

Axelrod v 44 Lexington Assoc., LLC

2022 NY Slip Op 31916(U)

June 14, 2022

Supreme Court, New York County

Docket Number: Index No. 154572/2016

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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NICOLE AXELROD,

Plaintiff,

Index No. 154572/2016

-against-

44 LEXINGTON ASSOCIATES, LLC, 44 LEXINGTON
HOLDING LLC, LEXINGTON HOLDING
ASSOCIATES, LLC, 44 LEXINGTON MANAGING
MEMBER, LLC, HERSHA HOSPITALITY MANAGEMENT,
L.P., HERSHA DEVELOPMENT COMPANY LLC, and
TRANSITION MANAGEMENT CORPORATION,

DECISION & ORDER

Mot. Seq. Nos. 003 & 004

Defendants.

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SHLOMO S. HAGLER, J.S.C.:

In this premises liability action, two summary judgment motions, brought pursuant to CPLR 3212, are before the court. The motions are consolidated for decision.

Defendant Transition Management Corporation (TMC) moves for summary judgment dismissing the amended complaint and cross claims against it (Motion Seq. No. 003). Plaintiff Nicole Axelrod (Axelrod) and the other defendants oppose, and TMC replies. Defendants 44 Lexington Associates, LLC, 44 Lexington Holding LLC, Lexington Holding Associates, LLC, 44 Lexington Managing Member LLC (collectively, the hotel), and defendants Hersha Hospitality Management, L.P., and Hersha Development Company LLC (collectively, Hersha), also move for summary judgment: (1) dismissing the amended complaint and cross claims against them; and (2) granting them judgment on their cross claims against TMC (Motion Seq. No. 004). Plaintiff opposes, TMC opposes to the extent the hotel seeks summary judgment against it, and the hotel and Hersha reply.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that she sustained serious personal injuries when, on October 1, 2015,

she slipped and fell because of an unsafe condition, to wit, water that accumulated on the floor of premises located at 517 Lexington Avenue, New York, New York and owned by the hotel. Hersha managed the hotel pursuant to a hotel management agreement. TMC provided certain services to the hotel with respect to maintenance workers pursuant to an agreement with the hotel. The accident occurred during plaintiff's employment as a bartender for non-party Lexington Brass, a bar/restaurant located on a portion of the hotel's ground floor.

Plaintiff alleges in her verified complaint and in her amended verified complaint, as amplified by her bills of particulars, that each defendant was negligent and had actual and constructive notice of the water condition and leak located in and around the bar of Lexington Brass that resulted in a defective, dangerous and trap-like condition. Additionally, plaintiff alleges that each defendant failed to properly repair and cure the condition, and defectively repaired it. Plaintiff additionally alleges that each defendant breached its respective duties and permitted, caused and allowed the premises to remain in an unsafe, defective, dangerous and recurring condition.

The hotel and Hersha, by verified answer to the amended verified complaint (NYSCEF Doc Nos. [Doc] 32 and 78), deny all substantive allegations of wrongdoing. They also assert six affirmative defenses, including: (i) assumption of risk; (ii) contributory negligence; (iii) that the risks and dangers, if any, "were open, obvious, notorious and apparent" (fourth affirmative defense, *id.* at 9), and (iv) that "the accident, injuries and damages were caused solely by the Plaintiff" (fifth affirmative defense, *id.*). The hotel and Hersha also assert two cross - claims against TMC: (1) apportionment of damages and judgment in accordance with culpability and "in accordance with any applicable contracts, agreements, and express or implied warranties" (*id.*); and (2) common law indemnification.

In its verified answer to the amended verified complaint (Docs 61 and 79), TMC denies the material allegations and asserts nine affirmative defenses. These include: plaintiff's negligence; assumption of risk; collateral source; mitigation of damages; failure to state a cause of action against TMC as there are no "allegations of injury to the plaintiff for which the answering defendant can be held liable" (seventh affirmative defense, *id.* at 6); that plaintiff's injuries and damages were caused not by TMC but "by reason of the carelessness, negligence culpable conduct and/or breach of duty of third parties, their servants, agents or employees over which" TMC had no control (eighth affirmative defense, *id.* at 7); and worker's compensation. Additionally, TMC asserts three cross claims: common law indemnification, contribution, and contractual indemnification.

Following discovery, plaintiff filed her note of issue and these motions followed.

