

**Pomahac v TrizecHahn 1065 Ave. of the
Americas, LLC**

2007 NY Slip Op 32865(U)

September 5, 2007

Supreme Court, New York County

Docket Number: 0105689/2004

Judge: Rolando T. Acosta

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. ROLANDO T. ACOSTA

PRESENT
Index Number : 105689/2004

PART 61

— POMAHAC, BRUCE
vs
TRIZECHAHN 1065 AVENUE
Sequence Number : 004
REARGUMENT/RECONSIDERATION

EX NO. _____
TION DATE _____
TION SEQ. NO. _____
TION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

see attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: 9/17/07

SO ORDERED
[Signature]
J.S.C.

Check one: FINAL DISPOSITION **NON-FINAL DISPOSITION**

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Bruce Pomahac,

Plaintiff,

– against –

TrizecHahn 1065 Avenue of the Americas, LLC
American Building Maintenance Co. of New York,
American Building Maintenance Co., Sterling
Services Company and OneSource Holdings, Inc.

Defendants.

DECISION/JUDGMENT

Index No. 105689/04

Seq. No. 4

Present:

Rolando T. Acosta
Supreme Court Justice

TrizecHahn 1065 Avenue of the Americas, LLC,

Third-Party Defendant,

– against –

American Building Maintenance Co. of New York,
American Building Maintenance Co., Sterling
Services Company and OneSource Holdings, Inc.,

Third-Party Defendants.

Third-Party Index No.
591169/04

FILED
SEP 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

The following documents were considered in reviewing plaintiff's motion to reargue this Courts Decision, Judgment and Order dated January 29, 2006, dismissing the complaint, and upon reargument denying defendants/third-party defendants Sterling Services Company and OneSource Holdings, Inc. ("Sterling")'s motion (Seq. 2) for summary judgment dismissing the complaint, third-party complaint and all cross-claims against it, American Building Maintenance Co. of New York, American Building Maintenance Co. ("ABM")'s motion (Seq. 3) for summary judgment dismissing the complaint, third-party complaint and all cross-claims against it, and TrizecHahn 1065 Avenue of the Americas, LLC ("TrizecHahn")'s motion for permission to file a late summary judgment motion, and if leave is granted, for summary judgment dismissing the complaint or summary judgment on its third-party complaint for common law indemnification from Sterling and ABM:

Papers	Numbered
Notice of Motion & Affirmation	1 (Exhibits 1-2)
Sterling's Affirmation in Opposition	2
AMB's Affirmation in Opposition	3 (Exhibits A-C)
TrizecHahn Affirmation in Opposition	4 (Exhibits A-B)
Reply Affirmations	5-6

Background

Plaintiff Pomahac slipped and fell in the lobby of 1065 Avenue of the Americas ("the premises") in Manhattan on October 29, 2003, at approximately 9:00 a.m. Defendant TrizecHahn is the real estate company in charge of operating and maintaining the premises. Tomas N. Protentis, the property manager and TrizecHahn's employee, testified at his deposition that defendant ABM performed cleaning and maintenance duties in the lobby at the time of the accident. ABM's duties in the lobby included sweeping, mopping and keeping it clean. Frank DeSilvio, ABM's on site foreman, testified that although there was an agreement in place, he was unaware of whether there was a written contract. A search for a written contract between TrizecHahn and ABM produced negative results.

According to De Silvio, pursuant to standing instructions from TrizecHahn, whenever it rained or the weather was inclement, mats were placed on the lobby floor. In addition, yellow "Caution Wet Floor" signs were placed throughout the lobby and ABM employees would "dry mop." Local Climatological Data for New York indicate that it had been raining on October 29, 2003, since 1:00 a.m to about 10:00 a.m. See AMB's Exhibit R.

Because of rain being tracked indoors on October 29, ABM placed mats in the entrance area. Plaintiff testified at his deposition, that when he entered the lobby through a set of doors at approximately 9:00 a.m., he stepped into a vestibule area where the floor was covered by a mat. The vestibule and the lobby are separated by another set of door. A second mat was placed on the floor that extended three to five feet into the lobby; the mat did not run the full length of the lobby. According to a TrizecHahn employee, when it rained, the procedure was to use two 20 foot long mats, and that they would extend twenty feet into the lobby. ABM would determine whether additional mats were needed. An ABM employee testified that the procedure when it rained was for two twenty foot mats to be placed side from the entrance and a third mat, also twenty feet long, was placed at the end of the "first mat." The security supervisor testified, in addition to the mat in the vestibule, that the

procedure was to place two twenty foot mats side by side from the door into the lobby and a third mat from the end of the first mat and extending another ten feet.

Plaintiff noticed a yellow "caution" sign in the corridor leading to an elevator bank as he walked into the lobby. The sign was about twelve to fifteen feet from the inside door. An ABM employee was mopping the floor to the right of the sign because moments before the accident, an individual spilled a beverage. There was also a second man in the area, but plaintiff did not recall whether the man had a mop. Plaintiff also noted that the floor was noticeably wet and the "runner," which was normally laid on days of inclement weather, was not placed on the floor at that time. As plaintiff passed to the left of the ABM employee in order to avoid walking into the employee and the "caution" sign, his right foot slipped on the wet floor and fell.

A surveillance camera video tape shows that approximately one minute before plaintiff fell, an ABM employee was mopping the lobby floor area where plaintiff fell. The tape shows that at 9:01:22 a.m., the ABM employee is replacing the mop in the wringer, and 32 seconds later, plaintiff slipped and fell in that exact location.

According to the security supervisor, he had informed both ABM and management that more mats were needed when it rained because people were slipping and sliding, and that on October 29, 2003, prior to the accident he was "screaming" to both ABM and management employees that more mats were needed. The security supervisor also testified about two prior accidents where people had fallen because lobby floor was wet.

Defendant Sterling was hired by TrizecHahn to clean and buff the lobby floors six times a year. Sterling last cleaned the floors "within a week of the accident." See Plaintiff's Exhibit M at p. 42.

Plaintiff commenced a negligence action against TrizecHahn, Sterling and AMB, and TrizecHahn commenced a third party action against Sterling and AMB for common law and contractual indemnification.

Analysis

Sterling's motion for summary judgment dismissing the complaint, third-party complaint and all cross-claims against it is granted because Sterling, who buffed the lobby floors six times a year, did not owe a duty of care to plaintiff. Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (2002). In general, a maintenance contractor owes a third party a duty of care only under three situations, none of which apply in this case: (1) where the contracting party in failing to exercise reasonable care in the performance of its duties launches a force of harm; (2) where plaintiff detrimentally relied upon the continued performance of the contractor's duties; and, (3) where the contracting party has entirely

displaced the owner's duty to safely maintain the premises. Id. at 140. With respect to the first situation, there is no indication in the record that Sterling failed to exercise reasonable care in buffing the floors (which were last done within a week of the accident) or that it launched a force of harm. The fact that polished floors were slippery and that they become even more so when wet, does not provide a basis of liability for plaintiff against Sterling. Wassertrom v. New York City Transit Authority, 267 A.D.2d 36 (1st Dept. 1999). Moreover, in its opposition, plaintiff merely stated that it would provide the testimony of an expert who would testify that Sterling was negligent. The promise to produce a witness a trial is insufficient to defeat summary judgment; only evidence in admissible form may be used. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Nor is there any indication in the record that plaintiff detrimentally relied upon Sterling's continued performance or that Sterling entirely displaced Trizechan's duty to maintain safely the premises. Espinal v. Melville Snow Contractors, Inc., supra, 98 N.Y.2d 140.

Even if Sterling owed plaintiff a duty, there is no indication in the record that it either created or had notice of the purported condition at issue. Gordon v. American Museum of Nat. History, 67 N.Y.2d 836 (1986). Hendricks v. 691 Eighth Avenue Corp., 226 A.D.2d 192 (1st Dept. 1996).

