

Baum v Millennium Hotel
2007 NY Slip Op 32072(U)
July 5, 2007
Supreme Court, New York County
Docket Number: 0107736/2002
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

Rakower

PART 5

Index Number : 107736/2002

BAUM, IRWIN

vs

CITY OF NEW YORK

Sequence Number : 015

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits X MOT + opp

2, 3, 4

Replying Affidavits _____

5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 12 2007

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/5/07

Eileen A. Rakower
EILEEN A. RAKOWER
J.S.C.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

IRWIN BAUM,

Plaintiff,

Index No.
107736/02

- against -

Decision and
Order

THE MILLENNIUM HOTEL, THE CITY OF NEW
YORK, THE UNITED NATIONS DEVELOPMENT
CORPORATION, and CUSHMAN & WAKEFIELD,
INC.,

Defendants.

-----X

THE UNITED NATIONS DEVELOPMENT
CORPORATION,

Third-Party Plaintiff,

Third-Party Index
No. 590697/05

- against -

PRITCHARD INDUSTRIES,

FILED
JUL 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Defendant.

-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for a broken left wrist which he allegedly sustained when he slipped and fell on what he claims was an icy substance outside of the Millennium Hotel ("MH"), located at Two United Nations Plaza ("Two UN Plaza") New York, New York. According to plaintiff's notice of claim, the incident occurred

on January 1, 2002 at approximately 3:00 a.m. underneath the marquis/canopy ("canopy") of MH. Plaintiff alleges that after attending a party in one of the rooms of the MH he came out and "slipped on ice on the ground which had accumulated as result of dripping water or some other liquid from the hotel marquis/canopy." One United Nations Plaza ("One UN Plaza") and Two UN Plaza are independent but attached buildings located on 44th Street. The Canopy under which plaintiff allegedly fell extended from One to Two UN Plaza and was attached to the exterior of both buildings.

The City of New York ("City") is the owner of both One and Two UN plaza. The United Nations Development Corporation ("UNDC") is a public benefit corporation that was established by New York State in 1968 for the purpose of developing office and hotel space to support the City of New York's United Nation's Community. UNDC leases floors One through Twenty-Eight of One UN Plaza from the City. MH has a condominium ownership interest in and operates a hotel on floors Twenty-Nine through Forty of One UN Plaza and subleases space from UNDC at Two UN Plaza. Cushman & Wakefield ("C&W") was the managing agent for One and Two UN Plaza pursuant to a written agreement with UNDC. Third-party defendant Pritchard Industries ("Pritchard") contracted with UNDC to provide general cleaning of the common areas at One and Two UN Plaza, including keeping the sidewalks free of snow and ice and washing the canopy. Pritchard employees reported directly to C&W.

Plaintiff moves for summary judgment against UNDC claiming it had the duty and responsibility to maintain the premises, including the canopy, in good condition. UNDC opposes plaintiff's motion and cross moves for summary judgment pursuant to CPLR 3212 and General Municipal Law §50-c against plaintiff and seeks to dismiss all cross claims against it. C&W submits a partial opposition to UNDC's cross motion to the extent that UNDC seeks to dismiss all cross claims against it. MH also partially opposes UNDC's motion.

Plaintiff, in support of his motion, argues that UNDC had a duty and responsibility to maintain the premises, including the canopy, in good repair. UNDC argues that plaintiff's claims should be dismissed because he failed to file a notice of claim against UNDC. The date of plaintiff's accident was January 1, 2002. Thus, UNDC argues plaintiff must have filed his notice of claim by April 1, 2002. Plaintiff did file a notice of claim against the City, however, it was never filed against UNDC

directly. UNDC argues service upon the City does not constitute valid service upon it and that the statute of limitations has run.

§9604 of The Unconsolidated Laws of the State of New York, Title 27-A, establishes The United Nations Development Corporation. §9610-j provides that actions against the UNDC:

Founded on tort shall not be commenced more than one year and ninety days after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been served on the corporation within the time limited by and in compliance with all the requirements of fifty-e of the general municipal law.