Summary Judgment

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "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*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

It is movant's burden to demonstrate that it did not create or exacerbate a dangerous condition. "A defendant may be liable for injuries resulting from a recurrent dangerous condition

it creates or leaves unattended” (*Erikson v J. I. B. Realty Corp.*, 12 AD3d 344, 345 [2d Dept 2004]). Whether or not a defendant owes a duty to undertake certain acts, “if it undertakes to do so, it may be held liable in negligence where its acts create or increase the hazards” (*Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337 [1st Dept 2004] [internal citations omitted]). “A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Pfeuffer v New York City Housing Auth.*, 93 AD3d 470, 471 [1st Dept 2012] [internal quotation marks and citations omitted]). See also *Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 (1st Dept 2013); *Martorel v Tower Gardens, Inc.*, 74 AD3d 651, 652 (1st Dept 2010); *Haracz v Cee Jay, Inc.*, 74 AD3d 1145, 1146 (2d Dept 2010).

Where a defendant asserts it neither created the condition nor had actual notice, the “defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed” (*Jacques v Richal Enters.*, 300 AD2d 45, 46 [1st Dept 2002] [internal quotation marks and citation omitted]). The burden then shifts to the plaintiff “to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Briggs*, 103 AD3d at 526, quoting *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). A movant cannot meet its “burden of disproving an essential element of plaintiffs’ claim and cannot affirmatively establish the absence of [an essential element] merely by pointing out gaps in the plaintiff’s case” (*Dabbagh v Newmark Knight Frank Global Mgt. Servs. LLC*, 99 AD3d 448, 450 [1st Dept 2012] [internal quotation marks and citations omitted]).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for*

the Blind, 3 NY3d 295, 315 [2004]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citations omitted]). The role of the court in determining the “drastic remedy” of summary judgment is “issue-finding, rather than issue-determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

TMC’s Motion (Mot. Seq. No. 003)

TMC’s Contentions

TMC, who contracted with the hotel to provide certain services in connection with maintenance workers for the hotel, contends that it owes no duty to plaintiff, a third-party, as its contract was with the hotel, and plaintiff cannot prove conclusively that TMC launched an instrument of harm.

Relying on its counsel’s affirmation, the pleadings, certain documents and portions of party and non-party deposition testimonies, TMC asserts that “[i]t is undisputed that TMC had an agreement with the Hotel to provide payroll services to pay the Hotel maintenance workers” (Doc 76, Affirmation in Support of Peter F. Tamigi, Esq. [Supporting Aff], ¶ 80 at 18). TMC references what it terms its letter proposal to 44 Lexington Associates, LLC d/b/a The Hyatt at 48 Lex Hotel, dated January 5, 2015 (Doc 91, Ex. O to the Supporting Aff), and what it terms its revised letter proposal dated January 20, 2015 to 44 Lexington Associates dba Hyatt 48 Lex (Doc 92, Ex. P to the Supporting Aff), agreed and accepted by the hotel by signature dated February 20, 2015 (the agreement). Additionally, TMC relies on a document entitled “Standard Staffing Addendum,” with an effective date of February 1, 2015, and its accompanying documents entitled “Appendix I” and “Appendix II” (collectively, addendum) (Doc 91), and the

deposition testimony of Gerard J. Costello (Costello) (Doc 89), who identifies himself as TMC's principal and who signed the agreement and addendum as its president.

TMC argues that plaintiff's fall was due to water on the floor of the bar that was caused by a leaky pipe or backed-up drain, and that "[e]ven if the maintenance workers had performed work at some point on same, to unclog the drain or tighten the pipe, this does not prove that such caused the water condition that ultimately resulted in plaintiff slipping on same" (footnote omitted) (Supporting Aff ¶ 82 at 19). TMC contends that: (1) "[t]here is no definitive evidence, including from plaintiff, what caused the water to be on the floor at the time of plaintiff's accident" (*id.*); and (2) "it is unclear if the last time any work was done on the pipes/sink, this was done by the maintenance workers or by the Director of Engineering [Hersha's engineering director]" (*id.*). "Thus, it cannot be conclusively established that TMC workers launched an instrument of harm" (*id.*), one of three exceptions to the general rule that a party to a contract does not owe a duty to a non-party to that contract.¹ Additionally, TMC asserts that "[a]t best, the allegations in plaintiff's Bill of Particulars and in her deposition testimony represent a failure by the maintenance workers/engineers to have properly repaired the pipe and drain prior to her accident" and that "[s]uch is not an affirmative act of negligence which launched an instrument of harm" (*id.* ¶82 at 19).

