

Singh v 150 E. 42 Realty LLC
2022 NY Slip Op 31090(U)
April 5, 2022
Supreme Court, New York County
Docket Number: Index No. 151446/2020
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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ANIL SINGH,

Plaintiff,

- v -

150 E. 42 REALTY LLC., JONES LANG LASALLE
AMERICAS, INC., PRITCHARD INDUSTRIES, INC.,

Defendant.

-----X

INDEX NO. 151446/2020

MOTION DATE 4/4/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for

JUDGMENT - SUMMARY

BACKGROUND

Plaintiff commenced this action seeking damages for alleged personal injuries suffered when he fell at the premises known as 150 East 42nd Street, New York, New York (Subject Premises). 150 E. 42 Realty LLC (Owner) is the owner of the Subject Premises. Jones Lang Lasalle Americas, Inc., (Jones Lang) and Pritchard Industries, Inc. (Pritchard), were hired to maintain the building and its common areas.

PENDING MOTION

On January 5, 2022, Owner and Jones Lang moved for summary judgment and dismissal of the complaint and cross-claims and further moved for summary judgment on its cross-claims for contractual indemnification.

On December 6, 2021, the parties filed a stipulation of discontinuing all cross-claims asserted between the defendants, as such that portion of the motion seeking summary judgment on the cross-claims is denied as moot.

On April 4, 2022, the court heard oral argument on the motion for summary dismissal of the complaint and reserved decision.

For the reasons stated below, the motion is denied.

ALLEGED FACTS

Plaintiff was working for the law firm of Wilson Elser at the Subject Premises and was making his way back to work when he slipped and fell in the vestibule in front of the Subject Premises on August 26, 2019 at approximately 9pm. Immediately after he had fallen, plaintiff observed that he had fallen on a liquid substance that was coming from an upside down garbage pail in the vestibule and at the same time also noticed the “maintenance guy” from the building standing within 5 to 10 feet of the pail.

Prior to his accident, plaintiff had left the building at approximately 8:00pm to get some dinner and his accident occurred as he was walking back into the Subject Premises. The weather was clear with no rain. The accident occurred as he approached the 3rd Avenue entrance to the Subject Premises, specifically underneath the vestibule. His left foot slipped, and he fell backwards and hit the pavement.

Lighting in the area was fine and well and plaintiff took a photo of the water or the liquid that caused him to fall. The liquid wasn't there when plaintiff left the Subject Premises about an hour before his fall. Plaintiff doesn't know who turned the garbage pail over, but he confirmed that there were three guys there, one was a facilities guy at the Subject Premises that he knew from cleaning the Wilson Elser office. He asked them to help him up after he fell. They had a

grayish blueish uniform with a white badge on the top left. When plaintiff took the picture of the condition that caused his fall, the garbage can was still turned upside down.

At the time of the accident, there was contract in effect between Jones Lang and Prichard to clean the Subject Premises. Pursuant to this contract, Prichard was responsible for inspecting, cleaning and maintaining the premises. Before this alleged accident, Jones Lang and Owner had not received any complaints about the liquid and turned over garbage pail. On behalf of Jones Lang and Owner, the security guard was supposed to perform periodic inspections of the Subject Premises up and to the time of accident.

Valon Mekaj (VM) works as nighttime foreman for Pritchard at the Subject Premises and has worked there for eight years. As the nighttime foreman, he shows his workers how to do things like scrubbing and waxing. VM viewed the picture of the area taken by plaintiff after his fall and identified the garbage pail as one used by Pritchard maintenance workers for garbage or to put equipment in. VM was working on the date of the accident between approximately 5pm and midnight but said he wasn't informed of the accident. VM had six workers working for him that night, cleaning, scrubbing, shampooing and removing dust. VM didn't know when the area in question was last inspected, or how often it would be inspected but confirmed it would be him that would do the inspection. The logs pertaining to inspections provide the area was inspected at approximately 4 am and then not again until 9 pm.

DISCUSSION

It is well settled law "that summary judgment is a drastic remedy, the procedural equivalent of a trial, *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 (1974), and that it should only be sparingly exercised." *Alvord and Swift v. Muller Construction Co., Inc.*, 46 N.Y.2d 276 (1978). Motions for summary judgment can only be granted when no material issues of fact exist.

Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Summary judgment must be denied if there is any doubt as to the existence of triable fact issues, *Thomai v. Ronai*, 82 N.Y.2d 736 (1993). Failure to demonstrate the absence of any material issues of fact requires denial of the motion, no matter how weak the evidence offered in opposition. *Ayotte v. Geravasio*, 81 N.Y.2d, 1062 (1993).

Defendants argue they are entitled to summary dismissal because they neither created the condition nor had notice of the condition. However, the defendants had a nondelegable duty to maintain the Subject Premises in a safe condition and have failed to meet their burden in establishing lack of actual or constructive notice of the condition.