Service of a notice of claim upon the City and State does not constitute service upon a public benefit corporation, which is a distinct legal entity and is entitled to direct service. (*Densico v. City of New York*, 309 A.D.2d 611[1st Dept. 2003]; *Mouzas v. City of New York*, 1 Misc.3d 910(A)[Sup. Ct. New York County 2003]). Here, UNDC, a public benefit corporation, was entitled to direct service of a notice of claim. Plaintiff did not file a separate notice against UNDC. Thus, plaintiff's claims against UNDC must be dismissed. The cross claims for indemnification remain.

City moves for summary judgment as to its claims against UNDC based on contractual and common law indemnification. City provides the lease between City and UNDC, which provides in pertinent part at Article XVIII

Section 18.01. UNDC shall indemnify and save harmless the City against and from all liabilities, suits . . . claims . . . which may be . . . asserted against the City by reason of . . . b) the negligent or wrongful acts of UNDC or its agents or employees with respect to any . . . condition, operation, maintenance or management of the Building . . . including, without limitation, any street, alley, sidewalk, curb ...

UNDC does not oppose City's motion for indemnification.

UNDC moves for partial summary judgment against C&W directing that C&W had a legal duty to maintain the canopy/marquee which plaintiff claims was defective and unsafe. Plaintiff, by separate motion, adopts the affirmation and exhibits submitted in support of UNDC's cross motion against C&W. UNDC and plaintiff both argue that pursuant to the property management agreement between UNDC and C&W, it was the sole duty of C&W to maintain the premises and keep it free from defects.

All parties, in support of the relief requested, have appended testimony and documents. Plaintiff provides the lease between City and UNDC, and adopts UNDC's submissions. UNDC provides the deposition of Jorge Ortiz, Controller employed by UNDC, the deposition of Jack DiMartino, senior property manager of C&W, and the contract between UNDC and C&W. C&W provides the plaintiff's Bill of Particulars, the pleadings, plaintiff's Notice of Claim as against the City, the affidavit of Jorge Ortiz stating that UNDC never received a Notice of Claim, the depositions (already provided) of Jorge Ortiz and Jack DiMartino, the management agreement between UNDC and C&W, the deposition of Thomas Calderone, director of operations for Pritchard, and the cleaning agreement between UNDC and Pritchard. City provides the lease and amendment to lease between City and UNDC. Finally, MH provides the depositions (already provided) of Ortiz and DiMartino, the sublease between UNDC and MH for portions of Two UN Plaza, the management agreement between UNDC and C&W, the purchase and sale agreement for premises described as "The Hotel Unit (including the Hotel Unit Common Elements) and Subleasehold Estate located at One UN Plaza," a photograph of the canopy in front of Two UN Plaza, the Hotel Services agreement between MH and C&W, the Agreement for Cleaning Services for One Two and Three UN Plaza between UNDC and Pritchard, the deposition of plaintiff, and the deposition of Steven Liesveld, director of security for MH.

Article II Section 2.1 of the Amended and Restated Property Management Agreement by and between United Nations Development Corporation and Cushman & Wakefield ("Management Agreement") states, in relevant part:

At all times during the term of this Agreement . . . Manager shall have the sole and exclusive right and obligation to manage and operate the UNDC properties. . .

Article II Section 2.1(I) states, in relevant part:

Manager shall make or install or cause to be made or installed, at UNDC's expense and in the name of UNDC . . . all needful and proper maintenance, repairs, renewals, revisions, alterations, replacements, additions and improvements in and to the UNDC properties. . .

Pursuant to Section 3.01(a)(ii) of the Sublease between UNDC and MH ("sublease"), UNDC was to "operate, keep, clean and maintain, and make repairs as appropriate to, the Common Elements" at Two UN Plaza. The subject canopy is listed in Article 1(22) of the sublease under the definition of Common Elements.

Further, UNDC entered into a separate agreement with Pritchard directing that Pritchard was responsible for the canopy of Two UN Plaza as follows:

Exhibit 1, Part 2A of 4, IV

- b. The top and underside of all canopy glass shall be cleaned every three months, including the store front glass directly under the canopy,

and for the sidewalk area of Two UN Plaza as follows:

Exhibit 1, Part 2A of 4, VI

- a. Sweep and hose all sidewalks and driveways daily, weather permitting.
- b. Remove snow or ice as soon as possible on all sidewalks, driveways and loading dock.
- c. Keep in clean condition and water daily all planting areas.
- d. Remove all gum and foreign matter from sidewalks on sight.
- e. Scrub clean and/or steam clean sidewalks and driveways as often as the building deems necessary, such work to be scheduled as not to interfere with operation of building.¹

¹Interestingly, the agreement with Pritchard for cleaning services does not mention the canopy in relation to its duties for One UN Plaza or Three UN Plaza, only with regard to Two UN Plaza.

The Management Agreement between UNDC and C&W shifts the responsibility to maintain and repair the premises to C&W, thereby placing the duty of maintaining the subject canopy with C&W. UNDC also contracted with third party Pritchard for certain services pertaining to both the canopy and snow and ice removal. Clearly, UNDC assigned responsibilities in connection with the canopy and with the cleaning of the sidewalk to two different entities. Thus, plaintiff's motion that this court direct that C&W had the sole duty of maintaining the canopy must be denied.

MH moves for summary judgment against plaintiff. Plaintiff cross-moves against MH for summary judgment. MH opposes plaintiff's cross motion. By separate motion, MH also moves for summary judgment against C&W and third-party defendant Pritchard Industries, Inc. ("Pritchard") on the basis of contractual and common law indemnification. C&W opposes the motion. Pritchard does not oppose MH's motion. C&W also cross moves against Pritchard for indemnification. Pritchard opposes the motion.

MH argues that it owed no duty to plaintiff because, as a tenant in Two UN Plaza, it was not responsible for the maintenance of the subject canopy under which plaintiff fell. Rather, it was UNDC and C&W who had the duty to maintain and repair the canopy. MH claims it did not create the alleged defect and had no actual or constructive notice of water leaking from the canopy.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 [1970]).

MH points to the sublease between it and UNDC, which states which services

will be provided by UNDC and its agents. According to the sublease UNDC and its agents were responsible for the maintenance of the "common elements." Despite MH's condominium ownership interest in One UN Plaza, it argues that it is a tenant with no responsibility for the common elements of Two UN Plaza.

While Plaintiff argues that the Hotel Unit includes common elements and the canopy is part of the hotel unit common elements, plaintiff's argument is not supported by exhibits (the attorney refers only to the affirmation of David A. LoRe on behalf of UNDC) and is otherwise misplaced. The sale of the hotel unit was for space contained within One UN Plaza, and the accident occurred outside Two UN Plaza. MH has an ownership interest in One UN Plaza, and one can argue that the canopy is a common element shared by One UN Plaza and Two UN Plaza, for purposes of this motion. However, only if a defect in the canopy caused or created the accumulation of frozen water on which plaintiff fell, could the responsibility be apportioned between the two buildings. While the claim here is that the canopy had a leak in it, no party has come forward with proof in admissible form demonstrating that such a defect exists. Indeed, to assume one exists to the exclusion of water occurring naturally, is based on speculation rather than proof submitted.

DiMartino, senior property manager of C&W, in his deposition states:

Q: At any time during 2000, 2001, did it come to your attention that there was a leak coming from a portion of the canopy?

A: No. (Page 17, lines 8-11)

Q: . . . Now do you recall yourself at any time prior to New Year's Day of 2002 observing a leak from any portion of the area of the canopy depicted in the right hand photo, number 2?

A: No. (Page 22, lines 10-14)

Q: Did anyone from Pritchard Industries ever advise you of any problems with the canopy prior to 2001?

A: No.

Q: Did anyone from Pritchard Industries ever advise you that there was a leak in, with reference to the leak in the photograph before (indicating deposition exhibit number 2) – prior to 2002?

A: No. (Page 56, lines 10-19)

Liesveld, director of security for MH, in his deposition testifies:

Q: Showing you Exhibits 3 and 4, first of all, do you recognize that as a photograph looking upward as a portion of the underneath part of the canopy?

A: Yeah, it looks like it. Should be.

...

Q: Specifically looking at the middle of each photograph, which shows a sort of brownish color line through the metal-colored object, do you recall ever seeing such a brownish color line during the year 2001?

A: No. (Page 22, line 13 through page 23, line 8.)

Q: Prior to January 1, 2001, had you ever seen any leaks from the canopy? . . . Excuse me, 2002?

A: No. (Page 25, lines 4-8)

Ortiz, controller for UNDC, in his deposition testifies:

Q: At any of the times that you used the entrance that is depicted in plaintiff's 1, did you ever see any leaks coming from the canopy?

A: No.

Q: At any time prior to January 1, 2002, did anyone ever report any leaks coming from the canopy to you?

A: No. (Page 47, lines 7-14)

Notably, the picture provided to the court in Exhibit J of MH's motion, is a photo of the canopy taken from in front of that canopy, and from a distance. No other photographs, particularly those shown to the witnesses at their respective depositions, were provided to the court. Nor was the video plaintiff claims in his deposition that he took of the area provided to the court.² While the depositions revealed experts had been engaged to take photographs, no expert affidavit or photographs taken by an expert were provided. Most important, plaintiff has the burden to lay bare his proof in opposition to MH's motion for summary judgment. Instead, plaintiff submits only an attorney affirmation. Plaintiff submits no evidence in admissible form demonstrating that MH, as the owner of the Hotel Unit of One UN Plaza, which

²Plaintiff, in his deposition, offered to supply it to counsel by email at no charge.

shared the canopy which extended to the area of plaintiff's accident in front of Two UN Plaza, owed a duty to plaintiff.

MH's motion for summary judgment as against plaintiff is granted. Plaintiff's cross motion as against MH is denied. Based on the foregoing, the court does not reach MH's other arguments for indemnification as against UNDC, C&W or Pritchard.

C&W brings a cross-motion for summary judgment for indemnification against UNDC and against Pritchard. C&W, in support of its cross-motion against UNDC, argues that UNDC must indemnify it against civil actions such as the one here. Plaintiff alleges that he slipped and fell as the result of a defect in the canopy at Two UN Plaza which caused ice to form on the sidewalk below. Thus, C&W maintains, if the allegations are true, the defect was clearly a "condition" on UNDC property as contemplated by the agreement between the parties.

UNDC, in opposition, argues that it was the sole duty of C&W to repair and maintain the subject canopy and to keep the sidewalk free of snow and ice in front of Two UN Plaza. Thus, UNDC concludes, if any defect existed it could only be by reason of C&W's negligence. By cross-motion, UNDC further argues that the indemnification clause contained in the contract titled "Amended and Restated Property Management Agreement by and between United Nations Development Corporation and Cushman & Wakefield" is triggered if it is found that the canopy was negligently maintained or repaired by C&W. The relevant portion of that clause states:

C&W shall reimburse UNDC for an expense in defense of, any civil action or proceeding instituted or maintained against UNDC or UNDC and Manager . . . due to i) damages, claims or injuries to person or property by reason of manager's or its employees negligence or willful misconduct . . . , ii) the condition or use of the UNDC properties resulting from Manager's or its employees negligence or willful misconduct, or iii) the maintenance and operation of the UNDC properties occasioned by the negligence or willful misconduct on the part of the Manager . . . Manager . . . shall defend any such action or proceeding and shall indemnify and hold UNDC harmless from and against any judgment . . .

C&W argues, in reply, that there is no proof of its negligence and the condition could have equally been caused by a defective design and/or construction of the subject canopy.

Pritchard entered into a contract with UNDC to perform quarterly cleaning of the subject glass canopy as well as removal of snow and ice from the sidewalks. C&W, in support of its motion as against Pritchard, submits the deposition testimony of Thomas Calderone, Director of Operations for Pritchard. Mr. Calderone testifies that Pritchard is responsible for cleaning the canopy:

Q: . . . Did Pritchard Industries have any responsibilities in connection with the cleaning of the canopy at the United Nations Plaza?

A: Yes.

Q: What were those responsibilities?

A: We were responsible to clean the canopy, underneath and the overhang, the exterior portion four times a year. (Calderone Deposition Page 39, Lines 10-17).

Pursuant to the Agreement for Cleaning Services for One, Two, and Three United Nations Plaza Between UNDC and Pritchard ("Cleaning Contract") Pritchard was also responsible for snow and ice removal:

Q: What does Pritchard Industries do in reference to One UN Plaza and Two UN Plaza, in general, in the year 2001?

A: Pritchard Industries provides personnel to clean the office space and through the condominium provide personnel between the common expenses, which is considered the common expenses of the condominium, which is on the outside of the building; and at Two UN, cleans the office space and as a common expense, the sidewalks and the snow and ice. (DiMartino Deposition, Page 53, Lines 15-25).

The indemnification clause contained in Pritchard's cleaning contract states, in relevant part:

Contractor (Pritchard) shall, to the fullest extent permitted by law and at it(s) own cost and expense, indemnify UNDC and the Agent(C&W), their officers, directors, agents and employees, the One UN Plaza

Condominium and the Millennium Hotel...and save them harmless from and against any and all claims, losses, liabilities, suits, judgments, actions and all expenses *arising out of or in connection with Contractor's performance of the work.* (emphasis added) (Paragraph 15 of the Cleaning Contract).

Pritchard, in opposition, argues that enforcement of the indemnification clause cannot be determined until the issue of negligence is resolved. Further, Pritchard claims that while it had the duty to clean the canopy and remove snow and ice from the sidewalk, it was C&W who had the duty to conduct a regular monthly inspection of the canopy. Thus, Pritchard argues, C&W was solely responsible for the condition of the canopy.

A decision whether to grant summary judgment based on an indemnification clause can properly be conditioned upon a finding of negligence of the party who is responsible under the clause. (*Crimi v. Neves Associates*, 306 A.D.2d 152 [1st Dept. 2003]). If issues of fact exist as to the negligence of the party responsible for indemnification, summary judgment must be denied. (*Zeigler-Bonds v. Structure Tone, Inc.*, 245 A.D.2d 80 [1st Dept. 1997]). The right to contractual indemnification depends upon the specific language of the contract. (*Moss v. McDonald's Corp.*, 34 A.D.3d 656 [2nd Dept. 2006]).

The indemnification clauses here are invoked only if the party against whom indemnification is sought is found to be negligent and further that such negligence was a substantial factor in causing plaintiff's accident. Thus C&W's motions for summary judgment on the issue of indemnification are premature and must be referred to the trial court.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant United Nations Development Corporation is denied, and it is further

ORDERED that defendant United Nations Development Corporation's cross motion for summary judgment is granted and plaintiff's claim as against UNDC is dismissed; and it is further

ORDERED that City's cross motion as against UNDC for contractual indemnification is granted without opposition; and it is further

ORDERED that UNDC's motion and plaintiff's motion as against Cushman & Wakefield directing that C&W had a legal duty to maintain the canopy is denied, and it is further

ORDERED that Millennium Hotel's motion for summary judgment as against plaintiff is granted and plaintiff's claim as against Millennium Hotel is dismissed; and it is further

ORDERED that C&W's cross-motion for summary judgment for indemnification against UNDC is denied as premature; and it is further

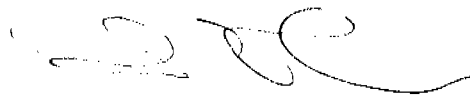
ORDERED that C&W's motion for summary judgment as against Pritchard Industries for indemnification is denied as premature, and it is further

ORDERED that all other relief requested is denied.

The case in all other respects continues.

This constitutes the decision and order of the Court.

Dated: July 5, 2007



Eileen A. Rakower, J.S.C.

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JUL 12 2007
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