In addition to arguing that all it did was provide payroll services in connection with the hotel's maintenance workers, TMC contends that the maintenance workers were the hotel's special employees, and, while recognizing that special employment status is usually a question of fact, asserts that here are no triable issues of fact and summary judgment dismissing the complaint against it should be granted on this basis. It asserts that, although the maintenance

¹ The court declines to address herein movant's arguments regarding the non-applicability of the other two circumstances under which potential tort liability to a non-party to a contract can be found.

workers “were nominally the employees of TMC, they were controlled by the Hotel and, therefore, were ‘special employees’ of the Hotel making the Hotel vicariously liable for any alleged torts by these workers” (Supporting Aff ¶ 92 at 22).

In support, TMC relies on various asserted facts, including: it did not hire the maintenance workers but simply inherited them; the hotel’s engineering director set the workers’ schedule, directly dealt with them, trained them, supervised their work and told them what to do; TMC had no office at the hotel and no one at the hotel to supervise or direct the maintenance workers; the maintenance workers did not answer to TMC; if the maintenance workers/engineers had an issue their recourse was to discuss it with the hotel’s engineering director; and the hotel provided the maintenance workers with their uniforms, tools and other equipment. It asserts that “where all TMC was doing was to provide payroll services to the Hotel for the maintenance workers and it did not hire, screen, or train the maintenance workers, nor direct or control their work, it is beyond dispute that the maintenance workers were, in fact, special employees of the Hotel” and, therefore, it is the hotel and not TMC who is liable for the workers’ torts (*id.* ¶ 103 at 24).

TMC concludes that, accordingly, it is entitled to summary judgment dismissing the amended complaint and the cross claims against it.

Discussion

Duty of Care to Plaintiff

As part of its argument that it is not liable as it owes no duty to plaintiff, TMC first asserts that all it did was provide payroll services to the hotel for the maintenance workers. The court need not go further than the agreement and addendum, however, to determine that issue[s] of fact remain as to TMC’s assertion, as the agreement and addendum provide to the contrary.

In the agreement, TMC states that “[w]e are pleased to offer maintenance labor for 44 Lexington Associates d/b/a The Hyatt 48 Lex Hotel” (Doc 92). Additionally, the agreement provides that: various hours “will be billed the same month as paid to the employee(s),” “[t]his includes payouts when an employee leaves TMC employment” (*id.* under “Notes” 5), and the hotel will provide the uniforms, supplies and equipment parts (*id.* under “Notes” 1 and 4). The agreement further provided, under the paragraph entitled “Termination,” that “[t]ermination of employees with cause will be instant. TMC will follow the progressive discipline policies of” the hotel “and will document all phases of the process” (Doc 92).

The addendum “governs all transactions between 44 Lexington Associates, LLC (as the Hotel), and Transition Management [TMC] (as the Vendor). Under the provision entitled “Services,” the hotel agrees to buy from TMC and TMC agrees to “provide to Hotel staffing services (‘Services’),” and TMC agrees that “[a]ll Services will be performed in accordance with good and workmanlike manner and in accordance with the highest industry standards” (Doc 91, ¶ 1). Additionally, the addendum states that the hotel “will provide all operation supplies and equipment for Vendor’s employees to carry out the services” (*id.* at 7).

Under the provision entitled “Relationship of Parties,” the parties agree that in performing their respective obligations: “Vendor’s relationship with Hotel shall be that of an independent contractor;” and “[a]ll personnel who provide services hereunder shall be considered employees of the Vendor (‘Vendor’s Employees’) and shall not be considered employees of Hotel for any purpose” (*id.* ¶ 13 at 4). Additionally, the addendum provides that “Vendor will, at its sole cost and expense, perform verification of work eligibility and criminal background checks on all of their employees before any assignments to the Hotels” (*id.* Appendix 1, at 7).