Last, since Sterling cannot be found negligent in the facts of this case, it does not owe common law indemnification to Trizechan. Benedetto v. Carrera Realty Corp., 32 A.D.3d 874 (2nd Dept. 2006)(in order to establish a claim for common law indemnification, an owner is required to prove not only that it is not negligent, but also that the proposed indemnitor was responsible for negligence that contributed to the accident.). Although Trizechan also seeks contractual indemnification from Sterling, the contract between these parties does not provide for contractual indemnification. See TrizecHahn's Affirmation in Opposition, Exhibit B. .

ABM's motion to dismiss the complaint, third-party complaint and all cross-claims against it, however, is denied inasmuch as it has failed to establish its prima facie entitlement to summary judgment. But even if it had, there are triable issues of fact as to whether ABM failed to exercise reasonable care in the performance of its duties or that it launched a force of harm. Espinal v. Melville Snow Contractors, Inc., supra, 98 N.Y.2d 140. Although ABM placed mats out in the lobby because it was raining and it was "not required to cover [the whole lobby] floor with mats, nor to continuously mop up all moisture resulting from tracked-in" rain. Kovelsky v. City University of New York, 221 A.D.2d 234 (1st Dept. 1995); see also Dubensky v. 2900 Westchester Co., LLC., 27 A.D.3d 414 (2nd Dept. 2006); Garcia v. Delgado Travel Agency Inc., 4 A.D.3d 204 (1st Dept. 2004), there are issues of fact as to whether it placed sufficient mats on the day of the accident. In fact, there was testimony that ABM usually placed longer mats in the lobby when it rained and that on October 29, 2003, a security officer was "screaming" at both ABM employees and management to place more mats on the lobby floor prior to the accident because people were slipping and sliding on the

wet floor.

There are also triable issues of fact as to the cause of the accident. It is unclear at this juncture whether plaintiff fell because of tracked in rain or because someone spilled what appeared to be a beverage in the area where plaintiff fell

TrizecHahn's motion is also denied for these same reasons. Given the warnings that it received from the security officer prior to the accident, there are issues of fact as to whether it should have directed ABM to place more mats in the lobby area notwithstanding that it had ABM take remedial efforts through out the morning, or that within seconds of someone spilling what appeared to be a beverage, an ABM employee moved a yellow caution sign immediately over the spill and began to mop the area. This is especially true since TrizecHahn had received complaints in the past (the last in June 2003 about an incident that occurred sometime in January 2003) about people who had fallen in the lobby because the wet floor was too slippery.

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiff's motion to reargue is granted and upon reargument it is

ORDERED that defendants/third-party defendants Sterling Services Company and OneSource Holdings, Inc.'s motion (Seq. 2) for summary judgment dismissing the complaint, third-party complaint and all cross-claims against it is GRANTED; and it is further

ORDERED that American Building Maintenance Co. of New York, American Building Maintenance Co.'s motion (Seq. 3) for summary judgment dismissing the complaint, third-party complaint and all cross-claims against it is DENIED; and it is further

ORDERED that TrizecHahn 1065 Avenue of the Americas, LLC's cross-motion for summary judgment dismissing the complaint is also DENIED; and it is further

ORDERED that the matter proceed to trial with the remaining parties.

This constitutes the Decision, Judgment and Order of the Court.

Dated: September 5, 2007

ENTER

FILED
SEP 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED
Rolando T. Acosta
Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

A. Joseph Giannini, Esq.
Friedman, Friedman, Chiaravalloti & Giannini
2 Rector Street
New York, NY 10006
Attorneys for Plaintiff

Cartafalsa, Slattery, Turpin & Metaxas
One Liberty Plaza
165 Broadway, 28th Floor
New York, NY 10013
Attorneys for TrizecHahn 1065 Avenue of the
Americas, LLC

Judah Z. Cohen, Esq.
Jeffrey Samel & Partners
150 Broadway, 20th Floor
New York, NY 10038
Attorneys for American Building Maintenance Co
of New York

David H. Motola, Esq.
Lester Schwab Katz & Dwyer, LLP
120 Broadway
New York, NY 10271
Attorneys for Sterling Services Company and
OneSource Holdings