding building conditions. Mr. Butwell stated that based on the Certificate of Occupancy issued for the building the subject stairs were in compliance with local building codes.

Donna Provost was deposed as the Director of Operations for Sodexo and began working at Marist in 2017. She indicated that she was working on the day of Plaintiff's accident. Ms. Provost testified that the top step of the staircase was worn and the concrete at the edge was chipped and that it had been in that condition since she began working there three months prior to the accident. She testified that on the day of the accident she did not notice any ambient oil in the air of the stairway from the fryers in the kitchen. Ms. Provost stated that she never saw Marist employees use the stairs, but knew that the employees did use the stairs to access the boiler and LAN room when plumbing problems or other issues occurred.

Anthony Legname was the Campus Executive Chef, he was responsible for the resident dining hall program, catering, retail shops, and concessions. Mr. Legname was walking with Plaintiff prior to his accident. He stated that as he and Plaintiff began to walk down the stairs to the loading dock, he looked at his clock and Plaintiff opened the door to go down. When he looked up, he saw Plaintiff fall. Mr. Legname saw Plaintiff's hands try to grab the railing and that Plaintiff twisted around a bit and then tumble down the stairs. Mr. Legname stated that he saw Plaintiff's head strike a piece of concrete that jutted out at the bottom of the steps on the right side and immediately called 911. Mr. Legname indicated that he did not know if Plaintiff tripped or slipped. Mr. Legname stated that during his time at Marist there had been a major renovation of the dining hall and student center, but that no work had been done on the staircase.

Plaintiff's hired International Technomic Corporation to provide an expert report. Randall Hacjeck, CEO and Alden P. Gaudreau, EdD, PE, provided a preliminary written report dated May 12, 2020 following a preliminary site inspection which occurred on November 21, 2019. They provided a supplemental report dated August 14, 2020 following a subsequent examination of the

stairway on July 21, 2020. They examined photographs, video of the Plaintiff's fall and deposition testimony.

In their May 12, 2020 report, Mr. Hacjeck and Mr. Gaudreau opined: "It is therefore our opinion based upon the examination, review of photographs and deposition transcripts, within the limits of the information currently available, and to a reasonable degree of engineering certainty, that the stairway in the Murray Student Center dining hall building leading from the kitchen to the back loading dock was improperly maintained such that it was worn with exposed steel and dangerous nosings. Handrails were not properly placed. These unsafe conditions were not repaired during a major revision of the building around 2012. Based upon the limits of the available information, it is our opinion that these conditions caused or contributed to Mr. Charafeddine's accident and injuries. It is further our opinion that had the stairway been maintained safely, or replaced in 2012, the condition(s) that caused the accident would not have existed, and in all likelihood, the accident would not have occurred".

Mr. Hacjeck and Mr. Gaudreau stated that the condition of the stair treads at the time of Plaintiff's incident consisted of worn paint and concrete and exposed steel. They indicated that it would have most likely taken many years to wear the nosing of the landing and the paint as noted in the pre-accident photographs. They noted that the landing paint was worn in spots, and the worn, exposed concrete surface would have been slippery. They found that the worn landing concrete, exposed steel, and paint likely caused Plaintiff's foot to slip and get "caught" especially at the top of the landing where the nosing was more worn.

Mr. Hacjeck and Mr. Gaudreau further found that the handrail was not placed at the proper height and did not continuously run from the top landing to the bottom of the stairs. They cited

the Property Maintenance Code of New York for the requirements of the height of handrails and 1956 Building Code with regard to the width of the staircase and landing.

At the November 21, 2019 site inspection, they noted that the top landing and tread walking surfaces and nosings were covered by SAFEGUARD tread covers, which had been installed after the Plaintiff's accident. They indicated that the tread covers had anti-slip surfaces and yellow nosings to denote the edges of the treads. They noted that the tread covers were placed over the top of the existing treads, obliterating the worn paint and wear of the treads and landing observed in the photograph. They concluded by stating that to be thorough they needed to perform and examination of the staircase with the SAFEGUARD covers removed as they were affixed by five screws.

