SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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ATEF ATTIA,

Plaintiff,

- v -

SLAZER ENTERPRISES, LLC, MADISON PARK GROUP, JMJS 23RD STREET REALTY OWNER, LLC, FKF MADISON GROUP OWNER, LLC, BOVIS LEND LEASE LMB, INC., CIVETTA COUSINS JV LLC

Defendant.

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INDEX NO. 113929/2007

MOTION DATE 10/29/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action for personal injuries allegedly sustained by plaintiff Atef Attia on March 16, 2007, when he tripped, slipped, and fell due to snow-covered debris on the sidewalk in front of 20 East 23rd Street, New York, New York ("the premises"). Defendants, Slazer Enterprises, LLC, Madison Park Group, JMJS 23rd Street Realty Owner, LLC, FKF Madison Group Owner, LLC, Bovis Lend Lease LMB, Inc. (collectively, "Contractors and Owners"), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and granting them summary judgment against co-defendant, Civetta Cousins JV, LLC for contractual and common-law indemnity. Co-defendant, Civetta Cousins JV, LLC ("Subcontractor" or "Civetta") cross-moves for summary judgment seeking the same relief with respect to all claims asserted against it.

Plaintiff voluntarily concedes to dismissal of the causes of action sounding in Labor Law and all claims against Madison Park Group, JMJS 23rd Street Realty Owner, LLC, FKF Madison

Group Owner, LLC (oral argument transcript, NY St Cts Electronic Filing [NYSCEF] Doc No. 37 at 13).

BACKGROUND

Plaintiff alleges that on March 16, 2007, at 11:35 pm he tripped, slipped, and fell on a piece of plywood on which snow had accumulated (bill of particulars, NYSCEF Doc No. 10 ¶ 1). The accident occurred on the sidewalk, in front of a construction site, at the premises owned by Slazer Enterprises, LLC ("Slazer"). Slazer hired Bovis Lend Lease LMB, Inc. ("Bovis") as construction manager to build a residential building at the premises ("the project"). Bovis subcontracted with Civetta to perform excavation and foundation work (subcontract, NYSCEF Doc No. 16). Madison Park Group, JMJS 23rd Street Realty Owner, LLC and FKF Madison Group Owner, LLC provided funding for the project.

ARGUMENTS

Contractors and Owners contend that they are entitled to summary judgment because they neither caused nor created the condition on which plaintiff tripped and fell, nor did they have actual or constructive notice of such condition. Contractors and Owners argue that the plywood that plaintiff tripped over must have belonged to Civetta since it was the only subcontractor on the premises performing work on the date of the accident and was using plywood as part of its excavation work. Furthermore, they argue, it was Civetta's contractual duty to clean and maintain the sidewalk, pursuant to the subcontract between Contractors and Owners and Civetta. Also contained within the subcontract was a broad indemnity clause, wherein Civetta agreed to defend and indemnify Contractors and Owners against all claims arising out of, or connected to, Civetta's work. Contractors and Owners also submit a certified weather report in support of their argument that a storm was in progress at the time of plaintiff's alleged accident, absolving them

of any duty to clear snow or ice until a reasonable time after the storm had passed. Finally, Contractors and Owners argue that Civetta's cross motion should not be considered as it is untimely and improperly labeled as a cross motion.

Civetta, in support of its cross motion also argues that it did not cause, create, or have actual or constructive notice of the plywood and snow plaintiff tripped and slipped upon. It contends that there is a question of fact as to which entity was responsible for clearing snow or debris from the sidewalk of the premises after the workday ended. Moreover, it asserts that plaintiff cannot establish a prima facie case of negligence against it because it did not owe him a duty of care arising out of its contractual relationship with Contractors and Owners, and no evidence exists that it was Civetta that caused the plywood to be placed in the sidewalk area where plaintiff allegedly had his accident. In response to the claim that its cross motion is untimely, Civetta argues that its cross motion is based on nearly identical grounds as that of Contractors and Owners' and should be considered on its merits.

Plaintiff argues that defendants have not met their burden in establishing lack of constructive notice because they have only come forth with general cleaning practices for the premises on the date of accident. What's more, plaintiff contends that simply by accusing the other of failing to keep the sidewalk clear, defendants have shown that a question of fact exists, warranting denial of summary judgment.

