SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12**

Justice

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LUZ DIAZ,

Plaintiff,

- v -

RFR HOLDING LLC,INTERIOR PRESERVATION INC.,CREATIVE ARTISTS AGENCY, LLC,CREATIVE ARTISTS AGENCY HOLDINGS, LLC,R&S CHRYSLER LLC,RFR REALTY LLC,

Defendant.

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INDEX NO. 156697/2019

MOTION DATE 03/15/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

INTERIOR PRESERVATION INC.

Plaintiff,

-against-

CREATIVE ARTISTS AGENCY, LLC, CREATIVE ARTISTS AGENCY HOLDINGS, LLC, CREATIVE ARTISTS AD AGENCY INC.,

Defendant.

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Third-Party
Index No. 565730/2019

CREATIVE ARTISTS AGENCY, LLC, CREATIVE ARTISTS AGENCY HOLDINGS, LLC, R&S CHRYSLER LLC, RFR REALTY LLC

Plaintiff,

-against-

PBM, LLC

Defendant.

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Second Third-Party
Index No. 595345/2022

The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

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

Plaintiff Luz Diaz (plaintiff) filed this negligence action on July 7, 2019, against defendants RFR Holding LLC (RFR Holding), RFR Realty LLC (RFR Realty), Interior Preservation Inc. (IPI), R&S Chrysler LLC (Chrysler), Creative Artists Agency, LLC (CAA), and Creative Artists Agency Holdings, LLC (CAA Holdings) (collectively, defendants). Plaintiff seeks to recover damages for personal injuries she sustained when she allegedly slipped and fell on a wet patch of carpet while working for PBM, LLC (PBM) as a housekeeper/cleaner, on the 18th floor of 405 Lexington Avenue, New York, New York 10174 (the premises). The subject premises is owned by Chrysler, and RFR Realty is the managing agent. CAA was the tenant leasing and occupying the subject premises at the time of incident, and IPI was a third party hired to clean carpets on the premises. In the complaint, plaintiff claims she stepped from a carpeted area onto a marble floor area and slipped on an unknown hazard, causing her fall.

I. Procedural History

After plaintiff filed her summons and complaint, IPI commenced a third-party action against CAA, CAA Holdings, and Creative Artists Ad Agency Inc (CA Ad Agency) alleging common law indemnity and common law contribution. Defendants CAA, CAA Holdings, Chrysler, and RFR Realty subsequently commenced a second third-party action against PBM alleging common law indemnification, common law contribution, contractual indemnification, and breach of contract.

Defendant/third-party plaintiff IPI now moves for summary judgement seeking an order dismissing all of plaintiff's complaints, crossclaims, and counterclaims against IPI. All parties oppose IPI's motion.

Defendants CAA, CAA Holdings, Chrysler, RFR Realty, and PBM cross-move for summary judgment seeking an order dismissing plaintiff's claims against them; dismissing IPI's

crossclaims, counterclaims, and third-party claims against them; and granting them summary judgment on their fourth and fifth crossclaims against IPI, seeking contractual indemnification and defense. *See* NYSCEF doc. no. 129.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

To establish a prima facie case of negligence, a plaintiff must demonstrate 1) a duty owed by the defendant to the plaintiff, 2) a breach thereof, and 3) injury proximately resulting therefrom. *See Solomon by Solomon*, 66NY2d 1026 (1985). On a negligence claim in a slip and fall case, plaintiff must show that defendants either created a dangerous condition or had actual or constructive knowledge of the condition. *See Lemonda v Sutton*, 702NY2d 275 (2000).

It has long been held that in premises liability cases, a defendant can only be held liable for injury of a guest if it, "knew of the [defect or] dangerous condition; realized that it involved an unreasonable risk; believed that the guests would not discover the [defect or dangerous] condition or realize the risk; and failed to warn them of the [defect or dangerous] condition and the risk involved." *Higgins v. Mason*, 255 N.Y. 104, 110 (1930). The premises owner must either have

caused or created the dangerous/defective condition or have actual or constructive notice of such defect, and fail to remediate it within a reasonable amount of time to be liable. *Parra v. City of New York*, 137 AD3d 532, 532-533 (1st Dept 2016). Constructive notice can be demonstrated where the dangerous/defective condition is visible, apparent, and has existed for a sufficient length of time prior to the accident to permit defendant(s) to discover and remedy it. *Espinal v. New York City Housing Authority*, 215 AD2d 281, 626 (1st Dept 1995); citing *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 (1986).

A. IPI's Summary Judgment Motion

IPI moves for summary judgment arguing that it did not create the alleged hazardous condition in question, nor did it ever service the 18th floor of the premises where the alleged accident occurred. Additionally, IPI claims that it owed no duty to plaintiff because plaintiff did not detrimentally rely on IPI's services, IPI did not entirely displace the owner's obligation to maintain a safe premise, and IPI did not agree to maintain the premises. With respect to the contractual indemnification and contribution cross-claims against it, IPI maintains it had no written agreement with any party to this action for its carpet cleaning services, and therefore no contractual obligation or promise to indemnify any other party of this action exists. Furthermore, IPI claims it only cleaned carpets on the premises a handful of times, and never cleaned the 18th floor.

In support of its motion, IPI relies on the deposition testimony of its employees Waldemar Szczerba and Waldemar Grodzki, who were the IPI carpet cleaners on the premises the day of plaintiff's accident. IPI points out that both Mr. Szczerba and Mr. Grodzki testified at their EBTs that they did not carpet clean the 18th floor on the date of plaintiff's accident. IPI also provides a floorplan, Exhibit X, as evidence to prove that IPI did not carpet clean the 18th floor where the instant accident occurred. *See* NYSCEF doc. no. 124; *see also* NYSCEF doc. no. 126. IPI alleges

that this floorplan was given to Mr. Szczerba instructionally, to direct him where to clean and where not to clean carpets on the premises. Therefore, IPI argues that the floorplan establishes that it had no duty to clean the subject carpet.

In opposition to IPI's motion, defendants CAA, CAA Holdings, Chrysler, RFR Realty, and PBM (collectively, opposing defendants) argue that summary judgment should be denied because triable issues of material fact exist. Specifically, they rely on plaintiff's deposition testimony that she saw IPI employees working on the 18th floor prior to her accident. *See* NYSCEF doc. no. 116, pages 77-78. Furthermore, opposing defendants contend that the deposition testimony of PBM employee, Aferdita Gashi, also indicates the presence of IPI on the 18th floor. Ms. Gashi alleges there had been shampoo machines splashing in the accident area prior to plaintiff's fall and that immediately after the accident there was water on the floor where plaintiff fell. *See* NYSCEF doc. no. 120, pages 48-55, 57. Opposing defendants argue that the testimony of plaintiff and Ms. Gashi creates questions of fact as to whether IPI caused the alleged dangerous/defective condition that plaintiff slipped on, thereby precluding summary judgement.

Similarly, plaintiff opposes IPI's motion and maintains that multiple witnesses, including Ms. Gashi, plaintiff, Hugo Gilbert (a PBM employee and coworker of plaintiff), Evelyn Harbert (an employee of tenant CAA), and Kate Childs (another employee of CAA) had seen IPI employees in the incident area, prior to plaintiff's fall. Plaintiff also cites Ms. Gashi's testimony where she states she personally observed water on the ground where plaintiff fell, and she felt with her feet and her hands that the carpet itself was wet. *See* NYSCEF doc. no. 135. Additionally, plaintiff contends that the floorplan offered as evidence by IPI to show where its employees were directed to clean is not verified and, as such, holds no evidentiary weight. Plaintiff also asserts that

Mr. Szczerba's testimony is not credible because of internal discrepancies during his deposition,[1] which create additional questions of fact. *See* NYSCEF doc. no. 135. Lastly, plaintiff submits a surveillance video which seems to indicate that IPI employees, Mr. Szczerba and Mr. Grodzki, were on the same floor as plaintiff when her accident happened, and seems to indicate that Mr. Szczerba and Mr. Grodzki had been moving their equipment repeatedly, through the exact area where plaintiff's fall occurred, on the day of the accident prior to the incident. *See* NYSCEF doc. no. 140, submitted as a hard copy exhibit. Therefore, plaintiff asserts, triable issues of fact exist as to IPI's liability in the instant matter, which defeats its motion for summary judgement.

III. Cross-Motion of CAA, CAA Holdings, Chrysler, RFR Realty, and PBM

CAA, CAA Holdings, Chrysler, RFR Realty, and PBM (collectively, cross-movants) cross-move for summary judgement. Cross-movants argue that they owed no duty to plaintiff. They contend that they did not create a dangerous or defective condition that caused plaintiff to slip and fall, nor did they have actual or constructive notice that any such condition existed within sufficient time to take any sort of remedial action. Moreover, cross-movants assert that they had no role whatsoever in the carpet cleaning.

Plaintiff opposes the cross-motion, claiming that cross-movants fail to establish through admissible evidence that no triable issues of material fact exist because cross-movants' liability has attached through constructive notice. Plaintiff argues that as owners and tenants of the accident location, and the employer of plaintiff, the cross-movants did have a duty of care to plaintiff, which would then implicate the negligence of cross-movants as the existence of a duty to plaintiff would attach the responsibility to regularly inspect the area for dangerous conditions. As such, plaintiff

[1]Plaintiff claims in her opposition to IPI's motion that, "Mr. Szczerba initially testified he had not received a floorplan for the eighteenth floor on the subject date of Ms. DIAZ's incident, but amended his testimony, contradicting himself, immediately after his attorney improperly interrupted under the guise of a leading question." *See* NYSCEF doc. no. 135.

contends that there is no admissible evidence in the record to show when the area where the incident occurred was last inspected or cleaned by the cross-movants, and argues that this creates constructive notice. Plaintiff asserts that the cross-motion must be denied because material issues of fact exist as to whether the movants owed a duty to plaintiff, and whether cross-movants had constructive notice of the alleged dangerous or defective condition.

IPI also opposes the cross-motion. Though most of IPI's opposition addresses the cross-movants' opposition to IPI's own motion, alleging that cross-movants mischaracterize deposition testimony in their opposition, IPI opposes cross-movants' counter-claims against it for indemnification. IPI argues that the first three counter-claims[2] against it fail as cross-movants incorrectly rely on contract law when no contract existed between IPI and cross-movants. IPI maintains that its services were procured through an email requesting the carpet cleaning, and nothing more, which it argues proves that no contract existed. IPI also argues that the final two cross claims[3] against them fail as IPI claims it has established a lack of duty owed by IPI to plaintiff, and therefore no common law indemnification exists. Finally, IPI alleges that cross-movants' summary judgment motion must also be denied because cross-movants have failed to establish a lack of constructive notice of the alleged defect.

In review of the admissible evidence submitted, the Court finds that questions of material fact remain as to cross-movants specific duty owed to plaintiff to control and maintain the area where the alleged injury occurred, and to inspect the practices of IPI in an area of the premises they controlled and maintained. Additionally, questions of material fact also remain as to whether cross-movants were on constructive notice of the dangerous or defective condition that was

[2]IPI argues that the first three counter-claims are contractual defense and indemnification, contractual indemnification third party beneficiary, and breach of contract for failure to procure insurance. *See* NYSCEF doc. no. 134.
[3]Common law indemnity and contribution are the final two cross claims. *See* NYSCEF doc. no. 134.

allegedly created when IPI cleaned the carpets and moved their equipment across the area where plaintiff fell. Considering this, the movants' cross-motion for summary judgement must be denied.

Accordingly, it is hereby

ORDERED that IPI's motion for summary judgement is denied; and it is hereby

ORDERED that CAA, CAA Holdings, Chrysler, RFR Realty, and PBM's cross-motion for summary judgement is denied; and it is hereby

ORDERED that a copy of this order with notice of entry be served by the moving parties upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon 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).

The foregoing constitutes the order and decision of the Court.

12/15/2023
DATE

LESLIE A. STROTH, 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