

Linares v Total Maintenance
2022 NY Slip Op 32451(U)
January 13, 2022
Supreme Court, Queens County
Docket Number: Index No. 710576/2016
Judge: Lourdes M. Ventura
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK – QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

-----X
MARIA LINARES,

Plaintiff,

Index
Number: 710576/2016

-against-

Motion
Date: October 25, 2021

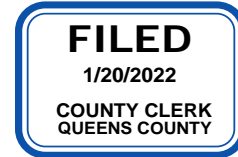
TOTAL MAINTENANCE and
ST. JOHN’S UNIVERSITY,

Defendants.

Motion
Seq. No.: 4

-----X
TOTAL MAINTENANCE and
ST. JOHN’S UNIVERSITY

Third-party Plaintiffs,



-against-

COMPASS GROUP USA, INC.,

Third-party Defendant.

The following numbered electronically filed (EF) papers read on this motion by defendants/third party plaintiffs for an Order: Pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's action against St. John's University and Total Maintenance; pursuant to CPLR 3212 granting St. John's University and Total Maintenance contractual indemnification against the third-party defendant Compass Group; and, for such other and further relief as to this court deems just and proper.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 62-91
Affirmation in Opposition - Exhibits.....	EF 93-96
	EF 95-96
Affirmation in Reply.....	EF 97-98

Upon the foregoing papers, it is Ordered that the instant motion is determined as follows:

Plaintiff commenced the above-referenced action seeking to recover for personal injuries allegedly sustained in a slip and fall on or about January 22, 2014 as plaintiff was walking through the basement located at 8000 Utopia Parkway Jamaica, County of Queens, the defendant St. John’s University (hereinafter “defendant St. John’s”) Campus. At the time of plaintiff’s slip and fall, plaintiff was employed by defendant Compass Group USA, Inc., (hereinafter “defendant

Compass”). It is alleged that defendant Total Maintenance (hereinafter “defendant Total”) performed cleaning services at defendant St. John’s University.

Total Maintenance and St. John’s University (collectively “defendants/third party plaintiffs”) filed this summary judgment motion pursuant to CPLR 3212 seeking to dismiss the plaintiff’s action against St. John’s University and Total Maintenance.

Plaintiff opposes defendants/third party plaintiffs’ motion and avers *inter alia* that plaintiff has raised triable issues of fact precluding summary judgment and that the testimony of the parties alone raises an issue of fact as to whether defendants created the subject slippery condition or had notice of same.

Defendant Compass also submitted a response to defendants/third party plaintiffs summary judgment motion pursuant to CPLR 3212.

The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues. (*See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Doyle v Wieber*, 194 AD3d 785 [2d Dept 2021].) A Summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility. (*See Kaziu v Human Care Servs. for Families & Children, Inc.*, 167 AD3d 588, 588 [2d Dept 2018], quoting *Ruggiero v DePalo*, 153 AD3d 870, 872 [2d Dept 2017].)

Generally, liability can be imposed upon a landowner or a lessee “who creates a dangerous condition on the property, or had actual or constructive notice of the dangerous condition” (*Koutsiaftis v All. Parking Servs., LLC*, 175 AD3d 1519, 1520 [2d Dept 2019]). 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]). It is also well settled that a property owner who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition (*Anderson v Cent. Valley Realty Co.*, 300 AD2d 422 [2d Dept 2002]).

Here, during plaintiff’s examination before trial, plaintiff testified that the oil she slipped on was located in the middle of the hallway and that there were two other prior occasions where she observed oil on the floor in the hallway.

The Court finds based upon the evidence submitted that genuine issue of material fact exists as to the cause of the hazard, whether the oil was visible and apparent and existed for a sufficient length of time prior to plaintiff’s fall for defendants to discover and remedy it, as would constitute constructive knowledge, precluding summary judgment. (*Taub v JMDH Real Estate of Garden City Warehouse, LLC*, 150 AD3d 1301, 1302 [2d Dept 2017]). Thus, defendants/third party plaintiffs’ motion seeking summary judgment pursuant to CPLR 3212 is denied.

Defendant also seeks summary judgment pursuant to CPLR 3212 on the ground of contractual indemnification against the third-party defendant Compass.

It is well settled that the right to contractual indemnification depends on the specific language of the contract. (*See Lesisz v Salvation Army*, 40 AD3d 1050 [2d Dept 2007]; *Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461 [2d Dept 2005]). The contractual indemnification clause in which defendants/third party plaintiffs relies upon in relevant part, reads as follows:

“To the fullest extent permitted by law, and except as set forth herein, each party to this contract shall indemnify, defend and hold the other party and (as applicable) the other party's trustees, directors, officers, employees, and agents harmless from and against any and all losses, damages or expenses, including reasonable attorneys' fees, arising out of or resulting from claims or actions for bodily injury, death, sickness, property damage or other injury or damage caused by any negligent act or omission of such party, any willful misconduct of such party, any breach by such party of its obligations under this contract, or claims arising from sexual abuse committed by such party's employees. The right of a party (the "Indemnified Party") to indemnification under this contract shall be conditioned upon the following: prompt written notice to the party obligated to provide indemnification (the "Indemnifying Party") of any claim, action or demand for which indemnity is claimed; control of the investigation, preparation, defense and settlement thereof by the Indemnifying Party; and such reasonable cooperation by the Indemnified Party, at the Indemnifying Party's request and expense, in the defense of the claim, The Indemnified Party shall have the right to participate in the defense of a claim with counsel of Indemnified Party's choice and at its expense. The Indemnifying Party shall not, without the prior written consent of the Indemnified Party (which shall not be unreasonably withheld), settle, compromise or consent to the entry of any judgment under circumstances imposing any liability upon the Indemnified Party. The provisions of this Article shall survive the termination of this contract.”

It should be noted that the contract in which defendants/third party plaintiffs submit in support of its papers, and relies upon, is only executed by and between defendant Compass and defendant St. John. Defendant/third party plaintiff Total cannot seek contractual indemnification under the contract executed by and between defendant Compass and defendant St. John as it was not a named signatory under the contract. Thus, the branch of the motion whereby defendant/third party plaintiff Total is seeking contractual indemnification from co-defendant compass is denied.

The branch of the motion by defendant/third party plaintiff St. John seeking contractual indemnification from co-defendant Compass is denied. “[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *see* General Obligations Law § 5–322.1; *Hirsch v Blake Hous., LLC*, 65 AD3d 570, 571[2d Dept 2009]). Labor Law § 200 is a codification of the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). When an accident arises from a dangerous condition on the premises, an owner may be held liable if it created the condition or failed to remedy it despite having actual or constructive

knowledge of it (*see Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d at 763; *Fuchs v Austin Mall Assoc., LLC*, 62 AD3d 746, 747 [2009]; *Chowdhury v Rodriguez*, 57 AD3d at 128). The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections” (*Kennedy v McKay*, 86 AD2d 597, 598 [2d Dept 1982]; *see Colon v. Bet Torah, Inc.*, 66 AD3d 731, 732 [2d Dept 2009]; *Wynne v State of New York*, 53 AD3d 656, 658 [2d Dept 2008]), and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact (*see Urban v. No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [1st Dept 2009]). Moreover, if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition (*see Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2003]).

Therefore, the defendants/third party plaintiffs failed to establish that there are no triable issues of fact as to the alleged negligence of defendants/third party plaintiffs in connection with plaintiff's slip and fall. (*see Hirsch v. Blake Hous., LLC*, 65 AD3d at 571; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2d Dept 2008]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708–709 [2d Dept 2007]). Consequently, that branch of the defendants/third party plaintiffs' motion which is for summary judgment on their cross claim for contractual indemnification from co-defendant compass is denied.

Accordingly, the defendants/third party plaintiffs' motion for an Order pursuant to CPLR 3212 is denied in its entirety. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: January 13, 2021



HON. LOURDES M. VENTURA, J.S.C.