Contrary to TMC's characterization, therefore, these documents do not support TMC's contention that issues of fact do not exist and that TMC merely provided payroll services. Rather, the documents provide that, *inter alia*: TMC provided the maintenance workers; the maintenance workers were considered the employees of TMC and not the hotel for any purpose; TMC characterized itself as an independent contractor; and, TMC had the right to terminate the employment of the maintenance workers. In light of this contradictory evidence alone, TMC has not met its prima facie burden that it cannot be held liable because it merely provided payroll services.

The court now turns to that part of TMC's argument that it is not liable in tort to plaintiff because plaintiff was a non-party to its contract with the hotel. While "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002] [internal citation omitted]), "under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*id.* at 139 [internal citations omitted]). One of the "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care -- and thus be potentially liable in tort - to third persons" is "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[es] a force or instrument of harm" (*id.* at 140 [internal quotation marks and citation omitted]). "In this context, a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (*id.* at 141-142 [internal citations omitted]). "A contractor who creates or exacerbates a harmful condition may generally be said to have launched it" (*Haracz v Cee Jay, Inc.*, 74 AD3d 1145, 1146 [2d Dept 2010] [internal quotation marks and citations omitted]).

First, TMC improperly relies on plaintiff's asserted lack of definitive and conclusive evidence. It fails to come forward with sufficient evidentiary facts to demonstrate that material factual issues do not remain in dispute and that the maintenance workers either did not repair or provide other services, or, if they did so, they exercised reasonable care and did not create or exacerbate a dangerous or unsafe condition. TCM's prima facie burden on this summary judgment motion cannot be met by merely asserting that plaintiff cannot meet her burden.

Second, and contrary to TMC's contention, TMC failed to demonstrate that a fair reading of the deposition testimonies show that disputed issues of fact remain on this issue of whether the maintenance workers performed the work and, by so doing, did not create or exacerbate a dangerous condition. For example, TMC relies upon Costello's deposition testimony. Yet, that testimony is insufficient to meet TMC's prima facie burden. Costello lacked personal or other knowledge as to whether and in what manner the maintenance workers performed the work on the drain or pipe at Lexington Brass, and lacked knowledge of the condition of the drain or pipe following completion of the work (*See Ray v Apple Sq. LLC*, 174 AD3d 416, 417 [1st Dept 2019]).

In response to questions posed, Costello testified that: he did not conduct any type of investigation to determine what occurred (Doc 80, at 81, lines 20-24); he does not know if workers provided by TMC performed any labor at Lexington Brass (*id.* at 82, lines 17-22); he does not know if he inquired as to whether they performed any labor there (*id.* at lines 23-25); he did not ask any of TMC's employees if they performed work in Lexington Brass (*id.* at 83, lines 7-12); he did not ask anyone other than TMC's workers about what happened in terms of the work performed at Lexington Brass (*id.* lines 13-17).

In answer to the posed question of whether he performed any type of investigation into the allegations against TMC, Mr. Costello answered “No. When I read it I thought to myself it has nothing to do with me” (*id.* at 82, lines 9 -11). In response to the posed question as to why he would think it had nothing to do with him, Mr. Costello answered: “Because I just provided the labor and didn’t direct” (*id.* at 15-16). Assumptions, conclusory assertions, and lack of knowledge, particularly when contradicted by other record evidence, do not meet a movant’s prima facie burden of showing entitlement to judgment as a matter of law.

Moreover, other deposition testimonies attached as exhibits to TMC’s moving papers offer sufficient evidence, based upon personal knowledge, as well as reasonable inferences therefrom, that the maintenance workers provided by TCM, sometimes with and sometimes without the engineering director, performed maintenance and repair of the alleged recurring condition, and that the maintenance workers exacerbated or created a dangerous or harmful condition, thereby launching it.

Special Employment Status

So too TMC fails to meet its prima facie burden of demonstrating that there are no remaining factual issues and that it conclusively established that special employment status can be summarily determined on its moving papers. “The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his [or her] servant within the scope of employment” (*Perkins v Crothall Healthcare, Inc.*, 148 AD3d 1189, 1190 [2d Dept 2017] [internal citation and quotation marks omitted]). “The special servant rule applies only where the usual employer relinquishes control of the servant to another person, thereby making the servant a special employee of the other person and making that person, rather than the usual employer, liable for the servant’s acts” (*id.* [internal citation and quotation marks omitted]). “General

employment is, however, presumed to continue, and special employment will not be found absent a clear demonstration of surrender of control by the general employer and assumption of control by the special employer” (*Bellamy v Columbia Univ.*, 50 AD3d 160, 161 [1st Dept 2008]) [internal quotation marks and citation omitted]). “Whether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry not amenable to resolution on summary judgment” (*id.* at 161-162 [internal citation omitted]).