Mr. Hacjeck and Mr. Gaudreau conducted a second physical examination of the staircase on July 21, 2020. At this visit, they attempted to remove the SAFEGUARD tread covers in order to examine the condition of the paint and the concrete landing and nosings. It was determined that the SAFEGUARD tread covers could not be removed without causing damage to either the cover itself or the concrete floor and paint. Mr. Hacjeck and Mr. Gaudreau concluded the report by stating their opinion had not changed, that the stairway had been improperly maintained as it was worn with exposed steel, dangerous nosing, and improperly placed handrails.

In addition to the report, Plaintiff provided an expert affidavit from Alden P. Gaudreau, EdD., PE. Mr. Gaudreau is a licensed engineer in the State of New York. He certified and confirmed the findings and conclusions contained in the two reports as true and accurate and within a reasonable degree of engineering certainty. He opined that the staircase was dangerous for several reasons and violated multiple sections of the Property Maintenance Code and 1956 Building Code. Mr. Gaudrea stated: "I certify and confirm, within a reasonable degree of

engineering certainty, that Mr. Charafeddine' s fall on September 23, 2017 was caused by the unsafe condition of the staircase. Based on my viewing of the video of the incident. I conclude, within a reasonable degree of engineering certainty, that Mr. Charafeddine would not have fallen if the staircase was maintained in a reasonably safe condition and did not violate multiple sections of Property Maintenance Code and Building Code of New York State."

"Summary Judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Sternbach v Cornell University*, 162 AD2d 922, 923, [3d Dept 1990] [internal quotations and citations omitted]). 'Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474, [1979]).

Pedagogically, to establish a *prima facie* entitlement to judgment as a matter of law, a moving party must present proof in admissible form to demonstrate the absence of any triable issues of fact as to each and every allegation in the complaint and bill of particulars. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *accord Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700 [3d Dept 2003]; *Balnys v Town of New Baltimore*, 160 AD2d 1136, 1136 [3d Dept 1990] [noting the movant must come "forward with competent proof refuting the allegations of the complaint as amplified by the bill of particulars."].) Such "burden may not be met by pointing to gaps in plaintiff's proof" (*DiBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326 [3d Dept 2010]; *accord Dow v Schenectady County Dept. of Social Servs.*, 46 AD3d 1084, 1084 [3d Dept 2007]).

Once the movant has made such a showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of

fact. (*See Zuckerman*, 49 NY2d at 562 ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient."].) "[I]n deciding a motion for summary judgment, the trial court must view all evidence in the light most favorable to the party against whom such judgment is sought and, where there is any doubt as to the existence of a triable issue of fact, it should deny the motion since the goal is issue finding rather than issue determination" (*Swartout v Consolidated Rail Corp.*, 294 AD2d 785, 786 [3d Dept 2002] [citations omitted]; *see also Oritz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]; *Greco v Boyce*, 262 AD2d 734, 734 [3d Dept 1999] [holding courts are "to view the evidence in light most favorable to the nonmoving party, affording that party the benefit of all reasonable inferences, and to ascertain whether a material, triable issue of fact exists."]).

"In a premises liability matter, '[t]o establish a prima facie entitlement to summary judgment, defendant was required to show that it maintained its property "'in a reasonably safe condition and that [it] neither created nor had actual or constructive notice of the allegedly dangerous condition'" (*Lucatelli v Crescent Assoc.*, 132 AD3d 1225, 1225, [3d Dept 2015], quoting *Decker v Schildt*, 100 AD3d 1339, 1340, [3d Dept 2012]; *see also Basso v Miller*, 40 NY2d 233, [1976]). '[A] defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that [a] plaintiff cannot identify the cause of [his or her] fall without engaging in speculation' (*Pascucci v MPM Real Estate, LLC*, 128 AD3d 1206, 1206, [3d Dept 2015], *quoting Ash v City of New York*, 109 AD3d 854, 855, [2d Dept 2013]; *accord Acton v 1906 Restaurant Corp.*, 147 AD3d 1277, [3d Dept 2017] ['defendants are not liable if the conclusion that defendants' negligence was the proximate cause of [plaintiff's injury] would be based on pure speculation.'])" (*Marino v Gjergji Enters., LLC*, 55 Misc3d 1223(A) [Sup Ct Greene Co. 2017]).

