SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH **PART** 18

Justice

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SOPHIA MERINO,

Plaintiff,

- v -

LARSTRAND CORPORATION, 723 ASSOCIATES, L.L.C., CP BURN, LLC, CP-3 79TH, LLC, PRIME BUILDING MANAGEMENT SERVICES INC.

Defendants.

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INDEX NO. 150488/2020

MOTION DATE 08/24/2021, 09/02/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 86

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, defendants CP BURN, LLC and CP-3 79th, LLC (hereinafter "CP Burn") move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims, including the contractual indemnification cross-claim, and breach of contract for failure to procure insurance crossclaim. Defendants Larstrand Corporation ("Larstrand") and 723 Associates LLC move for summary judgment dismissing the complaint and all cross-claims; and for an order granting summary judgment on their crossclaims for contractual indemnification and insurance coverage against defendant CP Burn.

BACKGROUND

Plaintiff commenced the instant action seeking damages for personal injuries allegedly sustained on October 16, 2019, at approximately 7:30 PM, as plaintiff was leaving a CP Burn pilates class and was caused to slip and fall while traveling down the second-floor interior staircase located at 187 East 79th Street in the County, City and State of New York.

Plaintiff's EBT Testimony

Plaintiff appeared for a deposition and testified that she arrived at the CP Burn pilates studio around 6:30 pm on the date of her accident (NYSCEF Doc. No. 50 [plaintiff's deposition transcript] page 24, 20-22). According to plaintiff, it had been raining heavily all day, and the heavy rain continued as she left the studio, after her accident (id. at 24-25, 23-5). Upon entering the building and as plaintiff traveled to the second floor, plaintiff noticed the stairs were wet, and it appeared to be from the rain as there was no color to the liquid (id. at 37, 7-19). Though plaintiff could not remember exactly, she believes every step on the staircase was wet (id. at 37-38, 24-1). After her class, plaintiff proceeded to leave the studio and began walking down the stairs. Plaintiff testified the staircase had good lighting, nonetheless, she slipped and fell down the staircase, and was unable to grab the handrail to stop her fall (id. at 60, 14-23).

Amaury Lopez EBT Testimony

Amaury Lopez is the property manager for Larstrand and appeared for a deposition on behalf of Larstrand and the building's owner, defendant 723 Associates LLC. Lopez testified Larstrand is a property management company that manages the 187 East 79th Street property on behalf of 723 Associates LLC, who owns the building (id. at 15-16, 7-2). As the property manager, Lopez manages the maintenance staff, construction team, and vendors. Lopez also serves as the liaison between tenants and different divisions of the company and ownership (NYSCEF Doc. No. 51 [Larstrand deposition transcript] page 14, 14-20). As for maintenance duties and responsibilities, Lopez testified that Larstrand was not responsible for the maintenance, cleaning or inspection of the 187 East 79th Street property (id. at 21, 10-13). Prime Building Management ("Prime") is the outside vendor that provides the janitorial and custodial duties for the 187 East 79th Street property (id. at 22-23, 22-2). As for Prime, Lopez testified the company performs their job duties from 7 am - 3 pm (id. at 28-29, 21-3). According to Lopez no one had a duty to inspect,

maintain, or clean the common areas of the building at the subject premises after 3 pm (id. at 29, 8-17). Lopez also testified that while Larstrand provided Prime with a general expectation of what they wanted, Prime had leeway to perform their duties as they saw fit (id. at 34-35, 23-5). As for general expectations, it was expected that Prime would sweep, mop, remove carding from the building, ensure the doors, windows, and glass were clean, among other job duties (id. at 35, 6-15). If someone had a complaint about the staircase in the building, it was Lopez's experience that the complaint would be directed to Larstrand (id. at 36, 10-19). Lopez also testified that according to the lease between the owner 723 Associates LLC and CP-3 79th LLC, 723 Associates LLC was responsible for maintaining and repairing the common areas of the building (id. at 62-63, 12-1).

Carlos Rafael EBT Testimony

Carlos Rafael is the owner of Prime and appeared for a deposition on the company's behalf. Rafael and his team clean the different buildings Prime has contracts with, and Rafael also supervises the workers (NYSCEF Doc. No. 53 [Prime deposition transcript] page 16, 8-13). According to Rafael, Larstrand hired Prime to perform its cleaning services at the 187 East 79th Street property (id. at 19-20, 22-7). Prime was tasked with cleaning the common areas of the building (id. at 18, 18-24). Prime cleaned these areas, including the subject staircase on the date of accident as they clocked in at 12:02 pm and clocked out at 12:36 pm (id. at 38-39, 13-5). Rafael testified that his team uses a swiffer sweeper to clean the stairs and not a mop, as the Swiffer sweeper drys within seconds (id. at 47-48, 14-2). Rafael was adamant that per the contract with Larstrand, Prime only works from 7 am - 3 pm (id. at 55, 14-24); (id. at 62, 8-12).