“[S]ummary adjudication of special employment status” is proper only where defendant demonstrated it “conclusively” (*id.* at 162). A court’s “determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-558 [1991]). “While it may be tempting to infer from the general employer’s surrender of control a corresponding assumption of control by the putative special employer, the law is clear that a showing of the former does not suffice to support an inference of the latter” (*Bellamy*, 50 AD3d at 165).” [T]here must, in addition, be an affirmative showing that complete and exclusive control has in fact been assumed” and, in the presence of other factors including the general employer’s right to terminate the employee’s employment, “not even the evidence of the general employer’s surrender of control is conclusive” (*id.*).

Here, TMC has not met its burden. TMC’s factual assertions do not conclusively establish the special employment status of the maintenance workers. Thus, for example, TMC does not so demonstrate by asserting that: the hotel supplied the uniforms and tools (particularly as the agreement and addendum so provided); TMC did not maintain an office at the hotel; and, the maintenance workers reported to the engineering director. Similarly, TMC does not address the other record evidence that TMC retained control and continued as the general employer of

the maintenance workers. For example, TMC had the right to terminate the employment of the maintenance workers. Additionally, the agreement and addendum between TMC and the hotel specifically stated that the maintenance workers provided by TCM were deemed employees of TMC and not the hotel (*see Ramos v 110 Bennett Ave., LLC*, 180 AD3d 554, 555 [1st Dept 2020]). Nor do the deposition testimonies of other parties and non-parties meet TMC's prima facie burden on this motion, the court further noting that movant TMC failed to offer the deposition testimony or an affidavit of one of the maintenance workers who possess personal knowledge on this issue.

Having failed to establish conclusively that the issue of special employment status can be resolved in its favor by summary adjudication, TMC's motion on this basis is denied.

The Cross Claims

TMC fails to meet its prima facie burden of demonstrating that material issues of disputed fact do not remain and that it is entitled to judgment dismissing the cross claims as a matter of law. For example, the agreement and addendum provide for TMC's indemnification of the hotel and Hersha. The addendum provides that TMC (as Vendor) "shall indemnify, defend and hold" harmless the hotel and Hersha Hospitality Management L.P., and that "any limitations on Vendor's damages and liability set forth in the Agreement shall not apply to: (a) liability arising from the negligence or willful misconduct of a party" (Doc 91, ¶ 11 at 3). In the paragraph entitled "Insurance Requirements," TMC agreed to maintain insurance coverage and include the Hotel and Hersha Hospitality Management L.P. as additional insureds (*id.* Doc 91, ¶ 12 [a] at 3-4). Appendix II, entitled "Insurance Requirements," provides that "Vendor shall obtain and maintain in full force, or cause of be obtained in full force, throughout the performance of its obligations under this Agreement, insurance coverage against claims,

regardless of when asserted, that may arise out of, or result from, Vendor's operations, the operations of Vendor's Subcontractors, Vendor's Sub-subcontractors, employees, agents and other entity, directly or indirectly, engaged by Vendor, in connection with the Services as described in this Agreement" (*id.* at 8).

Moreover, on these moving papers, it is premature to dismiss the cross claims, as issues of fact exist concerning whether one or more of defendants TCM, the hotel and Hersha were guilty of negligence (*see Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192 AD3d 581 [1st Dept 2021]; *One Bryant Park v Permasteelisa Cladding Tech., Ltd*, 189 AD3d 584 [1st Dept 2020]; *Martins v Little 40 Worth Assocs., Inc.*, 72 AD3d 483 [1st Dept 2010]; *Correia v Professional Data Mgt.*, 259 AD2d 60 [1st Dept 1999]).

TMC Failed to Demonstrate Entitlement to Summary Judgment

As movant TMC failed to meet its prima facie burden, the court does not turn to the opposing papers. In any event, to the extent, if at all, TMC met its prima facie burden, plaintiff and defendants hotel and Hersha cited sufficient evidence to raise triable issues of fact, and TMC failed in its reply papers to defeat this showing.

TMC's motion for summary judgment is denied.