'To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discovery and remedy it' (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, [1986]; *see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, [2005]; *see also McMullin v Martin's Food of S. Burlington, Inc.*, 122 AD3d 1103, 1104, [3d Dept 2014]). 'Constructive notice has been inferred where there is evidence that defendant's employees were in the immediate vicinity of the dangerous condition and could easily have noticed and removed it' (*Rose v Da Ecib USA*, 259 AD2d 258, 260, [1st Dept 1999]; *citing Catanzaro v King Kullen Grocery Co.*, 194 AD2d 584, [2d Dept 1993] [finding sufficient evidence from which a jury could impute constructive notice to the defendant where there were several employees working within the vicinity of the spill which caused the plaintiff's fall]; *see Altieri v Golub Corp.*, 292 AD2d 734, 735, [3d Dept 2002] [reversing award of summary judgment and reinstating complaint where 'defendants failed to demonstrate that their employee did not create the condition by dropping the foreign substance on the floor during the course of his work or that, in the exercise of reasonable care, he knew or should have known of the foreign substance on the floor in the immediate vicinity of where he was working.'])" (*Marino* v *Gjergji Enters*., *LLC*, supra).

Sodexo's motion for summary judgment

Sodexo moves for summary judgment against Marist contending that neither Marist nor the Plaintiff can establish any conduct on Sodexo's part for which liability can be imposed. Sodexo asserts that Marist owned the premises and the staircase where the Plaintiff allegedly fell, constructed the staircase and was responsible for the maintenance and cleaning of the staircase. Sodexo argues that pursuant to the Management Agreement between it and Marist the obligation to maintain the staircase was on Marist.

Sodexo asserts that it does not owe any contractual indemnity or insurance coverage as an additional insured to Marist. Sodexo indicates that it did procure insurance coverage, however the insurance carrier declined to accept Marist's demand for defense and indemnification under the policy. Sodexo asserts that it does not owe common-law indemnity or contribution to Marist because it owed no duty to Marist that was potentially breached and was not negligent. Sodexo asserts that because it was not negligent as none of its obligations under the Management Agreement were activated to indemnify Marist or to name Marist as an additional insured.

Relying on the terms of the Management Agreement entered between Sodexo and Marist, Sodexo sets forth its interpretation of said terms to argue that its motion for summary judgment should be granted. Sodexo argues that the plain language of the Agreement clearly spells out that the staircase was Marist's responsibility. Sodexo further relies on the Plaintiff's expert report and testimony provided by Plaintiff, Justin Butwell, Donna Provost and Anthony Legname to establish that Marist had obligations and ownership and control with regard to the staircase and failed to maintain those responsibilities. Sodexo argues that the record establishes that it was not negligent and as a result its obligations under the Management Agreement have not been activated and its motion should be granted.

Sodexo has presented proof in admissible form to demonstrate the absence of any triable issues of fact and established that it was not negligent and therefore, its obligations under the Management Agreement are not triggered. This includes its obligations to indemnify Marist and to name Marist as an additional insured. Further any claim based on common-law indemnity or contribution fail as Sodexo has cited its obligations under the Management Agreement asserting that it owed no duty to Marist that was potentially breached and was not negligent.

Based upon the evidence provided, the Court finds that Sodexo met its prima facie burden for summary judgment and the burden is now shifted to Marist to raise a triable issue of fact.

In opposition, Marist asserts that Sodexo's motion must be denied as there are several questions of material fact as to Sodexo's negligence that need to be resolved by a jury. Marist sets forth its understanding of the terms of Management Agreement and how, based on its interpretation asserts that Sodexo was responsible for the staircase. Marist asserts that pursuant to the Agreement, Sodexo was to "provide basic housekeeping services to all areas of operation." Marist states that the staircase running from the kitchen to the loading dock was clearly in Sodexo's areas of operation. Marist cites the deposition testimony of Plaintiff and Donna Provost to establish that it was Sodexo's job to notify Marist if a repair was required or if there was an issue that needed addressing. Marist argues that Sodexo was in exclusive control of the stairway and that Sodexo was in a position to discover or prevent any alleged unsafe condition, to the extent that there was one. Marist questions whether the tacky condition on the stairs was due to Sodexo's failure to adequately clean and contributed to Plaintiff's fall. Marist states that Sodexo is liable for the Plaintiff's own negligent conduct under the indemnification provision of the Management Agreement.

The Court finds that based on the conflicting interpretations of the terms of the Management Agreement that questions of fact exists. Marist and Sodexo are claiming the other was obligated under the agreement to maintain the stairs and interpreting terms of the Management Agreement between them for their own benefit. Questions of fact clearly exist over which of them had control over the staircase, what each of their responsibilities were regarding the subject stairs and their knowledge of the alleged condition of the stairs.

The Court finds that Marist has established that triable issues of fact exist regarding

Sodexo's possible negligence. Depending on how the terms of the Management Agreement are interpretated will impact whether a jury finds either Marist, Sodexo, or both to be negligent.

As questions exist regarding Sodexo's negligence with regard to the staircase a determination cannot be made regarding Marist's claims for either contractual or common-law indemnification (see, *Husted v Central N.Y. Oil & Gas Co.*, 68 AD3d 1220, 1223 [3d Dept. 2009]).

This same issue also impacts Marist's claim for contribution, as Marist is required to show that Sodexo owed them a duty of reasonable care independent of its contractual obligations or that Sodexo owed a duty directly to Plaintiff and that a breach of that duty contributed to his injuries (see, *Kearsey v Vestal Park*, 71 AD3D 1363, 1365 [3d Dept. 2010]). Again, as questions of fact exist regarding Sodexo's negligence, summary judgment is denied.

The Court will grant Sodexo's motion with regard to the breach of contract claim. "On a motion for summary judgment, a plaintiff abandons a claim by failing to address in its opposition papers the defendant's arguments in support of its motion seeking dismissal of that claim" (*Ng v NYU Langone Medical Ctr.,* 157 AD3d 549, 550 [1st Dept 2018]). As review of the motion papers in opposition to Sodexo's motion establish that Marist did not address this claim for breach of contract or oppose the motion on this claim. Based on the forgoing, the Court finds that Marist has abandoned its claim for breach of contract against Sodexo and that cause of action is dismissed.

Accordingly, Sodexo's motion is granted with regard to the cause of action for breach of contract and denied in all other respects.

Marist's motion for summary judgment

Marist moves for summary judgment dismissing Plaintiff's complaint. Marist argues that Plaintiff cannot establish the proximate cause of his fall as Plaintiff has identified several possibilities, which could include a misstep or loss of balance by Plaintiff. Marist states that the subject staircase was kept in reasonably safe condition by Marist as no reports were ever made regarding defects or issues and a Certificate of Occupancy had been provided in 2017. Marist argues that it did not create any dangerous condition as there is no evidence that Marist took any affirmative action to create an unsafe or dangerous condition with regard the staircase. Marist states that it had no actual notice of any dangerous condition. Marist asserts that prior to Plaintiff's fall it received no complaints and was aware of no incidents, falls or accidents regarding the staircase. Marist further asserts that it had no constructive notice any dangerous condition as the stairs were believed to be in good condition as there were no reports or complaints of any issues noticed or recorded during Plaintiff and Mr. Sansola' s bi-weekly walkthroughs of the area. Marist asserts that as it bears no liability with respect to the subject incident its motion should be granted.

The Court finds that Marist has met its initial burden by establishing that it kept the stairs in a reasonably safe condition, did not create or have constructive or actual notice of any dangerous condition. Through the deposition testimony of Plaintiff, Donna Provost, Justin Butwell and Anthony Legname, Marist establishes that there were no complaints ever made about the stairs or any incidents on them. Marist states that Plaintiff indicated that he and Steve Sansola would perform walk throughs of the dining and kitchen area every two weeks, which included the staircase because Steve wanted to check every area. Justin Butwell further indicated that the stairs did not need to be renovated. He further stated the stairs were in compliance with the local building code as evidenced by the fact that the Town of Poughkeepsie issued a Certificate of Occupancy

for the entire building upon completion of the renovation in 2017. Both Donna Provost and Justin Butwell also testified that the stairs were utilized daily by Sodexo employees and that Marist employees only used them for specific purposes and not on a daily basis. They further each testified that Sodexo was responsible for maintenance of the stairs. Justin Butwell indicated that he had never received any reports of issues or requests regarding the stairs prior to the Plaintiff's accident.