DISCUSSION

1. Untimeliness of Civetta's Cross Motion

CPLR 3212 (a) requires summary judgment motions to "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007] [internal quotation marks and citation omitted];

Brill v City of New York, 2 NY3d 648, 652 [2004]). "An untimely *but correctly labeled* cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause" (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013]; *see Grande v Peteroy,* 39 AD3d 590, 591-592 [2d Dept 2007]). As explained by the court in *Kershaw* (114 AD3d at 87-89), a true cross motion seeks relief only against the moving party and "allowing movants to file untimely, mislabeled 'cross motions' without good cause shown for the delay, affords them an unfair and improper advantage."

Here, Civetta does not deny that its cross motion is untimely by over 30 days, nor does it give a reason for its delay. Instead, it argues that its cross motion is nearly identical to the original motion and should be considered by the court. However, the untimely motion by Civetta seeks dismissal of plaintiff's complaint on the additional grounds that it owed no duty to the plaintiff due to Civetta's status as a subcontractor, an argument not raised by the timely motion of Contractors and Owners. Thus, the portion of Civetta's motion seeking summary judgment on grounds not originally raised by the initial motion will not be considered by the court.

2. 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 eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and

citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960], *rearg denied* 8 NY3d 934 [1960]).

In premises liability actions, a defendant moving for summary judgement 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" for a sufficient length of time to discover and remedy it (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "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 discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [citations omitted). When a defendant seeks summary judgment on grounds that it had no constructive notice of a dangerous condition, it must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Similarly, in cases involving snow and ice, a property owner or possessor is not liable unless he or she created the dangerous condition or had actual or constructive notice of it (*Voss v D&C Parking*, 299 AD2d 346, 346 [2d Dept 2002]). However, "the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Pippo v City of New York*, 43 AD3d 303, 304, [1st Dept 2007]). Accordingly, there is "no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways" (*Powell v*

MLG Hillside Assoc., 290 AD2d 345, 345 [1st Dept 2002]). "[E]vidence of a storm in progress presents a prima facie case for dismissal" (*id.*).

Moreover, pursuant to Administrative Code § 16-123 (a), every owner of a building in New York City that abuts a street with a paved sidewalk is not required to remove snow from the sidewalk until four hours after the snow ceases falling, excluding the hours of 9:00 p.m. through 7:00 a.m. (Administrative Code of City of N.Y. § 16-123 [a]; *Valentini v PCV St Owner LP,* 2017 NY Slip Op 31706[U],*2 [Sup Ct, NY County 2017]).

Here, the certified weather report indicates that a total of 5.5 inches of snow fell on the day of the alleged accident, March 16, 2007; 1.12 inches of which fell from 4:00 p.m. to approximately 11 p.m., the time of plaintiff's accident (certified weather report, NYSCEF Doc No. 12). The storm did not cease until 3:00 a.m. on March 17, 2007 (*id.*). Therefore, defendants had until 11:00 a,m. on March 17 to clear the sidewalk of snow and ice. Accordingly, defendants have established a prima facie case for dismissal based on the storm in progress doctrine. As the storm in progress defense is applicable here, the court need not reach a decision as to which defendant was responsible for clearing ice and snow.

However, both movants have failed to meet their respective prima facie burden of showing that they lacked constructive notice of the plywood upon which plaintiff tripped.

John Hyers, Bovis' superintendent for the project, testified on its behalf. Hyers testified that he worked at the premises every day in March 2007, including on the date of the alleged accident (Hyers deposition, NYSCEF Doc No. 14 at 11-12, 39-40). Hyers, along with a Civetta foreman would inspect the sidewalk both in the morning and before they left the site at the end of the day, to ensure that the sidewalk was clear and safe for pedestrians (*id.* at 20, 36-37). While it

was part of Hyers' duties to maintain a daily report log as well as a safety log, he testified that the records were most likely destroyed after the project ended (*id.* at 24-25).

John Lombardi, a principal of Civetta, and responsible for site safety at the project, testified on its behalf. Lombardi stated that Civetta was responsible for maintaining the sidewalk in front of the project during normal business hours unless another contractor placed debris on the sidewalk, which would then be the offending contractor's job to clear (Lombardi deposition, NYSCEF Doc No. 15 at 37-38). While Lombardi was not sure of the frequency at which he visited the site, he stated that Civetta's superintendent was there daily (*id.* at 16, 26). As to daily inspection practices:

> Q: At the end of each workday, would Civetta's superintendent do an inspection of the site?
> A: I'm not sure.
> Q: And were you ever there at the job site at the end of a workday?
> A: Probably.
> Q: And do you remember what was done at the end of a workday?
> A: Do you have a specific day? I wouldn't even know.
> Q: No. No. When you were there?
> A: I don't remember.