Defendants Hotel and Hersha's Motion (Mot. Seq. No. 004)

Contentions

The hotel and Hersha contend that they did not owe, and in any event did not breach, a duty to plaintiff because pursuant to the lease, the hotel, as an out-of-possession owner, was not required to maintain or repair plumbing, make non-structural repairs, keep the demised premises neat and clean, and, unless otherwise required, to install and maintain any additional plumbing systems required by the tenant. Movants' additional contentions include that: (1) they lacked

constructive or actual notice of the condition; (2) the condition was not due to their actions; (3) the condition was open and obvious; (4) non-party entities, and not movants, owed and breached a duty to plaintiff; and (5) plaintiff's slip and fall was due to her own actions, including the type of shoes she wore and her failure to exercise due care. With respect to these and related contentions, however, movants fail to meet their prima facie burden of proof.

Discussion

A few preliminary matters. By way of attorney affirmation, movants attach and rely upon copies of a certain lease and amendment[s]. These documents, however, do not appear to be in proper evidentiary form. The documents are copies, not the originals; the documents are not introduced by someone with personal knowledge who attests that the documents are true and complete copies of the originals and are maintained in the ordinary course of business.

Additionally, the documents contain references to other documents or amendments that are not attached as exhibits. Movants have not addressed the omission of these documents or otherwise demonstrated that these unattached documents do not alter the terms of the lease as to the obligations of the owner and tenant or that these documents support the contentions made by movants.

Moreover, the provided description and analysis of these documents appear incomplete and are not supported, or appear contradicted, by the documents that are attached as exhibits. For example, movants assert or imply that the tenant's obligations under the lease are borne by non-party Lexington Brass or non-party EMM Group, Inc. (EMM) (which movants allege owns Lexington Brass). Yet, the relied-upon lease, dated June 2010 and entitled "Standard Form of Store Lease," names The Lexington Project Managers, LLC, and not Lexington Brass or EMM, as tenant (Doc 109). While EMM is named in the guaranty portion of this lease (EMM signed

under the name EMM Group Holdings, LLC),² it is in its capacity as one of the guarantors for the named tenant The Lexington Project Managers, LLC. So too the attached “First Amendment to Ground Lease” (amendment) (Doc 113), which also refers to a portion of the demised premises, does not identify Lexington Brass or EMM as the tenant. Rather, Lexington Holding Associates, LLC, a defendant herein, is identified as the tenant.

Additionally, movants appear to have omitted various agreements that are referenced in the amendment, such as a document entitled “Restaurant Lease Assignment” dated as of September 15, 2011, and an October 2011 document entitled the “Restaurant Lease.” Nor do movants attach an affidavit by a person with personal knowledge as to the non-attached documents or with respect to agreed-upon obligations of Lexington Brass or EMM with respect to the repair of the alleged recurring condition. Movants’ reliance on a selected portion of plaintiff’s deposition testimony supports only that Lexington Brass occupied a portion of the ground floor. Movants have failed to lay bare their proof.

While plaintiff may or may not have a workers’ compensation claim or other possible action against Lexington Brass or EMM, the hotel and Hersha fail to address in these papers how the lease obligated these non-parties to make the repairs or to demonstrate how such an alleged obligation relieves movants from liability under the disputed factual circumstances herein. There can be more than one proximate cause. Nor do the moving defendants attach an expert or other affidavit setting forth that the recurring condition of water on the floor resulted from a cause that was non-structural in nature, and that the work and repairs needed to remedy the condition also were non-structural in nature.

² It appears that movants failed to redact certain of their exhibits so as to protect certain personal and confidential information. Movants are reminded of their obligation to do so. Movants are to forthwith submit and file the appropriate stipulation with the Clerk, or a stipulation to be so ordered, so as to effectuate these redactions.

Movants' Duty

In any event, even if a property owner or managing company owed no duty to an injured plaintiff to have repaired a condition, “if it undertakes to do so, it may be held liable in negligence where its acts create or increase the hazards” (*Prenderville v International Serv. Sys., Inc.*, 10 AD3d at 337 [internal citations omitted]). “A defendant may be liable for injuries resulting from a recurrent dangerous condition it creates or leaves unattended (*Erikson v J.I.B. Realty Corp.*, 12 AD3d 344, 345 [2d Dept 2004] [internal citations omitted]).

