SCAN.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

TRIAL/IAS, PART 28
NASSAU COUNTY

JEAN NATARUS and GEORGE NATARUS,

Plaintiffs,

Index #: 014425/00

-against-

Motion Seq. #: 01 & 02

Motion Date: 03/31/03

CORPORATE PROPERTY INVESTORS, INC., a/k/a SIMON PROPERTY GROUP, INC.,

XXX

Defendants.

CORPORATE PROPERTY INVESTORS, INC., a/k/a SIMON PROPERTY GROUP, INC.,

Third-Party Plaintiffs

-against-

ISS / INTERNATIONAL SERVICE SYSTEM, INC.

Third-Party Defendant.

The following paper read on this motion:

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The motion by the third-party defendant "One Source", s/h/a, ISS/International System, Inc., for summary judgment, pursuant to CPLR §3212, dismissing the plaintiff's

complaint, or alternatively, dismissing the third-party complaint is determined as set forth herein.

The motion by the defendant / third-party plaintiff, Corporate Property Investors, Inc., a/k/a, Simon Properties, pursuant to CPLR §3212, dismissing the plaintiff's complaint insofar as asserted against it, or alternatively, for judgment on its third-party complaint is determined as set forth herein.

In September of 1997, the plaintiff, Jean Natarus, fell at the Roosevelt Field Mall in an internal hallway, or corridor not open to the general public, as she was returning from the Mall "Food Court" to her employment at Bloomingdales.

The corridor, which was apparently frequented by employees of stores located in the mall, was adjacent to a store, which had been undergoing construction and / or related cleanup work, up until a few days prior to the plaintiff's accident (Natarus Dep., 15-18, 20-22, 25; Mongiardo Dep., 19, 23-24).

According to Natarus, after she had proceeded approximately halfway through the corridor, the heel portion of her "right foot appeared to step on something and tumbled [her] off her shoe" (Natarus Dep., 39-40). She lost her balance and fell, striking her right-knee on the ground (Natarus Dep., 40, 53; Natarus Aff.,¶¶ 2-3 [Pltffs' Opp., Exh., "A"]).

When she scanned the area in the immediate vicinity of her fall, she noticed a single nail, approximately two and one half inches in length on the ground, and "[m]aybe a piece

of wire", which she described as a cable, "gray * * * a scrap, like a section" (Natarus Dep., 42, 47, 91).

Natarus, who concluded that she slipped on the nail, did not know how long it had been there prior to her accident, although she "assumed" its presence was related to construction work, which had been ongoing, but allegedly completed a few days prior to her fall (Natarus Dep., 45; Natarus Aff.,¶¶ 2-3).

Natarus also claimed to have observed construction debris in the area "every day" (Natarus Dep., 51).

By summons and complaint dated July 2000, the plaintiffs commenced the within action to recover damages for personal injuries, alleging that defendant, Corporate Property Investors, Inc.["CPI"], the mall owner, possessed constructive knowledge of the allegedly hazardous condition of the corridor and failed to remedy it (Cmplt.,¶ 10; Bill of Particulars, ¶¶ 9-10).

CPI subsequently commenced a third-party action against ISS/International System, Inc ["ISS"] – the janitorial contractor with which it had a written agreement – for contribution and common law / contractual indemnity (Def's Exh., "C"). CPI's third-party complaint also contains a cause of action alleging that ISS breached the parties' janitorial agreement by failing to procure liability insurance naming CPI as an additional insured (Agreement, § 8[a], [b]).

Upon the instant notice, the CPI, moves for, ***inter alia***, summary judgment dismissing the plaintiffs' complaint, arguing that it lacked the requisite prior actual, or constructive notice of the alleged defect, or "in the alternative", for judgment on its third-party complaint.

ISS moves for dismissal of CPI's third-party complaint, which sets forth claims sounding in contractual / common law indemnity, and alleged breach of a contract provision requiring ISS to obtain liability coverage naming CPI as an additional insured.

CPI has established its ***prima facie*** entitlement to judgment as a matter of law dismissing the plaintiff's complaint, which – as narrowed by the parties' submissions – is predicated upon the assertion that CPI possessed constructive notice of the offending nail (***e.g.***, **Paino v. Friendly Ice Cream Corp.**, 756 NYS2d 894, 895 [2nd Dept. 2003]; **Dane v. Taco Bell Corp.**, 297 AD2d 274). The burden then shifted the plaintiffs to come forward with evidence sufficient to establish the existence of a triable issue of fact. The plaintiffs have failed to do so (***see,*** **Sanchez v. Delgado Travel Agency, Inc.**, 279 AD2d 623).