DISCUSSION

"[T]he 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]). The

"evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

CP Burn's Motion

In support of their motion for summary judgment, CP Burn argues they did not owe plaintiff a duty of care as it was not their responsibility to maintain the common areas of the building, nor did they cause or create the wet condition. CP Burn also argues all cross-claims against them should be dismissed, including the failure to procure insurance, because CP Burn did not have a contract with Larstrand, and CP Burn did not have a duty to contractually indemnify 723 Associates. In opposition counsel for Larstrand and 723 Associates LLC addresses only one of CP Burn's arguments, that being the issue of the contractual indemnification crossclaim. They argue contractual indemnification is required pursuant to the lease which states that CP Burn as tenant is to protect and save the owner, 723 Associates LLC, from and against all claims for injury to person or property by reason of any accident or happening in, on, or upon the demised premises.

At the outset, since defendants Larstrand and 723 Associates LLC, failed to oppose CP Burn's arguments that it did not owe plaintiff a duty of care, nor did it cause or create the condition, summary judgment is granted in favor of the defendant CP Burn, dismissing plaintiff's claims against it.

Contractual Indemnification

The Court finds that CP Burn has no obligation to indemnify Larstrand or 723 Associates LLC, as "[t]he unambiguous language of the parties' agreement expressly limits [CP Burn's] indemnity to situations where [CP Burn's] negligence [upon the demised premises] was responsible for plaintiff's injuries" (Peranzo v WFP Tower D Co. L.P., 201 AD3d 486, 487 [1st Dept 2022]). Counsel for Larstrand and 723 Associates LLC argues that paragraph 48 of the indemnification clause which states "any accident or happening in, on or upon the demised premises" controls, and further argues the staircase where plaintiff's accident occurred qualifies as the demised premises under CP Burn's lease, given the proximity to CP Burn's pilates studio. However, the Court finds otherwise. All signs point to the conclusion that the stairs where plaintiff fell are not regarded as the demised premises under CP Burn's lease agreement, and defendants cannot use CP burn's proximity to the staircase to hold them liable.

Amaury Lopez, the property manager for Larstrand testified that according to the lease between 723 Associates LLC and CP Burn, 723 Associates LLC was responsible for maintaining and repairing the common areas of the building, and CP Burn had no such duty (id. at 62-63, 12-1). Carlos Rafael, the owner of Prime who was contracted to clean the 187 East 79th Street property, testified that Prime had the responsibility of cleaning the common areas of the building, that included the subject staircase where plaintiff fell (id. at 18, 18-24). There is no testimony or evidence that implies CP Burn had the duty or responsibility of maintaining the staircase where plaintiff's accident occurred. The lease agreement provides that CP Burn contracted to rent the "demised premises on the second floor" and the lease agreement fails to mention that the second floor included any of the surrounding areas such as the nearby staircase. This matter is distinguishable from Queens Off. Tower Assocs. v Gen. Mills Rest., Inc., where the First Department held that "[t]he area where the dumpster [that leaked a slippery substance which

caused plaintiff's accident] was kept was accordingly part of the demised premises" (269 AD2d 223, 223–24 [1st Dept 2000]). For unlike in Queens where the parties contracted that the dumpster space would be deemed part of the demised premises, the lease in this matter did not designate that the staircase or the surrounding area of the second floor would be regarded as the demised premises for which CP Burn would be responsible.

Defendants highlight several cases that fail to address the issues at hand, that being what encompasses the demised premises under CP Burn's lease agreement, and what area(s) did CP Burn have a duty to maintain. Defendants cite Paramount Ins. Co. v Fed. Ins. Co., which held "that the accident did not occur in the demised premises is not dispositive of the coverage issue under [the subject] policy" (174 AD3d 476, 477 [1st Dept 2019]). However, this matter is readily distinguishable from the Paramount case, because CP Burn's duty to indemnify is only triggered if the accident occurred on their demised premises. The Court agrees with defendant CP Burn that the "in, on or upon" or "in, on or around" provision in the lease agreement does not require indemnification for claims arising out of a common area controlled by the owner or shared with other tenants. It would be unfair to suddenly impose a duty upon defendant CP Burn for an accident that took place on the staircase outside of their studio, when they were never charged with maintaining the area beforehand. "A court will not find a duty to indemnify unless a contract manifests 'a clear and unmistakable intent to indemnify' for particular liabilities" (Millennium Holdings LLC v Glidden Co., 146 AD3d 539, 545 [1st Dept 2017] quoting Commander Oil Corp. v Advance Food Serv. Equip., 991 F2d 49, 51 [2d Cir 1993] [internal quotation marks omitted]). "The indemnity obligation will be strictly construed, and additional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement" (id.). The agreement lease is clear that CP Burn had a duty to indemnify only if their negligence was attributable to plaintiff's injury and the accident occurred on their demised premises. Since plaintiff's accident did not occur

