SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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KYLE DOHERTY and ABIGAIL FAFAGLIA,

Plaintiffs,

- v -

730 FIFTH UPPER, LLC,730 FIFTH RETAIL, LLC,GENERAL GROWTH SERVICES, INC. (D/B/A GENERAL GROWTH PROPERTIES), WHARTON PROPERTIES, LLC,AMAN RESORTS GROUP LIMITED, OKO GROUP, LLC,SHVO, INC.,CBRE, INC.,730 FIFTH OWNERS, LLC,CROWN 730 CAA SEREN, LLC,CROWN 730 HOLDINGS, LLC,CROWN 730 INVEST, LLC,CROWN 730, LLC,CROWN 730 MEMBER, LLC,CROWN 7-30 SD, LLC,CROWN FIFTH RETAIL, LLC,CROWN ACQUISITIONS, INC.,OKO ACQULSITIONS, LLC,OKO FUNDING, INC.,OKO INVESTMENTS, LLC,OKO DEVELOPMENT, LLC,GILBANE-ANT YAPI JOINT VENTURE, LLC,ANT YAPI NEW YORK, LLC,GILBANE BUILDING COMPANY, SWEET CONTRUCTION OF LONG ISLAND, LLC,ABC CORPORATIONS 2-20, and JOHN DOES 1-20,

Defendants.

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INDEX NO. 158538/2018

MOTION DATE 03/21/2022, 03/21/2022, 04/29/2022, 04/29/2022

MOTION SEQ. NO. 005 006 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 164, 165, 166, 167, 172, 173, 174, 178, 179, 180, and 250

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 168, 169, 170, 171, 175, 176, 177, 181, and 283

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 251, 253, 255, 256, 257, 258, 259, 260, 261, 262, 263, 273, 274, 275,and 284

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 008) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 252, 254, 264, 265, 266, 267, 268, 269, 270, 271, 272, 276, 277, 278, and 285

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Motion sequence numbers 005 through 008 are hereby consolidated for disposition in accordance with the following memorandum decision.

Background

In this personal injury action, plaintiff Kyle Doherty ("Doherty") alleges negligence in the maintenance of the entrance doors of the building located at 730 Fifth Avenue, New York, New York (the "building"). Doherty's wife, plaintiff Abigail Fafaglia ("Fafaglia") asserts a derivative claim for loss of consortium. Defendants 730 Fifth Upper, LLC 730 Fifth Retail LLC, and General Growth Services, Inc. (collectively "Fifth-Gen"), owned the building (Seebeck EBT Transcript, NYSCEF Doc. No. 203 at 34-39), and defendant CBRE, Inc. ("CBRE"), managed the building's common elements pursuant to a management agreement with Fifth-Gen (Management Agreement, NYSCEF Doc. No. 238). Pursuant to a contract between Fifth-Gen and discontinued-defendant Sweet Construction of Long Island, LLC ("Sweet") (Owner-Contractor Agreement, NYSCEF Doc. No. 237), at the time of the accident that caused plaintiff's injuries, Sweet was relocating the main lobby entrance to the building from Fifth Avenue to 56th Street (NYCEF Doc. No. 203 at 36). The existing vestibule and inner glass entrance doors at 56th Street, which had been in place at the building since before Fifth-Gen acquired the building, were not replaced (*id.* at 40, 44, 72-73).

Doherty testified that, on July 17, 2016, he and several of his coworkers had come to the building to meet with one of the building's commercial tenants (Doherty EBT Transcript, NYSCEF Doc. No. 240 at 31-32). As he entered the building and pulled on the entrance door,

the handle on the inside of the door swung loose and hit the floor (Video of Incident, NYSCEF Doc. No. 206 at 13:07).[1] Immediately after the handle hit the floor, the door shattered and struck Doherty and one of his companions (*id.*; *see also* Paolini EBT Transcript, NYSCEF Doc. No. 211 at 46-47). Doherty stated that he had used that particular door to enter the building several times prior to the accident, including the week before, without incident (NYSCEF Doc. No. 240 at 33, 117). It is uncontested that neither Fifth-Gen nor CBRE had any reports prior to the accident of damage, defect, or other malfunction of the door (Sahmanovic EBT Transcript, NYSCEF Doc. No. 204 at 62-64, 81; Seebeck aff., NYSCEF Doc. No. 223, ¶¶ 13-14, 17-18; Merejo EBT Transcript, NYSCEF Doc. No. 209 at 74, 84). It is also uncontested that the entrance doors were used repeatedly throughout the day by visitors to, and workers at, the building (Seebeck EBT Transcript, NYSCEF Doc. No. 203 at 53; Sahmanovic EBT Transcript, NYSCEF Doc. No. 204 at 45; Rovtar EBT Transcript, NYSCEF Doc. No. 210 at 49). One of the outer doors had been damaged in an unrelated incident shortly before the accident; but following inspection the inner doors were unaffected by same and not in any way damaged or defective (Seebeck EBT Transcript, NYSCEF Doc. No. 203 at 59, 140; NYSCEF Doc. No. 223, ¶¶ 15-16). Andy Merejo, the security guard manning the front desk at the time of the incident, testified that there was nothing about the door that would have alerted Doherty that it was not in working order (Merejo EBT Transcript, NYSCEF Doc. No. 209 at 62).

Presently before the court are motions by both CBRE (Mot. Seq. No. 005) and Fifth-Gen (Mot. Seq. No. 006) to vacate plaintiffs' note of issue filed on February 28, 2022, on the grounds that necessary discovery is still outstanding. Shortly after filing those motions, Fifth-Gen and CBRE also moved for summary judgment dismissing the complaint (Mot. Seq. Nos. 007 and

[1] The court reviewed video footage of the incident as part of its determination of the motions.

008, respectively). As a decision in the moving parties' favor on the motions for summary judgment would also resolve the motions to vacate the note of issue, the court turns first to the motions for summary judgment.

Motions for Summary Judgment (Seq. Nos. 007, 008)

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Fifth-Gen (Seq. 007)

Fifth-Gen, as the owner of the building, has a "nondelegable duty to maintain its property in a reasonably safe condition, taking into account the foreseeability of injury to others" (*Daly v 9 E. 36th LLC*, 153 AD3d 1145, 1147 [1st Dept 2017], *citing Basso v Miller*, 40 NY2d 233, 241 [1976]). A plaintiff must demonstrate "that the owner created, or had actual or constructive notice of the hazardous condition which precipitated the injury" (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]). Here, there is no dispute that Fifth-Gen did not create the hazardous condition, nor did it have actual notice of any problems with the door prior to the accident. Accordingly, it must be determined whether Fifth-Gen had constructive notice of the condition of the door.

"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]). A general awareness of some potentially dangerous condition is insufficient; the issue is whether the owner had notice of the particular condition that caused plaintiff's injuries (*id.* at 838). Where the hazardous condition in question is an "object capable of deteriorating" that is "concealed from view," the owner has an affirmative duty to "conduct reasonable inspections of the premises" (*Ayers v Dormitory Auth. of the State of New York*, 165 AD3d 441, 442 [1st Dept 2018]). "[C]onstructive notice will not be imputed where the defect is latent, i.e., where . . . the defect is of such a nature that it would not be discoverable even upon a reasonable inspection (*Ferris v County of Suffolk*, 174 AD2d 70, 76 [2d Dept 1992]).

Here, as set forth above, it is undisputed that the door was in constant use by everyone who entered and exited the building, which was estimated in the hundreds. The parties also do not dispute that the area was constantly recorded by a camera with a direct view of the door and its handles, as evidenced by the video footage submitted as part of the motion. No complaints or reports of damage or other defect with the door or its operation were received by Fifth-Gen in the weeks leading up to the accident. Doherty testified that he himself had used the same door without incident prior to it shattering (Doherty EBT Transcript, NYSCEF Doc. No. 240 at 33, 117), and according to Merejo, there was no outward sign that there was anything wrong with the door on the day of the incident (Merejo EBT Transcript, NYSCEF Doc. No. 209 at 62). Indeed, a detailed inspection of the inner doors was undertaken following damage to the outer doors, which revealed no problems with the door, said investigation taking place only a few days before

the incident (Seebeck EBT Transcript, NYSCEF Doc. No. 203 at 59, 140; NYSCEF Doc. No. 223, ¶¶ 15-16).

Plaintiffs offer the affidavit of their engineering expert (NYSCEF Doc. No. 259), who opines that daily inspections of the door would have disclosed that the door handle was loose, but does not explain what such inspection would constitute beyond the constant monitoring and usage by defendants' employees, other building staff, tenant staff, and visitors to the building. It is undisputed that the expert did not examine the door handle, which was remounted to the current inner door (*id.*, ¶ 3 ["I have reviewed relevant case materials, including depositions and records produced by Defendants in the above captioned matter"]). Merejo, who at one point testified that he had never seen anyone conduct a safety inspection of the doors while he was on duty (Merejo EBT Transcript, NYSCEF Doc. No. 209 at 23-24), also testified that he did not know what such a safety inspection of the door would look like (*id.* at 91). Thus, plaintiffs do not raise a triable issue of fact with respect to constructive notice.

McDonald v Fitzgerald, cited by Fifth-Gen, is instructive. There, the plaintiff was injured when, while attempting to close a door at the defendants' premises, a pane of glass in the door shattered, causing glass to fall on her hand and arm (*McDonald v Fitzgerald*, 154 AD3d 927 [2d Dept 2017]). The defendants successfully moved for summary judgment, and the Appellate Division affirmed on appeal. The court held that, as here, the defendants established *prima facie* entitlement to summary judgment on the issue of notice by showing that there were no prior complaints or issues with the door or the glass panel prior to the incident, and that the affidavit of plaintiff's expert, who only inspected the door two years after the incident was insufficient to raise a triable issue of fact (*id.*, at 928).

Plaintiff also relies upon the doctrine of *res ipsa loquitur* to establish liability. "When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident upon the theory that certain occurrences contain within themselves a sufficient basis for an inference of negligence" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [internal quotation marks and citations omitted]). To establish the applicability of *res ipsa loquitur*, a plaintiff must show, *inter alia*, that its damages were "caused by an agency or instrumentality within the exclusive control of the defendant" (*id.*). Here, the door and door handle were in constant use by members of the public and various persons within the building on a daily basis, as set forth above. In such circumstances, *res ipsa loquitur* does not apply (*Pavon v Rudin*, 254 AD2d 143, 146 [1st Dept 1998] [holding that the doctrine does not apply where "the defective piece was directly handled by many members of the public"]).

CBRE (Seq. 008)

CBRE, the management company for the building, is not generally liable to third parties to its contract with Fifth-Gen outside of certain well-settled exceptions (*Laronga v Atlas-Suffolk Corp.*, 164 AD3d 893, 895 [2d Dept 2018]). As first set forth by the Court of Appeals, they are as follows:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm," (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

(*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002].) Where a plaintiff's claim is based on a failure to perform or discover a defect in the premises, the managing company will not be liable for such nonfeasance unless the management agreement is so "comprehensive and exclusive as to entirely displace the [owner]'s duty to maintain the

premises" (*Caldwell v Two Columbus Ave. Condominium*, 92 AD3d 441, 442 [1st Dept 2012] [internal quotation marks and citations omitted]). As set forth above, even if CBRE could be said to have so displaced Fifth-Gen, the record does not support a finding that CBRE had actual or constructive notice of any defect with or damage to the door, establishing entitlement to summary judgment (*see generally Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393, 394 [1st Dept 2008] [holding both that the *Espinal* exceptions to liability did not apply and that in the event defendant had displaced the owner, there was no evidence of actual or constructive notice of the defect). Moreover, the record does not reflect that CBRE launched a "force or instrument of harm," or that Doherty "detrimentally [relied] on the continued performance of [CBRE's] duties" (*Espinal*, 98 NY2d at 140).

Spoliation

Common to both defendants, plaintiff allege that critical evidence impacting their ability to address defendants' defenses has been spoliated, specifically the visitor logs for the building and the video footage from the hours prior to the accident. This argument fails on both procedural and substantive grounds. Procedurally, plaintiffs have filed the note of issue in this action (NYSCEF Doc. No. 108), certifying that all discovery known by plaintiff to be necessary have been completed. Plaintiffs cannot on the one hand argue that they have obtained all necessary discovery and on the other claim that they have been prejudiced by defendants apparent inability to produce the requested items. The court notes that plaintiffs made no attempts to seek discovery sanctions for defendants' alleged spoliation until the opposition to this motion. The motion is, therefore, also untimely (James v Kensington Assoc., LLC, 192 AD3d 587, 588 [1st Dept 2021] [denying motion to strike where "belatedly made more than three years

after plaintiff's receipt of a copy of the edited video footage, as well as nine months after plaintiff had filed a note of issue and certificate of readiness in the action"]).

Substantively, spoliation is the destruction of evidence (*Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 [1st Dept1997]), and plaintiffs themselves admit that they do not know whether the visitor logs were actually destroyed or simply not produced (Kingsbury affirmation, NYSCEF Doc. No. 268 at 5 n 1). To the extent that defendants were under an obligation to preserve video records of the incident, they have clearly done so, as evidenced by the video footage attached to Fifth-Gen's moving papers (NYSCEF Doc. No. 206; *Duluc v AC & L Food Corp.*, 119 AD3d 450, 452 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014] [Obligation to preserve video of accident "does not translate into an obligation on a defendant to preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a plaintiff's request for them"]).

For all of the foregoing reasons, the motions for summary judgment are granted, and the complaint against those defendants must now be dismissed. Defendants' motions to vacate the note of issue in this matter are therefore dismissed as moot. Defendants' cross-claims for indemnification and contribution against each other are also mooted, as there is no underlying finding of liability to plaintiff.

Accordingly, it is

ORDERED that defendants 730 Fifth Upper, LLC 730 Fifth Retail LLC, and General Growth Services, Inc. (collectively "Fifth-Gen"), and CBRE, Inc.'s ("CBRE") motions for summary judgment dismissing the complaint against them (Mot. Seq. Nos. 007, 008) are granted, and the Clerk of the Court is directed to enter judgment in favor of said defendants dismissing the action; and it is further

ORDERED that the motions of the same defendants to vacate the note of issue (Mot. Seq. Nos. 005, 006) are dismissed as moot based on the dismissal of the complaint against said defendants.

This constitutes the decision and order of the court.

ENTER:

12/23/2022
DATE

LOUIS L. NOCK, J.S.C.

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