In order to prevail in a slip / trip and fall case, "the plaintiff must demonstrate that the defendant created the dangerous condition that caused the accident, or that it had actual or constructive notice of that condition and failed to remedy it within a reasonable time" (**Vlachos v. Weis Markets, Inc.**, 757 NYS2d 79 [2nd Dept. 2003]; **Martinez v. City of**

Yonkers, 756 NYS2d 431 [2nd Dept. 2003]; **Ellis v. New York Racing Ass'n.,** 300 AD2d 621 ***see,*** **Mercer v. City of New York**, 88 NY2d 955, 956).

Moreover, where "the plaintiff proceeds on a theory of constructive notice, the plaintiff must prove that the defect which caused the accident was visible and apparent, and that it existed 'for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it'" **(Daniely v. County of Westchester**, 297 AD2d 654, 656, ***quoting from***, **Gordon v. American Museum of Natural History**, 67 NY2d 836, 837 ***see also***, **Chianese v. Meier**, 98 NY2d 270, 278; **Hoffman v. Second Beach Hills Corp.**,___AD___ [2nd Dept. 2003]; **Petty v. Harran Transp. Co., Inc.**, 300 AD2d 290). Contentions predicated upon conjecture and speculation will not suffice **(Bogdanovic v. Norrell Health Care Services, Inc.**, 300 AD2d 611; **Smith v. J.B.H., Inc.**, 300 AD2d 874, 875).

Here, there is nothing in the record establishing how the allegedly offending nail came to be present at the location where the plaintiff's accident occurred, and nothing which substantiates the speculative contention that it was present for any specific period of time – much less "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, supra).**

Moreover, "[t]he plaintiff admitted that she did not know how long the condition

existed before her fall, and that she never complained about [the condition of] * * the hallway before her fall" (**Metling v. Punia & Marx, Inc.,** 756 NYS2d 262, 264 [2nd Dept. 2003]; **Stone v. Long Island Jewish Medical Center, Inc.,** 754 NYS2d 352 [2nd Dept. 2003]). Further, her submissions indicate that the nail "was not visible and apparent even to her as she [allegedly] stepped down on it" (**Carricato v. Jefferson Valley Mall Ltd. Partnership**, 299 AD2d 444, 445)(J. Natarus Aff.,¶ 4). Nor could she say with certainty that the nail which she found actually precipitated her fall.

In the absence of probative evidence demonstrating how long the nail was on the floor, there is no proof supporting a non-speculative inference that CPI had constructive notice of its presence – or that it was on the floor for any particular period of time (**Luciani v. Waldbaum, Inc.**, 756 NYS2d 886 [2nd Dept. 2003]; **Stone v. Long Island Jewish Medical Center, Inc., supra; Ellis v. New York Racing Ass'n., supra**).

Although CPI was generally aware of the renovations and / or construction work which was being performed, the foregoing awareness does not establish constructive knowledge of the nail's presence in an adjacent corridor for any specific period of time. It is well settled that a "general awareness that a dangerous condition may be present is legally insufficient to constitute notice of a particular condition" (***see,* Piacquadio v. Recine Realty Corp.**, 84 NY2d 967, 969; **Smith v. Funnel Equities, Inc.**, 282 AD2d 445, 446; **Andrus v. National Westminster Bank**, 266 AD2d 171, 172).

The plaintiffs also suggest that the presence of the single nail at issue can be linked to an alleged recurring debris condition, which the injured plaintiff claims to have observed in the corridor.

Although "[a] defendant who has actual knowledge of a recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition" **(Garcia v. U-Haul Co., Inc.,** 755 NYS2d 900 [2nd Dept. 2003]; **Clark v. Chau Shing Wong,** 293 AD2d 640 ***cf.*, Chianese v. Meier, supra,** at 278 [2002]), to support this theory, the plaintiffs were 'required to show by specific factual references that the defendant had knowledge of the allegedly recurring condition' **(Stone v. Long Island Jewish Medical Center, Inc., supra,** 354, ***quoting from*, Carlos v. New Rochelle Mun. Hous. Auth.**, 262 AD2d 515, 516; ***see,* Manzione v. Wal-Mart Stores, Inc.**, 295 AD2d 484-485). Conclusory statements "which fail to identify how long the condition existed, or the identity of the persons to whom notice of the condition was allegedly given, and when and how it was given" are insufficient (**Manzione v. Wal-Mart Stores, Inc. , supra,** at 485; **Carlos v. New Rochelle Mun. Hous. Auth., supra**).

While the plaintiff's deposition contains a reference to debris being on the corridor floor "every day" during an unspecified span of time (Natarus Dep., 51), her testimony does not establish that CPI possessed actual knowledge of any purported, or recurring debris condition. Nor does her testimony demonstrate with adequate particularity, that the debris

– assuming it constituted a dangerous condition to which the nail could be linked – was present for a specific and appreciably significant period of time (**Smith v. Funnel Equities, Inc., supra**; **Carlos v. New Rochelle Mun. Hous. Auth., supra**).

Since the evidence adduced falls short of demonstrating that CPI possessed actual knowledge "of the tendency of a particular dangerous condition to reoccur" (**Columbo v. James River, II, Inc.**, 197 AD2d 760, 761), it is not chargeable with constructive notice of the purported condition relied upon by the plaintiffs. Moreover, the plaintiff's affidavit, which embellishes in part, her deposition testimony, fails to establish the existence of triable issues with respect to the alleged existence of a recurring condition (***e.g.,*** **Christopher v. New York City Transit Authority**, 300 AD2d 336, 337; **Manzione v. Wal-Mart Stores, Inc. , supra,** at 485).

Accordingly, and under the circumstances presented, CPI's motion for summary judgment dismissing the complaint is granted.

To the extent that CPI's notice of motion – which is framed in the alternative – can be read as requesting third-party relief notwithstanding dismissal of the plaintiff's complaint, that relief is denied. However, ISS's motion for dismissal of the third-party complaint is granted to the extent indicated below.

Although the janitorial services contract entered into between ISS and CPI authorizes the recovery of, ***inter alia*** expenses, including counsel fees, incurred by virtue of

ISS, improper performance of the agreement (Agreement, § 7[c] [i], [ii]) (*cf.*, **Dominguez v. Food City Markets, Inc.**,756 NYS2d 637, 639 [2nd Dept. 2003]; **Pope v. Supreme-K.R.W. Const. Corp.**, 261 AD2d 523, 525), the evidence in the record fails to generate a triable issue with respect to the speculative contention that the plaintiff's accident arose out of, or was attributable to, any omission, act or improper and / or inadequate performance of third-party defendant ISS (*cf.*, **Hajdari v. 437 Madison, Avenue Fee Associates**, 293 AD2d 360; **Murphy v. M.B. Real Estate Dev.**, 280 AD2d 457). Accordingly, CPI's third-party claims for contractual and / or common law indemnity are dismissed.

CPI further contends that ISS breached the parties' agreement by failing to obtain comprehensive liability insurance "with limits of not less than $2,000,000.00 in the aggregate" naming CPI as an additional insured (Third-party Cmplt., 3rd Cause of Action Agreement, ¶ 8 [a],[b]).

The record indicates that ISS obtained an insurance policy naming CPI as an insured, which provided, ***inter alia***, $1,500,000.00 in "excess" "commercial general liability" coverage (ISS Reply, Exh. "A").

Preliminarily, while ISS's carrier declined CPI's earlier tender of the defense based upon CPI's failure to demonstrate outlays in excess of the $500,000.00, "self-insured retention" amount, any claim predicated solely upon the ISS's failure to procure the

contractually specified, $2 million coverage amount is academic in light of the Court's prior dismissal of the plaintiffs' complaint.

To the extent that CPI claims entitlement to expenses and counsel fees incurred to date based on the theory that the carrier's refusal to defend can be attributed to ISS's breach of the insurance procurement provision (Niro Reply Aff., at 4), that claim must be denied.

There are outstanding interpretive issues and questions of fact with respect to the import and intent of the insurance procurement provision which have not been determinatively addressed through the submission of relevant affidavits or probative documentary materials.

It bears noting that the carrier's original disclaimer letter suggests that coverage was denied in light of a failure to exhaust a $500,000.00 "self-insured" retention amount, apparently resembling – in application and effect – a deductible threshold. The Court notes that the insurance procurement provision does not preclude the purchase of coverage containing deductible amounts (***cf.***, Agreement ¶ 8[a][iii]). Significantly, neither movant has annexed relevant underwriting analysis definitively illuminating the commercial significance and / or meaning of the coverage provisions contained in the disputed policy – which has not been produced for the Court's review.

Accordingly, it is,

ORDERED that motion of defendant / third-party plaintiff, Corporate Property

Investors, Inc., a/k/a, Simon Properties, for summary judgment is granted to the extent that the plaintiffs' complaint is dismissed and its motion is otherwise denied, and it is further;

ORDERED that the third-party defendant "One Source", s/h/a, ISS / International System, Inc., motion for summary judgment dismissing the plaintiff's complaint is granted. In addition the complaint of the third party plaintiff against third party defendant is also dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: June 2, 2003

JOSEPH COVELLO, J. S. C.

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ENTERED

JUN 10 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE