SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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BRYNA LEVINE,

Plaintiff,

- v -

WATERLILY CORP. D/B/A GLORIA CABRERA SALON & SPA, EAST MIDTOWN PLAZA HOUSING COMPANY, INC.

Defendants.

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INDEX NO. 157746/2017

MOTION DATE 08/10/2021, 09/14/2021

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 91, 92, 93, 95, 96, 97, 98, 99, 107, 110, 111, 115

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 94, 100, 101, 102, 103, 104, 105, 106, 108, 112, 113, 114, 116

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

Upon the foregoing documents, defendant WATERLILY CORP. d/b/a GLORIA CABRERA SALON & SPA (hereinafter "Waterlily") moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all crossclaims (motion sequence no. 3). Defendant EAST MIDTOWN PLAZA HOUSING COMPANY, INC. (hereinafter "Midtown") moves for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint and all crossclaims, or, in the alternative, granting Midtown common law indemnification against defendant Waterlily (motion sequence no. 4).

BACKGROUND

Plaintiff commenced the instant action seeking damages for personal injuries allegedly sustained on May 27, 2016, as plaintiff tripped and fell due to a doorstop, and then slipped due to a floor mat upon entering the Gloria Cabrera Salon & Spa (the salon).

Plaintiff's EBT Testimony

Plaintiff appeared for a deposition and testified that she was a frequent customer of the Gloria Cabrera Salon. For about twenty-five years plaintiff had appointments at the salon twice a week (NYSCEF Doc. No. 69 [plaintiff's deposition transcript] page 28, 9-20). Plaintiff stopped going to the salon between the years of 1983-2014, however, when she returned in 2014, she continued to patronize the salon twice a week (id. at 29, 17-21). Prior to her accident on May 27, 2016, plaintiff testified that she was in the salon a few days earlier, approximately on May 23rd (id. at 29-30, 22-2). On the date of accident, plaintiff testified that the very heavy front door was held open about two or three inches by a doorstop, to conserve the air conditioning in the salon (id. at 41-42, 21-7). Plaintiff testified that she was barely able to open the front door, as she opened it "enough for [her] to get in" (id. at 43, 13-20). As plaintiff attempted to walk in the door, the left-heel portion of her shoe got caught on the doorstop, causing plaintiff to trip and fall and then slip, as plaintiff fell on a floor mat that started to move once her hands hit the ground (id. at 41:21-42:17). Plaintiff claims the doorstop was not visible from the outside (id. at 42, 2-7). Plaintiff also testified that she saw the doorstop just as she was opening the door, as she was looking down (id. at 47-48, 21-11). According to plaintiff, she accessed the salon using this door many times before her accident and was aware that the door had a doorstop (id. at 101, 14-23). Plaintiff complained about the heaviness of the door prior to her accident, but only in a joking manner (id. at 94-95, 19-5). Plaintiff also testified that the mat upon which she tried to break her fall was a different mat than that depicted in defendant's Ex. A (id. at 93, 4-7).

Waterlily (Gloria Cabrera EBT Testimony)

In 2016, Gloria Cabrera was the owner of Waterlily and she appeared for a deposition on the company's behalf. Cabrera testified that the salon opened at the 309 E. 23rd Street location,

the location of plaintiff's accident, in 1973 (NYSCEF Doc. No. 71 [Cabrera deposition transcript] page 10, 11-18). According to Cabrera, there is only one entrance into the salon and neither she nor anyone else made any changes to the front entrance door at any point (id. at 12, 15-22). Cabrera testified that she was present on the day of the accident, but she did not see plaintiff's accident occur, and she was notified by an employee that plaintiff fell (id. at 54, 6-13). Cabrera testified that it was not uncommon for the entrance door to be slightly open, with the doorstop propped down, as the salon tried to keep the hot air from entering (id. at 60, 3-16). Cabrera also testified that an individual would be able to open the door smoothly when the door was slightly opened, with the doorstop down, because the doorstop did not prevent the door from opening (id. at 60-61). Cabrera further testified that the salon owned a mat that was present on the date of accident (id. at 49, 7-11). According to Cabrera, the mat depicted in defendant's exhibit B was the only mat the salon owned, but Cabrera could not remember if it was ever placed inside of the salon, as the mat was routinely kept outside (id. at 50:16-51:15).

Midtown (Robert Murdakhayev EBT Testimony)

Robert Murdakhayev appeared for a deposition on behalf of Midtown and testified that he is a superintendent/resident manager for the company, and that he held this position since 2012 (NYSCEF Doc. No. 72 [Murdakhayev deposition transcript] page 10, 8-14). Murdakhayev testified that his duties as superintendent/resident manager were to maintain the daily operations, supervise the function of the equipment, and provide cleanliness for the six buildings on the premises (id. at 11, 6-11). Murdakhayev testified that the Gloria Cabrera Salon & Spa is in one of the six buildings on the premises, and that Midtown does not have a relationship with the salon besides handling the salon's heat, water, and electricity, since Waterlily leases the salon space from Midtown (id. at 11, 19-25; 15, 16-21; 16, 11-14). According to Murdakhayev, since he started his job as superintendent/resident manager in 2012, he was not aware of any repairs or

modifications to the salon's front entrance door (id. at 20-21, 22-6). Furthermore, besides a complaint about the heat, Murdakhayev was not aware of any complaints made on behalf of the salon or the building space (id. at 22, 21-24). Nor was he aware of the accident that occurred on May 27, 2016, as it was not custom or practice for Midtown to investigate an accident that occurred on the salon's premises (id. at 24, 21-23); (id. at 27, 12-17).

Non-party Witness (Juvy Polera EBT Testimony)

Juvy Polera, a non-party witness, appeared for a deposition and testified that she formerly worked at the salon and witnessed plaintiff's accident (NYSCEF Doc. No. 73 [Polera deposition transcript] at 9-10, 22-11; 25, 12-18). Moments before the accident, Polera testified that she was behind the register, at the front of the salon's entrance, as plaintiff approached the door to enter (id. at 26, 5-13). According to Polera, in order to enter the salon an individual must be buzzed in by someone in the salon (id. at 27-28, 24-12). Polera testified that she buzzed plaintiff in, and due to the heaviness of the door, plaintiff was only able to slightly open the door, nevertheless, plaintiff proceeded to squeeze herself through the door and fell, as her leg caught the side of the door (id. at 28, 6-7; 33-34, 20-11). Polera could not remember if plaintiff was caused to fall due to a doorstop or not (id. at 44, 2-5). Polera also testified that the salon had two mats (id. at 32:25-33:7). According to Polera, when the weather was bad, the salon would place a big mat outside of the entrance, and the smaller mat, depicted in plaintiff's exhibit 1, was placed inside the salon (id. at 44:6-45:7). Moreover, Polera testified that the smaller mat had rubber edges and was placed inside the salon on the date of accident, as it was always in this location while Polera worked at the salon (id.; 16:25-17:8).

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]).

Waterlily argues that it is entitled to summary judgment because it did not cause or create a dangerous condition, nor did they have actual or constructive notice of any defect. Furthermore, Waterlily contends that plaintiff has not shown that it was negligent, as plaintiff was unable to identify a defect within the door, the doorstop, or the mat. Additionally, Waterlily argues that the doorstop and mat were open and obvious, and not inherently dangerous. Defendant Midtown argues that they are entitled to summary judgment because an out of possession landlord cannot be held liable for plaintiff's injuries. Moreover, the doorstop and mat were not defective, and there was no actual or constructive notice of the alleged defective conditions. However, if the Court were to find that the doorstop and mat were defective, Midtown argues that the conditions were created by Waterlily, and that they should be granted common law indemnity. In opposition, plaintiff argues that Waterlily has failed to meet its prima facie burden, as it did not offer any evidence that it did not cause or create the defective conditions that gave rise to plaintiff's accident. As for Midtown, plaintiff argues that it failed to show that it is an out of possession landlord, and owed no duty of care to plaintiff, because the lease provision it relies upon was not in effect on the date of the accident.

Waterlily's Summary Judgment Motion

> "To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it. A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" (Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc., 61 AD3d 629 [2d Dept 2009]).

Waterlily maintains that they are free of any liability for plaintiff's accident and are therefore entitled to summary judgment because they did not cause or create a dangerous condition, nor did they have actual or constructive notice of any defect. However, the Court finds that Waterlily has failed to offer evidence that supports their argument, for Waterlily simply states that they did not cause or create the alleged dangerous condition without offering evidence that supports such a stance. Moreover, Waterlily argues that plaintiff has not shown that Waterlily was negligent, as plaintiff has not identified a defect within the door or mat. However, "[a]s the proponent of the summary judgment motion, [Waterlily bares] the initial burden of establishing that it maintained the premises in a reasonably safe condition" (Flahive v Union Coll., 99 AD3d 1151, 1152 [3d Dept 2012]). Waterlily argues that their premises were not inherently dangerous because they never received any complaints about the front entrance door, the doorstop, or the mat, prior to plaintiff's fall, but plaintiff refutes this by alleging that the premises were inherently dangerous and that's why she fell. Thus, establishing a triable issue of fact which prevents summary judgment in favor of Waterlily.

Furthermore, in rebuttal to plaintiff's opposition papers, Waterlily fails to proffer evidence that rebuts plaintiff's assertion that Waterlily created the dangerous condition that caused plaintiff's accident. Specifically, that the heavy front entrance door that was slightly open, with the doorstop down, combined with the alleged mat located just inside the front entrance, that resembled a carpet remnant and allegedly was not properly adhered to the floor, which were items

all under Waterlily's control, did not cause plaintiff's accident. Waterlily merely maintains that these objects were open and obvious and that a defective condition did not exist. Waterlily also relies heavily on plaintiff's status as a frequent customer of the salon, inferring that plaintiff should have been familiar with the salon's appearance. Though plaintiff's frequent visitation status is notably important, contrary to Waterlily's argument, "whether a danger is open and obvious is most often a jury question" (Stadler v Lord & Taylor LLC, 165 AD3d 500, 500 [1st Dept 2018] quoting Liriano v Hobart Corp., 92 NY2d 232, 242 [1998]). Moreover, Waterlily has failed to disprove the existence of triable issues of fact concerning their creation of the dangerous condition. Additionally, the testimony of non-party witness Juvy Polera provides a different account of how plaintiff's accident occurred. Polera testified that she buzzed plaintiff into the salon as the front entrance door was closed, which rebuts the testimony that the front entrance door was slightly open with the door stopped down, which further rejects a summary judgment order in favor of Waterlily. Accordingly, viewing the facts in the light most favorable to the nonmoving party, and resolving all reasonable inferences in their favor, the Court denies Waterlily's motion for summary judgment as triable issues of fact exist as to whether Waterlily created the dangerous condition that allegedly caused plaintiff to trip and fall and sustain personal injuries.

Midtown's Summary Judgment Motion

Defendant Midtown argues that they are entitled to summary judgment because an out of possession landlord cannot be held liable for plaintiff's injuries. Moreover, Midtown asserts that the doorstop and mat in the salon were not defective, and there was no actual or constructive notice of the alleged defective conditions. However, if the Court were to find that the doorstop and mat were defective, Midtown argues that the conditions were created by Waterlily, and Midtown should be granted common law indemnity. Since the Court has determined that triable issues of

fact exist as to whether Waterlily created the dangerous condition, the Court will only address Midtown's out of possession landlord claim.

In opposition to Midtown's claim that they are entitled to summary judgment due to their out of possession landlord status, plaintiff claims that the lease Midtown relies upon is invalid, as the lease is dated January 31, 1972, with a 10-year commitment. Plaintiff argues Midtown has failed to offer any evidence that the lease it relies upon was in effect on the date of accident.

As for the legitimacy of the lease between Midtown and Waterlily, Cabrera testified that Waterlily initially moved into the building in 1973, pursuant to a lease with Midtown that has since been renewed four times (NYSCEF Doc. No. 71 [Cabrera deposition transcript] page 12:23-13:11). Cabrera also testified that Midtown provided Waterlily with a ten-year lease term every time the lease was renewed, with the latest renewal occurring in March of 2018 (Id.). Furthermore, with each renewal, the duties and obligations remained the same for each party (Id. at 18, 13-19). Without offering more to refute the validity of the lease other than claiming that Midtown has failed to offer a lease that was in effect on the date of the accident, plaintiff's claim that the lease is invalid must fail, as the deposition testimony of Cabrera establishes that the lease between Waterlily and Midtown was valid and current on the date of accident, seeing that the lease was renewed for a ten-year period in March of 2018.

> "An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it '(1) is contractually obligated to make repairs or maintain the premises or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision'" (DeJesus v Tavares, 140 AD3d 433, 433 [1st Dept 2016] quoting Vasquez v The Rector, 40 AD3d 265, 266 [1st Dept 2007]).

Section VI of the lease between Waterlily and Midtown states that "[t]he tenant shall be responsible for all repainting, redecorating and for the maintenance and repair of the interior of the premises and all equipment installed therein other than structural repairs or damage caused by the

Landlord or the Landlord's agent" (NYSCEF Doc. No. 88 [Lease] Section VI). Thus, it appears that Midtown was not contractually obligated to make repairs or maintain the premises, as the lease assigned that responsibility to Waterlily. Plaintiff argues that Midtown performed repairs to Waterlily's heat, water, and electricity, and that this should be enough to bestow the obligation of maintenance upon them, however, this is not so, for the lease clearly assigned the duty to maintain the premises to Waterlily. Furthermore, the exceptions to the out-of-possession landlord rule that plaintiff cites are not applicable in this case. For the non-delegable duty to provide the public with a reasonably safe premises and safe means of ingress and egress was contractually Waterlily's obligation. Moreover, Midtown did not have a contractual obligation to repair or maintain the premises, nor did they create the dangerous condition. And lastly, plaintiff's injury did not arise from a structural defect or specific statutory violation. Thus, the Court finds that that the lease between Waterlily and Midtown was valid on the date of accident, and that Midtown was an out of possession landlord.

In light of the foregoing, the Court need not address whether Midtown is entitled to common law indemnification for Waterlily.

It is hereby ORDERED that defendant WATERLILY's motion for summary judgment, dismissing plaintiff's complaint and any and all crossclaims is denied (motion sequence no. 3); and it is further

ORDERED that defendant EAST MIDTOWN HOUSING PLAZA HOUSING COMPANY INC.'S motion for summary judgment, dismissing plaintiff's complaint and any and all crossclaims is granted (motion sequence no. 4) and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

This constitutes the decision and order of the Court.

9/30/2022
DATE

ALEXANDER M. 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