Here, whether or not the lease obligated movants to repair the allegedly dangerous recurring condition, movants fail to meet their prima facie burden in their moving papers that: (1) they did not undertake to and did not repair the condition; and (2) even if they did undertake to and did make the repairs, they were not negligent and did not create an unsafe condition or make the condition more dangerous. While the hotel and Hersha may characterize the work they performed as a courtesy and describe it as merely unclogging a drain, they have not demonstrated that factual issues do not remain as to whether they performed the repair(s) and the extent, frequency and nature of the work and repairs they undertook. Similarly, movants, relying on counsel’s affirmation, assert that the hotel “never performed work requiring a licensed plumber” (Doc 97, Affirmation in Support and Opposition of Neil L. Sambursky, at 3 ¶ 7). This conclusory assertion of fact, however, is not sufficiently supported by record deposition evidence. Nor is the conclusion supported by an expert’s affidavit. That the record evidence appears to demonstrate that the engineering director and maintenance workers did not possess a plumber’s license, does not equate to an established fact that a plumber was not needed.

Moreover, the party and non-party deposition testimonies movants attach contain sufficient and numerous evidentiary support based on personal knowledge to demonstrate that

movants failed to meet their prima facie burden on these issues. Nor have movants met their prima facie burden of demonstrating that disputed factual issues do not remain as to whether the water on the floor was a recurrent and dangerous condition and whether any work they did undertake was performed in a negligent manner.

Constructive or Actual Notice

The hotel and Hersha fail to establish the absence of a disputed issue of fact with respect to their contention that they lacked constructive and actual notice of the wet condition. “Even absent proof that a defendant has actual knowledge of the condition on the date of the accident, a defendant’s actual knowledge of the recurrent condition constitutes constructive notice of each specific recurrence of it” (*Erikson v J.I.B. Reality Corp.*, 12 AD3d at 345 [internal citations omitted]). Similarly, movants did not demonstrate that issues of fact do not exist as to notice, as plaintiff [and non-parties] “provid[ed] evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed” by movants (*David v New York City Hous. Auth.*, 284 AD2d 169, 171 [1st Dept 2001]). On these moving papers, the hotel and Hersha did not demonstrate that they lacked actual notice of the specific recurring water condition, and such notice can be sufficient to establish constructive notice of the specific recurrence on the day of the accident (*See Chianese v Meier*, 98 NY2d 270, 278 [2002]). “The strength of plaintiff’s case is a matter to be resolved at trial, and not on a motion for summary judgment” (*David*, 284 AD2d at 171). The court need not and does not address the issue of actual notice, other than noting that movants have not shown that issues of fact do not remain on this issue, as the testimonies of party and non-party deponents indicate that the water

condition and a request for repair was made to the hotel within a certain time period prior to the instant accident.³

Moreover, the deposition testimonies demonstrate the existence of disputed material issues of fact on the issue of constructive and actual notice.

The Nature of the Condition

Movants have not met their “burden of establishing, as required to prevail on a motion for summary judgment, that the defective condition of the floor was ‘open and obvious,’ and that [they] were not otherwise responsible for plaintiff’s injuries as a matter of law” (*Bruker v Fischbein*, 2 AD3d 254, 255 [1st Dept 2003]). “Establishing that a hazardous condition is open and obvious relieves a party charged with maintaining the premises of the duty to warn of the condition” but “[i]t does not abate the duty to maintain the premises in a reasonably safe condition” (*Garrido v City of New York*, 9 AD3d 267, 267-268 [1st Dept 2004]). “Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances” and a condition “may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiff’s attention is otherwise distracted” (*Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [1st Dept 2004] [internal citation omitted]). “Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question” (*Stadler v Lord*

³ Plaintiff requests that this court preclude the hotel and Hersha from arguing lack of notice as a ground for summary judgment, as they failed to produce the maintenance log(s), and that preclusion is an appropriate remedy because of spoliation of evidence. As to the existence of such documents, plaintiff relies upon the deposition testimony of the engineering director that all requests for repairs, and every repair made, were required to be and were entered into a maintenance log. Yet, the hotel and Hersha responded to the production demand by stating that such documents do not exist. As a preliminary matter, the court notes that such request is moot, as the court finds that the hotel and Hersha failed to meet their prima facie burden on this issue. In any event, such request is not now properly before this court. First, to the extent plaintiff is seeking to preclude on the basis of non-production of documents, such request more properly should have been brought during discovery. Second, to the extent plaintiff seeks a trial order or jury charge with respect to preclusion, missing documents or spoliation of evidence, such request is not properly before this court. Plaintiff may make the appropriate application before the trial court and defendants may oppose such application. This court does not opine on the merits or lack thereof of such an application.