Marist cites Plaintiff's deposition testimony to assert that Plaintiff does not know the proximate cause of his fall. Plaintiff testified that when he fell, he felt his foot catch on something, but does not know what it was. Marist further cited Anthony Legname' s testimony who was with Plaintiff at the time of his accident and he indicated that he did not see what caused the Plaintiff's fall.

The burden now shifts to Plaintiff to come forward with evidence demonstrating triable issues of fact.

The Court finds that Plaintiff has raised triable issues of fact that preclude an award of summary judgment and Marist's motion for summary judgment is denied. The Court finds that the report from Randall Hacjeck, CEO and Alden P. Gaudreau, EdD, PE, establish triable issues of fact regarding whether the stairs constituted a dangerous condition and were kept in a reasonably safe condition.

The Court further finds that the photographs of the stairs provided by Plaintiff that depicts the stairs condition at the time of the Plaintiff's accident coupled with the testimony of Plaintiff, Donna Provost and Anthony Legname, who each testified that the stairs had been in this same condition for years, establish questions of facts regarding whether Marist had actual or constructive notice of the condition of the stairs.

In addition, the fact that Plaintiff cannot directly identify the cause of his fall does not warrant the granting of Marist's motion. In the absence of direct evidence of causation, proximate cause maybe inferred from the facts and circumstances underlying the injury. Plaintiff testified that his foot slipped because the stairs were worn out and curved, and the fact that there were other causes which may have caused his fall, establishes a triable issue of fact as to the proximate cause of his fall which maybe resolved by a trier of fact.

When viewed in the light most favorable to the nonmovant, the Court finds that Plaintiff has established the existence of a triable issue of fact regarding whether the stairs constitute a dangerous condition, whether Marist had actual or constructive knowledge of the condition and regarding the cause of Plaintiff's injuries.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Third-Party Defendant Sodexo's motion is a **DENIED except** for the cause of action for breach of contract, which is **GRANTED**, and all other relief requested therein is denied in its entirety; and it is further

ORDERED that Defendant/Third-Party Plaintiff Marist College's motion is **DENIED**, and all other relief requested therein is denied in its entirety; and it is further

IT IS SO ORDERED.

DATED: June 11, 2021
Catskill, New York

E N T E R :

HON. LISA M. FISHER
SUPREME COURT JUSTICE

This constitutes the Decision and Order of the Court. Please note Chambers has uploaded the original Decision and Order on NYSCEF with the County Clerk. Plaintiff is required to serve notice of entry pursuant to CPLR R. 2220.

The Court considered all papers filed on NYSCEF in motion sequence 001 and 002, numbers 4 through 73, excluding 23, 24, 25, 61, and 62, including the following:

1) Notice of motion, filed on October 29, 2020; affirmation in support, of Nicholas M. Cardascia, Esq., with annexed exhibits, filed on October 29, 2020;
2) Affirmation in opposition, of Meishin Riccardulli, Esq., with annexed exhibits, filed on January 8, 2021; memorandum of law, filed January 8, 2021;
3) Reply Affirmation, of Nicholas M. Cardascia, Esq., filed January 12, 2021;
4) Notice of motion, filed on January 15, 2021; affirmation in support, of Meishin Riccardulli, Esq., with annexed exhibits, filed on January 15, 2021; memorandum of law, filed January 15, 2021;
5) Affirmation in opposition, of Derek J. Spada, Esq., with annexed exhibits, filed on March 5, 2021; Plaintiff's Affidavit filed on March 5, 2021; and
6) Affirmation in reply, of Meishin Riccardulli, Esq., filed March 19, 2021; memorandum of law, filed March 19, 2021.