The law is well settled that an owner of land has a duty under the common law to maintain its premises “in a reasonably safe condition in view of all the circumstance, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk” (see, *Basso v Miller*, 40 N.Y.2d 233, 241) *Boderick v. RY Management*, 71 A.D.3d 144, 144 (1st Dept. 2009). 35. “[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977).” *Doughim* at 467. Defendants, as owner and management company of the Subject Premises, had the duty to keep the premises in a safe condition. As held in *Backiel v. Citibank, N.A.*, 299 A.D.2d 504 (2d Dept. 2002): “The allegedly defective condition in this case was created by an independent contractor and the well settled general rule provides that a party who retains an independent contractor is not liable for the negligence of the independent contractor because it has no right to supervise or control the work (see *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273, 598 N.Y.S.2d 149, 614 N.E.2d 712; *Mercado v. Slope Assocs.*, 246 A.D.2d 581, 667 N.Y.S.2d

289). An exception to this general rule is the nondelegable duty exception, which is applicable where the party “is under a duty to keep premises safe” (*Rosenberg v. Equitable Life Assur. Soc. of U.S.*, 79 N.Y.2d 663, 668). Where, as here, the premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress (*see Thomassen v. J & K Diner*, 152 A.D.2d 421; *June v. Zikakis Chevrolet*, 199 A.D.2d 907). This duty may not be delegated by the owner to its agents, employees or to an independent contractor (*Thomassen v. J & K Diner, supra* at 424–425, 549 N.Y.S.2d 416).

In a case on point, *Edwards v BP/CG Center I Inc.*, 102 A.D.3d 413, the Appellate Division, First Department held that where the record demonstrated that the area where plaintiff slipped and fell was a means of ingress and egress on premises open to the public, the owner had a nondelegable duty to maintain the premises in a reasonably safe condition, and could be held vicariously liable for any negligence on the part of its agents. (*see also LoGiudice v. Silverstein Props., Inc.*, 48 A.D.3d 286, 851 N.Y.S.2d 187 [1st Dept.2008]).

In the case at bar, there are issues of fact as to whether Pritchard failed to perform its maintenance contract with Owner, performed negligently, or negligently created the wet condition on the ground (*see Tamhane v. Citibank, N.A.*, 61 A.D.3d 571, 572–573[1st Dept. 2009]). Property owners have a common law duty to maintain their property “in a reasonably safe condition so as to prevent foreseeable accidents.” *White v. Gabrielli*, 272 A.D.2d 469, 470 (2d Dept. 2000). It was certainly foreseeable that workers at the Subject Premises would use the vestibule as a means of ingress and egress and that they assumed that said area would be kept in a safe condition, free of any defective, slippery, wet, dangerous condition.

Moreover, defendants have failed to meet their burden of proof in establishing lack of notice.

“A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of demonstrating, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see DeFalco v. BJ's Wholesale Club, Inc.*, 38 A.D.3d 824). This burden cannot be satisfied merely by pointing out gaps in the evidence as the defendant does here (*see Picart v. Brookhaven Country Day School*, 37 A.D.3d 798).” *Totten v. Cumberland Farms, Inc.*, 57 A.D.3d 653, 654 (2d Dept. 2008).

Defendant must submit evidence concerning when the area was last cleaned and inspected prior to the incident. *Sabalza v. Salgado*, 85 A.D.3d 436 (1st Dept. 2011). Viewing the complaint, the bill of particulars, the various deposition testimony, and supporting affidavits in the light most favorable to plaintiff, a factual issue is presented as to whether defendant had actual or constructive notice of the liquid on its floor. Defendant, as the proponent of the motion, has the burden of showing its “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).

In this case, it is reasonable to assume that the condition was created by defendant’s agents, the maintenance workers in the building, as it is acknowledged that the garbage pail was equipment used by them in their duties. Defendants allege there was an inspection at 9 pm which made no notation of the condition. However, the accident is alleged to have taken place at 9 pm. VM who said he would be doing the inspection had no recollection of the inspection and was unaware of the incident. It is impossible for the court to determine based on this record whether the alleged 9 pm inspection took place, and if so whether it was before or after the accident, as they are both alleged to have taken place at the same time, but clearly did not.

Additionally, defendants acknowledge that prior to 9 pm the last inspection of the area was at 4 am. Moreover, one of the maintenance workers was allegedly there when plaintiff fell, and according to plaintiff's testimony helped him get up, that worker clearly had actual knowledge of the condition as he was standing in the area at the time that plaintiff slipped.

Given that both the inspection and the accident allegedly took place at the same time questions of credibility and weight remain for the trier of fact as to whether a 9 pm inspection actually took place or whether the plaintiff's testimony as to the time of the incident is wrong.

“Defendants failed to establish prima facie that they neither created nor had actual or constructive notice of the water condition alleged to have caused plaintiff's fall in the vestibule of their building (*see Pfeuffer v. New York City Hous. Auth.*, 93 A.D.3d 470, 940 N.Y.S.2d 566 [1st Dept. 2012])... Nor is there any evidence as to when the vestibule floor was last checked before plaintiff's accident.” *Brown v. Phillbert*, 188 A.D.3d 559, 559–60 (1st Dept. 2020). The same is true herein.

Based on the foregoing, defendant's motion for summary judgment is denied.

WHEREFORE, it is hereby:

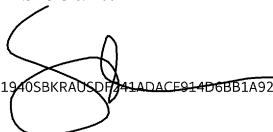
ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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4/5/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE