Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

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NANCE LYNCH,

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, MTA, NEW YORK CITY TRANSIT AUTHORITY, MTA-LONG ISLAND RAILROAD, MERIDIAN MANAGEMENT CORP., MERIDIAN CONTRACTORS CORP. and T.U.C.S. CLEANING SERVICE, INC.,

Defendants.

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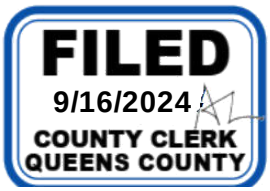
Index No.: 710949/2019

Motion Seq. No.: 4

Motion Date: 2.14.2024

Motion Cal. No.: 15



The papers bearing NYSCEF Doc. Nos. 112-138, 232, 241, 247, 256-258, 265, 270, 273, 274 and 277-278 were read on (1) the motion filed by the defendant Meridian Management Corp. ("Meridian") for summary judgment; and (2) the cross-motion of the defendant Port Authority of New York and New Jersey ("Port Authority") for summary judgment on its cross-claims against Meridian.

The plaintiff, Nance Lynch (the "Plaintiff"), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a trip-and-fall accident (the "Accident"). Presently before the Court are two motions. Meridian moves for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. The Port Authority cross-moves for summary judgment on its cross-claims against Meridian for contractual indemnification. For the following reasons, Meridian's motion is granted in part and denied in part, and the Port Authority's cross-motion is granted.

I. Factual Background

The Accident took place on February 18, 2019 at the Jamaica Station. More particularly, the Accident occurred on the mezzanine bridge of the AirTrain, which is located at 93-02 Sutphin Boulevard, Jamaica, New York (the "Premises"). The Plaintiff was walking towards a subway elevator when her "shoe hit a ledge," causing her to fall. The "ledge" was a metal perimeter surrounding glass blocks that were embedded in a cement walkway. In essence, the Plaintiff alleges that the metal "ledge," which shall be referred to the "trim," was a tripping hazard because there was a height differential between it and the surrounding area.

Meridian is involved in the business of facility maintenance. On the date of the Accident, there was a contract in effect between the Port Authority and Meridian. Pursuant to the contract,

Meridian was responsible for cleaning and maintenance of the mezzanine level of the Premises. However, Meridian employees did not actually clean the mezzanine level; rather, this work was performed by T.U.C.S. Cleaning Service, Inc. ("TUCS") pursuant to a subcontract.

Crystal Rivera ("Rivera") is Meridian's Project Manager for the Premises. Rivera avers as follows in her affidavit in support:

> Meridian had no obligation under the contract to make structural repairs to the glass block embedded in the surface of the walkway. … at no time prior to Ms. Lynch's accident did the Port Authority ask Meridian to actually make any repairs … Meridian never repaired or altered the glass block or metal border surrounding the glass blocks. The only involvement that Meridian had with the glass blocks themselves was to clean them in the early stages of the contract and then to supervise T.U.C.S. cleaning of the glass blocks once T.U.C.S. was subcontracted. Meridian did not, nor was it asked to, perform any structural work or repairs to the glass block or metal border surrounding the glass blocks.

Mats were typically placed over the glass blocks and the surrounding trim. At her deposition, the Plaintiff testified that the trim caused her to trip. However, the Plaintiff also testified that a mat was not covering the trim and the glass blocks when the Accident took place.

The contract between Meridian and the Port Authority contains the following indemnification provision:

> To the extent permitted by law, the Contractor shall indemnify and hold harmless the Port Authority…from and against all claims and demands, just or unjust of third persons…arising out of or in any way connected to or alleged to arise out of or alleged to be in any way connected with the Contract and all other services and activities of the Contractor under this Contract and for all expenses incurred by it … in the defense, settlement or satisfaction thereof, including without limitation thereto, claims and demands for…personal injury…whether they arise out of … Contractor's operations… or arise out of the acts, omissions, or negligence of the Contractor [or] the Port Authority…

II. Discussion

Meridian's motion and the Port Authority's cross-motion are considered separately below.

A. Meridian's Motion

"[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 NY2d 136, 138-139 [2002] [citation omitted]).

However, "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, launches 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 (*see id.,* at 140 [internal brackets, quotations and citations omitted]). As explained below, none of these exceptions apply to Meridian.

A. Launch of the Force or Instrument of Harm

"Uniformly, a launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition. This requirement is consistent with the use of the word launch in *Espinal*. Launch is an action verb, requiring by definition evidence that the contractor affirmatively left the premises in a more dangerous condition than it was found. In the abstract, a party's passive omissions might also conceivably create or exacerbate a dangerous condition just as active omissions, particularly in light of New York's general elimination of the distinction between active and passive negligence. In either instance, however, evidence must still be introduced linking the conduct to the creation or exacerbation of the condition" (*Santos v Deanco Services, Inc.*, 142 AD3d 137, 141-142 [2d Dept 2016] [internal quotation marks and citations omitted]).

There is no evidence in the record that Meridian created the raised trim or that it improperly placed a mat around same. Thus, Meridian did not launch the foregoing forces or instruments of harm (*see id.*).

Any claim that Meridian to failed place a mat around the trim fails: "[t]o suggest, as does the plaintiff, that a mere omission by a contractor, without more evidence, may constitute a launch of a force or instrument of harm, decimates the meaning of the first *Espinal* exception. In other words, the first *Espinal* exception would be limitless, triggered upon any breached contract, and have the practical effect of entirely abrogating the general rule that contractors owe no duty to plaintiffs with whom they are not in contractual privity. Without requiring, in the context of the first *Espinal* exception, proof that the contractor's conduct created or exacerbated the icy condition, any breach of contract could always be conflated with tort liability, even though breach of contract and tort liability are two separate concepts. In our view, for the jury's verdict to be rational, there needs to be evidence in the record that BTN's failure to salt at the bullpen created the icy condition on which the plaintiff fell, or exacerbated it" (*see id.,* at 142). Therefore, any omission by Meridian in placing a mat around the trim does not give rise to legal liability against it (*see id.*). In any event, as stated, there is no evidence in the record that Meridian created the raised trim, improperly placed the mat, or exacerbated these conditions. Therefore, the first *Espinal* exception is inapplicable to Meridian (*see id.*).

B. Detrimental Reliance

The second *Espinal* exception is inapplicable because the record is devoid of any evidence that the Plaintiff detrimentally relied upon the contractual duties of Meridian relative to the Premises. To establish detrimental reliance, the Plaintiff must have knowledge of the contract at issue; the performance of the contractual obligations must induce the Plaintiff to rely upon the continued performance; and the failure of Meridian to perform the subject obligations injured the Plaintiff (*see Bugiada v Iko*, 274 AD2d 368 [2d Dept 2000]). Here, there was no contract between the Plaintiff and Meridian. Moreover, there is no evidence that the Plaintiff was aware of the contract between Meridian and the Port Authority, and the subcontract between Meridian and TUCS relative to the Premises (*see Foster v Herbert Slepoy Corp.*, 76 AD3d 210 [2d Dept 2010]) The second exception to *Espinal* is therefore also inapplicable.

C. Entire Displacement

The third *Espinal* exception is equally inapplicable because Meridian did not entirely displace the Port Authority to maintain the Premises safely. In *Hagen v Gilman Management Corp.*, 4 AD3d 330, 331 [2d Dept 2004], it was held as follows: "[a]s managing agent of the building in which the plaintiff was injured, the defendant could be subject to liability for nonfeasance only if it was in complete and exclusive control of the management and operation of the building. To show the existence of a duty on the part of the defendant, the management contract between the defendant and the owner had to constitute a comprehensive and exclusive set of obligations which the parties could have reasonably expected to displace the owner's duty to maintain the premises safely. However, the evidence demonstrated that the owner reserved to itself a significant amount of control over the maintenance of the premises. Accordingly, the defendant did not have a comprehensive agreement that displaced the responsibility of the owner such that it could be held liable to the plaintiffs" [citations omitted].

Here, the responsibilities of Meridian related to maintenance and cleaning; the Port Authority conducted weekly inspections of the Premises; and any attempt to remedy issues related to the glass blocks would be made by the Port Authority. On this record, the Court concludes that Meridian did not entirely displace the Port Authority to maintain the Premises safely and that Meridian did not assume a comprehensive maintenance obligation giving rise to a duty of care to third parties (*see id.; Lattimore v First Mineola Co.*, 60 AD3d 639 [2d Dept 2009]). The third exception to *Espinal* is thus similarly inapplicable.

In sum, because a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party and none of the *Espinal* exceptions are applicable, Meridian is entitled to summary disposition dismissing the complaint insofar as asserted against it (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136).

D. The Cross-Claims Asserted Against Meridian

Meridian also seeks summary judgment dismissing the co-defendants' cross-claims. In the absence of opposition, this branch of the motion is granted against the MTA, New York City Transit Authority, MTA-Long Island Railroad and TUCS. Here, where a party fails to oppose

some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *Argent Mtge. Co., LLC v. Mentesana*, 79 AD3d 1079 [2d Dept 2010]). Furthermore, where a party does not oppose a motion or branches thereof, the party is deemed to have acquiesced in the relief sought therein (*see Flake v Van Wagenen*, 54 NY 25 [1873]; *Mixon v TBV, Inc.*, 76 AD3d 144 [2d Dept 2010]).

The Port Authority does, however, oppose Meridian's motion. Thus, to dismiss the Port Authority's cross-claims for contractual indemnification, Meridian "… must make a *prima facie* showing that it was not contractually obligated to indemnify … [the Port Authority]. This may be accomplished by showing that, under the circumstances, an indemnification clause in a contract between the parties either was not triggered or was otherwise inapplicable" (*Selis v Town of N. Hempstead*, 213 AD3d 878, 880 [2d Dept 2023] [internal quotation marks and citations omitted]).

"The right to contractual indemnification depends upon the specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*see id.* [internal quotation marks and citations omitted]).

Meridian contends, *inter alia*, that because it bears no legal liability in this cause, the Port Authority's cross-claims for contractual indemnification should be dismissed. As more fully discussed within the context of the Port Authority's cross-motion, this assertion is incorrect because the indemnification clause is triggered by, among other things, the *allegation* that a claim arose out of or was in any way connected with the contract and all other services and activities of Meridian under the contract (*see Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956 [2d Dept 2021]). Since the contract between Meridian and the Port Authority related to the Premises and the Plaintiff *alleges* that she was injured because of Meridian's conduct, Meridian fails to establish that the indemnification clause was not triggered or was otherwise inapplicable. Accordingly, the branch of Meridian's motion for summary judgment dismissing the Port Authority's cross-claims for contractual indemnification is denied (*see id.*; *Sand v City of New York*, 83 AD3d 923 [2d Dept 2011]).

E. The Port Authority's Cross-Motion

The Port Authority cross-moves for summary judgment on its contractual indemnification claims against Meridian. To obtain this relief, the Port Authority must demonstrate that the Plaintiff's allegations fall within the broad indemnification provision of the contract between it and Meridian. As stated, the indemnification provision encompasses claims that are "*alleged* to arise out of or *alleged* to be in any way connected with the" contract, and "all other services and activities" of Meridian pursuant to the contract. Since Meridian was contractually responsible for maintenance and cleaning of mezzanine level of the Premises and the Plaintiff alleges that Meridian was negligent in maintaining said area, the broad indemnification provision of the contract is triggered (*see Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956; *Sand v City of New York*, 83 AD3d 923 [2d Dept 2011]).

Contrary to Meridian's contention, its obligation to indemnify the Port Authority is not conditioned upon a finding that Meridian was negligent (*see Cuellar v City of New York*, 139 AD3d 996 [2d Dept 2016]).

Lastly, Meridian's reliance upon GOL § 5-322.1 is misplaced. This statutory provision, which prohibits a party from being indemnified for its own negligence, is inapplicable to the contract between Meridian and the Port Authority, which relates to routine maintenance and cleaning (*see Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that Meridian's motion for summary judgment is granted in part and denied in part; and it is further,

ORDERED, that motion is granted to the extent that the complaint and all cross-claims, except for those asserted by the Port Authority, are dismissed as to Meridian; and it is further,

ORDERED, that Meridian's motion for summary judgment is denied insofar as directed to the Port Authority; and it is further,

ORDERED, that the Port Authority's cross-motion for summary judgment on its contractual indemnification cross-claims against Meridian is granted; and it is further,

ORDERED, that Meridian shall serve a copy of this Order with Notice of Entry upon all other parties via NYSCEF by October 15, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 10, 2024

MOJGAN C. LANCMAN, J.S.C.