SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

SHENEK BYRD,

Plaintiff,

-against-

TOTAL AQUARIUMS, INC. and SAMSON MANAGEMENT, LLC,

Defendants.

----------X

DECISION/ORDER

Index No.: 155564/2012

Mot. Seqs. 004 and 005

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. In motion sequence 004, defendant Total Aquariums, Inc. ("Total Aquariums"), now moves for summary dismissal of the complaint ("Complaint") of plaintiff Shenek Byrd ("Plaintiff") and summary dismissal of the cross-claims of defendant Samson Management, LLC ("Samson"). In motion sequence 005, Samson now moves for summary dismissal of the Complaint and all cross-claims against it. The motions are consolidated for disposition.

Factual Background

Plaintiff alleges that on August 20, 2009, at approximately 11:00 a.m., she fell on a slippery surface located on 110 Fifth Avenue, New York, New York, 8th floor (the "premises") (Wenckebach Aff., Ex. C, Plaintiff's Bill of Particulars ¶¶1-3). Defendant Samson was the management company that managed the premises. Defendant Total Aquariums was the aquarium company contracted to service the fish tank located at the premises.

Motion Sequence 004

Total Aquariums' Motion

In support of their motion for summary dismissal, Total Aquariums first argues that it did not owe Plaintiff a duty of care, as it was only contracted to service the aquarium located on the floor where Plaintiff worked. Total Aquariums submits, *inter alia*, the deposition testimony of Martin Caceres ("Caceres"), the owner of Total Aquariums, in support of its argument that it did not negligently create the alleged slippery condition that caused Plaintiff's fall (Wenckebach Aff., Ex. E). Caceres testified that Total Aquariums serviced the tank at the premises every two weeks (*id.* 8:19-21). Caceres further testified that the tank located at the premises was a saltwater tank, and that Total Aquariums would bring saltwater from off site to the premises (*id.*, 25:7-14). Caceres further testified that on the date of Plaintiff's accident there would have been no reason for a Total Aquariums employee to remove water from or add water to the subject tank (*id.*, 25:2-14). Nothing would have to be washed using a sink in the office for the services (*id.* 26:3-7). Caceres further testified that a Total Aquariums employee, John Traversa, who was present at the premises on the day of the accident told Caceres that a woman had come up to him and had made a comment about her slipping and "[Traversa] said that they had not been anywhere in that premise or any water or anything to that extent" (*id.*, 19:16-20:3). Caceres went on to testify that Traversa told him that he did not witness Plaintiff's fall (35:5-7.). Caceres further testified that when he asked Traversa whether there was water on the floor, Traversa responded "no water" (*id.*, 34:18-24). Further, Total Aquariums argues that the deposition testimony of Plaintiff demonstrates that she does not know how the slippery condition was created, or whether the liquid she slipped on was water or something else. Moreover, Total Aquariums argues that Plaintiff did not detrimentally rely on Total Aquariums. Further Total Aquarium did not assume a duty by way of contract to maintain the premises.

Next, Total Aquariums argues that the doctrine of *respondeat superior* is inapplicable since it did not cause the alleged slippery condition. Moreover, Total Aquariums argues that there is insufficient evidence to establish that its employee was at the premises acting in the scope of the business entrusted to him, since there was no reason for the employee to replace water from the subject tank.

As to Samson's cross-claims for contractual and insurance indemnification, Total Aquariums argues that there is no contract between the parties containing an indemnification provision in Samson's favor. Further, Total Aquariums contends that since it did not create the slippery condition, it cannot be liable to Samson for common law indemnification.

Samson's Opposition

In opposition, Samson argues that Plaintiff's testimony raises a question of fact as to whether Total Aquariums created the slippery condition that caused Plaintiff's fall. Plaintiff testified that she was working as a "temp" for a company-tenant of the premises (Kauber Aff. Ex. E, 42:16-19). Plaintiff further testified that Total Aquariums visited the premises approximately every other week to service the subject tank (*id.*, 83: 4-24). Plaintiff testified that there were two Total Aquariums employees present at the premises when she arrived at approximately 9:10 a.m. (*id.*, 77:6-25; 85:17-23). Plaintiff also testified that she observed a Total Aquariums employee in possession of a trash can sized bucket with wheels in the premises (*id.*, 86:8-16). Plaintiff further testified that between 9:50 a.m. and 9:55 a.m. she entered into the kitchen for the first time that morning and observed that there was nothing on the kitchen floor and noted that the floor was clear (*id.*, 90:3-25; 91:2-10).

Plaintiff testified that she entered the kitchen a second time that morning and observed a Total Aquariums employee either removing water from the bucket into the sink or adding water into the bucket from the sink. She testified as follows:

Q: Did you make any observations upon entering the kitchen area?
A: Yes. I saw the younger guy with the trash can type container at the sink and he was dumping the water into the sink or putting the water into the container. The water was on and he was either taking the water out or putting the water into the container.
Q: You said this was a three-foot bucket with wheels; correct?
A: Yes.
Q: So how was he filling the bucket or - -
A: He had a cup of - - a little cup or a container thing and he was just taking the water and filling it up in the back.
Q: So he was transferring water using a cup or container to the bucket from the sink?
A: Yes.
Q: Can you describe the cup or container?
A: I can't remember what - - I believe it was like a white or a clear type - - it almost looked like a pitcher? Like a smaller pitcher of - - you know, like they use for punch.
Q: Was he doing this as you walked into the cafeteria.
A: Yes.

(*id.*, 93 24-95:6).

Plaintiff next testified that at approximately 11:00 a.m. she returned to the kitchen a third time and she slipped by the sink. She indicated that, at the moment she fell, she "felt the slipperiness" of the water, and that afterword her pants were wet (*id.*, 103:10-104:24). Further, Plaintiff testified that after she fell, a Total Aquariums employee "ran in and he was like: 'oh my god are you ok? I'm sorry'" and "he had a cloth and he started wiping up everything" from the floor (*id.*, 109:10-110:10).

Samson further argues that an issue of fact is raised by Plaintiff's testimony that she observed a Total Aquariums employee transferring water from the sink to the bucket, as it contradicts Caceres' testimony that there was no need for Total Aquarium employees to use the sink.

Plaintiff's Opposition

In opposition, Plaintiff first argues that Total Aquariums has failed to meet its initial burden of demonstrating that it did not create the slippery condition. Specifically, Plaintiff argues

that an issue of fact exists as to whether Total Aquariums created the alleged slippery condition, since Plaintiff's testimony that she observed the Total Aquariums' employee utilize the sink at the premises contradicts Caceres' testimony. Plaintiff further argues that it may be reasonably inferred from her testimony that Total Aquariums caused the slippery condition.

Total Aquarium's Reply to Samson and Plaintiff

In reply, Total Aquariums first argues that Samson's cross-claims for common-law and contractual indemnification should be dismissed, since Samson's opposition fails to oppose Total Aquariums' motion for summary dismissal of those claims. Total Aquariums further reiterates that the testimony of Plaintiff and Caceres demonstrate that it was not negligent. Total Aquariums additionally argues that the record is void of evidence that it caused the condition.

Motion Sequence 005

Samson's Motion

In support of its motion for summary dismissal, Samson argues that the deposition testimony of Brian McCarthy ("McCarthy"), Executive Vice-President of Samson, establishes that it did not have a duty to clean the premises during the day (Kauber Aff.. Ex. G). McCarthy testified that Samson maintained only two individuals at the subject premises during the day, a superintendent and a building engineer (*id.*, 28:16-29:19). McCarthy further testified that it was not Samson's responsibility to clean within a tenant space during the day and that Samson's staff would not be required to go to the tenant space to clean any areas of the space during the day (*id.*, 29:24-30:19). McCarthy further indicated it was the responsibility of the tenant of the premises to clean the premises during the day (*id.*, 31:11-13). He further testified that a maintenance company, United Building Maintenance would clean only in the evening (*id.* 31:7-18). McCarthy additionally testified Samson did not supervise or inspect United Building Maintenance's cleaning (*id.*, 25: 21-24; 38:3-7).

Samson further contends that Plaintiff and McCarthy's testimony demonstrate that there is no evidence that it created the alleged slippery condition. Moreover, Samson argues that there is no evidence suggesting that Plaintiff detrimentally relied on Samson's continued performance. Next, Samson argues McCarthy's testimony that Samson's staff was not notified of the alleged slippery condition demonstrates that it did not have actual or constructive notice of the alleged slippery condition.

Additionally, Samson argues that Plaintiff's testimony that she did not observe the wet condition of the kitchen floor the first time she entered into the kitchen, but testified that she slipped on a liquid suggests that the alleged slippery condition was caused by Total Aquariums.

Total Aquariums' Opposition[1]

In opposition, Total Aquariums first argues that the property management agreement between the owner of the premises and Samson establishes that Samson owed Plaintiff a duty of care, since it required Samson to "manage, operate, lease and maintain the property" and to make all repairs to the premises (Wenckebach Aff., Ex. G). Next, Total Aquariums argues that Samson failed to demonstrate that it did not have notice of the alleged slippery condition, since Samson failed to indicate when it last inspected the premises and failed to submit logs documenting the cleaning of the premises.

Samson's Reply to Total Aquariums and Plaintiff

In reply, Samson reiterates that it did not owe a duty of care to Plaintiff. Samson further reiterates that there is no evidence that Samson created the allegedly slippery condition or that it had notice of the condition.

[1] Plaintiff's opposition to Samson's motion for summary dismissal indicates that it adopts and incorporates the arguments made by Total Aquariums in opposition to Samson's motion.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 [1st Dept 2012], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Sokolowsky*, 101 A.D.3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M Muller Constr. Co.*, 46 N.Y.2d 276, 281-282 [1978]; *Carroll v. Radoniqi*, 105 A.D.3d 493 [1st Dept 2013]). The Court views the evidence in the light most favorable to the non-moving party, and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

Further, "[a] defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition nor had actual or constructive notice of its existence" (*Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500 [1st Dept 2008]).

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138

[2002]; *Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 111 [2002] ["Ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor"]). The Court in *Espinal* articulated three exceptions to the rule:

> "[A] party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (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."

(*id.* at 140 [internal quotation marks and citations omitted]).

Here, Total Aquariums has failed to establish its *prima facie* entitlement to judgment as a matter of law. In support of its motion, Total Aquariums submitted, *inter alia*, the deposition testimony of Plaintiff. However, Plaintiff's deposition reveals that: there was no liquid on the kitchen floor at approximately 9:55 a.m.; Plaintiff observed a Total Aquariums' employee using a cup or small pitcher to either remove water from the bucket into the sink or to add water into the bucket from the sink; and at approximately 11:00 a.m. she slipped on a liquid in the area of the subject sink. Further, she testified that after she fell, she observed that her pants were wet. From Plaintiff's testimony, an issue of fact exists as to whether Total Aquariums' employee created the slippery condition on the floor of the kitchen that Plaintiff alleges to have caused her to fall (*see Schneider v. Kings Highway Hosp.*, 67 N.Y.2d 743, 744 [1986] [noting that to establish a *prima facie* claim of negligence based on circumstantial evidence, "[i]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred"], quoting *Ingersoll v.*

Liberty Bank of Buffalo, 278 N.Y. 1,7 [1938]; *Healy v. ARP Cable, Inc.*, 299 A.D.2d 152 [1st Dept 2002]).

As for Samson's motion, Samson has established its *prima facie* entitlement to summary dismissal by submitting McCarthy's testimony demonstrating that Samson did not have a duty to clean the subject kitchen during the daytime hours. Further, there is no evidence showing that Samson launched an instrument of harm or that Plaintiff detrimentally relied on Samson's performance of the agreement. Total Aquariums' argument that Samson assumed a duty of care pursuant to the property management agreement fails, since cleaning of the premises is not a condition of the agreement (*see Vermont Teddy Bear Co.*, 1 N.Y.3d 470, 475 ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"], quoting *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72, [1978]; *see also Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 [2001]). Even if Samson did have a duty to clean the kitchen in the daytime hours, Plaintiff's testimony suggests that Samson did not have constructive notice of the alleged slippery condition, since the slippery condition was created sometime between approximately 9:55 a.m. and 11:00 a.m. Moreover, there is no evidence on the record demonstrating that Samson had actual notice of the subject condition.

Respondeat Superior

The doctrine of *respondeat superior* holds that an employer is "vicariously liable for torts committed by an employee acting with the scope of his/her employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment [internal quotation marks and citation omitted]" (*Schilt v. New York City Transit Auth.*, 304 A.D.2d 189, 193 [1st Dept 2003]).

> "The determination of whether the doctrine applies depends upon the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated [internal quotation marks and citation omitted]."

(*Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005]).

Here, factual issues exist with respect to Plaintiff's claim based upon the theory of *respondeat superior*, including whether Total Aquariums employee was acting within the scope of his employment at the time of the subject incident and as to whether the actions of Total Aquariums' employee were foreseeable, as Plaintiff testified that Total Aquariums serviced the subject tank bi-weekly and that she observed the Total Aquariums employee either removing water from the bucket into the sink or adding water into the bucket from the sink. Moreover, determining whether or not a particular act falls within the scope of employment varies based on facts and circumstances of each case and the applicability of *respondeat superior* is "normally left to the trier of fact" (*Schilt*, 304 A.D.2d at 193).

Contractual and Common-Law Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 N.Y.2d 149, 153 [1973]; *see also Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 [2004]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' " (*Perri v. Gilbert Johnson Enters.*, Ltd., 14 A.D.3d 681, 684-685 [2d

Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 A.D2d 60, 65 [1st Dept 1999]; *Priestly v. Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 A.D.3d 493, 495 [1st Dept 2004]).

Initially, all claims for contractual indemnification are dismissed, as there is no agreement between Total Aquariums and Samson. Moreover, Total Aquariums' claim for common law indemnification must dismissed as the court has determined that Samson was not negligent in Plaintiff's accident. Finally, Samson's claim for common law indemnification against Total Aquariums is moot, as Samson is not liable to Plaintiff.

CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of defendant Total Aquariums to dismiss the Complaint of Plaintiff and cross-claims of defendant Samson, is granted only to the extent that defendant Samson's cross-claims are dismissed as moot. It is further

ORDERED that the motion of defendant Samson for summary dismissal of the Complaint and all cross-claims against it, is granted. It is further

ORDERED that defendant Total Aquariums shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 29, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.