& *Taylor LLC*, 165 AD3d 500, 500 [1st Dept 2018]). “For a condition to be open and obvious as a matter of law, it must be one that could not be overlooked by any observer reasonably using his or her ordinary senses” (*Garrido*, 9 AD3d at 268). So too the issue of whether a condition is a hazard is usually a question of fact, although a court may determine the condition to be not inherently dangerous “when the established facts compel that conclusion” (*Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475, 476 [1st Dept 2007], quoting *Tagle v Jakob*, 97 NY2d 165, 169 [2001]).

On this record, movants have failed to meet their prima facie burden. They have not established that, on this record, disputed facts do not exist and that they are entitled to dismissal as a matter of law.

Role of Other Entities and Persons and Comparative Fault

Movants have not demonstrated that there are no disputed factual issues with respect to the actions or non-actions of other parties or non-parties and that as a result movants are entitled to dismissal as a matter of law. Nor have movants shown that the alleged actions or non-actions of plaintiff, TMC, or non-parties were the sole proximate cause of the accident and plaintiff’s injuries. Proximate cause and comparative negligence remain factual issues to be determined at trial.

Cross Claims

On these moving papers, movants have not demonstrated that there are no remaining disputed issues of fact exist and that they are entitled to dismissal of TMC’s cross claims and for judgment in their favor on their cross claims. Here, determination of the cross claims is premature. The cross claims cannot be summarily resolved until a determination is made as to defendants’ respective negligence, if any (*see Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192

AD3d 581 [1st Dept 2021]; *One Bryant Park v Permasteelisa Cladding Tech., Ltd*, 189 AD3d 584; *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334; *Correia v Professional Data Mgt.*, 259 AD2d 60).

Additionally, as to common-law indemnification, it “requires proof not only that the proposed indemnitor’s negligence contributed to the causation of the accident, but also that the party seeking indemnity was free of negligence” (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d at 484, citing *Correia v Professional Data Mgt., Inc.*, 259 AD2d at 65). “Common-law indemnification is predicated on vicarious liability without actual fault, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotation marks and citations omitted]). “[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law” (*Correia*, 259 AD2d at 65)].

The Hotel and Hersha Failed to Demonstrate Entitlement to Summary Judgment

As movants hotel and Hersha fail to meet their prima facie burden, the court does not turn to the opposing papers. In any event, to the extent, if at all, movants met their prima facie burden, plaintiff and TMC have cited sufficient evidence to raise triable issues of fact, and movants failed in their reply papers to defeat this showing.

The hotel and Hersha’s motion for summary judgment is denied.

Other Requested Relief

In her opposing papers, plaintiff requests that the court search the record and grant summary judgment in her favor. The request is denied for a number of reasons, including that plaintiff has failed to demonstrate that such relief is appropriate here as disputed issues of fact remain.

Conclusion

For the foregoing reasons, the court holds that movants in both summary judgment motions have failed to meet their prima facie burden and denies both motions. Moreover, to the extent movants met their prima facie burdens, the opponents of the motions demonstrate, by admissible evidence, that issues of fact remain, and movants have failed to defeat this showing in their reply papers. To be clear, the court does not opine in this decision on the ultimate merits of the case or on any evidentiary or other trial issue, and leaves all such issues to the trial court and the jury.

Accordingly, it is

ORDERED that the motion of defendant Transition Management Corporation for summary judgment dismissing the amended complaint and all cross claims against it (motion sequence number 003) is denied; and it is further

ORDERED that the motion of defendants 44 Lexington Associates, LLC, 44 Lexington Holding LLC, Lexington Holding Associates, LLC, 44 Lexington Managing Member LLC, Hersha Hospitality Management, L.P., and Hersha Development Company LLC, for summary judgment dismissing the amended complaint and all cross claims against them, and granting them summary judgment on their cross claims (motion sequence number 004) is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties and upon the Court Clerk within thirty days.

This constitutes the Decision and Order of the Court.

Dated: June 14, 2022



SHLOMO S. HAGLER, J.S.C.