on their premises, they cannot be held liable or deemed to indemnify. For these reasons the Court finds that CP Burn demonstrated there are no triable issues of fact regarding their duty to indemnify.

Breach of Contract for Failure to Procure Insurance

Section 8 of the lease agreement required CP Burn to procure insurance in favor of 723 Associates LLC for claims arising on its demised premises. Section 8 states:

> "Tenant agrees, at Tenant's sole cost and expense, to maintain commercial general liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession of the demised premises and during the term of this Lease"

CP Burn procured insurance from Philadelphia Insurance Company with effective dates of December 15, 2018, and December 15, 2019, fulfilling its obligation. Defendants Larstrand and 723 Associates LLC do not oppose CP Burn's assertion that the failure to procure insurance crossclaims should be dismissed. On the contrary, the defendants concede CP Burn has fulfilled this obligation (NYSCEF Doc. No. 82 [Larstrand and 723 Associates LLC reply brief] ¶14). As there are no triable issues of fact, CP Burn is granted summary judgment on this crossclaim.

Larstrand's and 723 Associates LLC's Motion

Defendants Lastrand and 723 Associates LLC argue that absent proof that a defendant created the dangerous condition, or had actual or constructive notice of the same, there can be no claim for premises liability. The Court finds that a triable issue of fact exists as to whether said defendants were afforded constructive notice of the wet condition, and therefore reject summary judgment in their favor.

> "A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created nor had actual or constructive notice of the unsafe condition. Once that showing is made, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice of it" (Rosario v Prana Nine Properties, LLC, 143 AD3d 409, 410 [1st Dept 2016]).

Defendants argue the absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law. Defendants argue they did not have constructive notice because there is no proof as to how long the water was on the steps. Plaintiff opposes by arguing the defendants should have discovered and remediated the hazardous condition prior to plaintiff's accident, for plaintiff testified the wet condition existed for about an hour prior to her accident occurring, which creates an issue of fact.

The Court agrees with plaintiff that defendants have failed to meet their summary judgment burden of demonstrating they lacked constructive notice of the wet condition. Plaintiff testified the stairs were wet when she arrived for the pilates class at approximately 6:30 pm (NYSCEF Doc. No. 50 [plaintiff's deposition transcript] page 24, 20-22). Plaintiff's accident occurred about an hour later, when she left the class and proceeded down the wet staircase. This passage of time may infer a triable issue of fact as to whether defendants could have had constructive notice of the wet condition. Furthermore, defendant's witness only testified to general cleaning procedures, and failed to detail when the staircase was last cleaned or inspected, which is insufficient for meeting a prima facie burden on a motion for summary judgment (see Rodriguez v Bd. of Educ. of City of New York, 107 AD3d 651, 652 [1st Dept 2013] [Defendant's witness testified only as to a general cleaning routine but had no personal knowledge when the staircase had last been cleaned or inspected prior to the accident]). Furthermore, Carlos Rafael of Prime testified that his crew cleaned the premises on the day of accident from 12:02 pm – 12:36 pm, and that they do not work after 3 pm. Plaintiff testified that CP Burn has classes well past 3 pm. This also creates a question of fact as to defendant's negligence, as no one had a duty to inspect, maintain, or clean the common areas of the building after 3 pm, as testified to by Amaury Lopez

of Larstrand, yet landowner has a duty to maintain the premises in a reasonably safe condition (see Zuk v Great Atl. & Pac. Tea Co., 21 AD3d 275, 275 [1st Dept 2005] ["[i]t is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition"]).

CONCLUSION

It is hereby ORDERED that defendant CP Burn's motion for summary judgment dismissing plaintiff's complaint and all crossclaims (motion sequence no. 2) is granted; and it is further

ORDERED that Defendants Larstrand Corporation and 723 Associates LLC motion for summary judgment dismissing the complaint and all crossclaims; and for an order granting summary judgment on their cross claims for contractual indemnification and insurance coverage against defendant CP Burn (motion sequence no. 3) is denied.

This constitutes the decision and order of the Court.

8/8/2022
DATE

ALEXANDER TISCH, J.S.C.

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