(*id.* at 65-55).

None of the defendants' witness testimony established anything more than its general inspection practices, which is insufficient to establish that it did not have constructive notice (*Herman v Lifeplex, LLC*, 106 AD3d 1050, 1051 [2d Dept 2013] ["Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice"]). Nor does either movant present any evidence in the form of records, reports or testimony of when the area was last inspected or cleared on the date of accident (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 599 [2d Dept 2008] [summary judgment denied where testimony merely referred to general daily cleaning practices and defendant tendered no evidence regarding any particularized or

specific inspection or cleaning procedure in the area of the plaintiff's fall on the date of the accident]; *see also Porco v Marshalls Dept. Stores*, 30 AD3d 284, 285 [1st Dept 2006] [summary judgment denied where defendant's manager did not testify as to how often the aisles were checked, nor was there testimony from employees working that day who could have offered testimony regarding the last time the aisle was checked prior to the accident]; *Joachim v AMC Multi-Cinema Inc.*, 129 AD3d 433, 434 [1st Dept 2015] [where manager kept no written log of inspections and vaguely testified that he inspected the premises weekly was insufficient to satisfy summary judgment burden]).

Accordingly, since there are triable issues of fact as to whether defendants had constructive notice of the debris, the moving parties' summary judgment motions are denied.

3. Common Law and Contractual Indemnity

Contractors and Owners move for summary judgment on its contractual indemnification claim against Civetta, pursuant to Article 12 of the subcontract, which provides as follows:

> "Subcontractor agrees to defend, indemnify and save harmless Contractor and Owner, as well as any other parties which Contractor is required under the Contract Documents to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claim, cost, expense, or liability (including attorneys' fees, and Including costs and attorneys' fees incurred in enforcing this indemnity), attributable to bodily injury, sickness, disease, or death, or to damage to or destruction of property including loss of use thereof), caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor, its subcontractors and suppliers, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder: provided, however. Subcontractor's duty hereunder shall not arise if such injury sickness, disease, death, damage, or destruction is caused by the sole negligence of a party indemnified hereunder"

(NYSCEF Doc No. 16 at 7).

Contractual indemnification involves the parties agreeing to shift liability from the owner or contractor to the subcontractor that proximately caused plaintiff's injuries through its negligence. "In contractual indemnification, the one seeking indemnity need only establish that

it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Pro. Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). However, it would be premature to conditionally grant summary judgment on a contractual indemnification claim when there is a possible finding that the plaintiff's injuries can be attributed to the party seeking indemnification (*Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]). Here, Contractors and Owners' failure to make a *prima facie* showing as to their own negligence makes their application for summary judgment as to contractual indemnification against Civetta premature.

Contractors and Owners also move on common law indemnification grounds. A party seeking common law indemnification is required to prove that it is not liable for negligence other than statutorily and that the proposed indemnitor contributed to the cause of the accident (*McCarthy v Turner Construction, Inc.*, 17 NY3d 369, 376 [2011]). Here again, issues of fact remain as to the Contractors and Owners' liability, warranting denial of summary judgment on their claim for common law indemnification.

CONCLUSION

Based upon the foregoing, it is

ORDERED that defendants Slazer Enterprises, LLC, Bovis Lend Lease LMB, Inc.'s motion for summary judgment (motion sequence number 005) is denied in its entirety; and it is further

ORDERED that the motion of defendants Madison Park Group, JMJS 23rd Street Realty Owner, LLC, FKF Madison Group Owner, LLC to dismiss the complaint herein is granted on consent and the complaint is dismissed in its entirety as against said defendants, with costs and

disbursements to said defendants as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that defendant Civetta Cousins JV, LLC's cross motion for summary judgment is denied in its entirety; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it if further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) who are directed to mark the court's records to reflect the change in the caption herein.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23
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ATEF ATTIA

Plaintiff,

Index No. 113929/2007

-against-
SLAZER ENTERPRISES, LLC, BOVIS LEND LEASE LMB, INC., and CIVETTA COUSINS JV LLC,

Defendants.
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And it is further

ORDERED that such service upon the Clerk of Court and the Clerk of the General Clerk's Office 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).

6/21/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE