

**Mandell v Smit Fifth Ave. LLC**

2008 NY Slip Op 30689(U)

March 10, 2008

Supreme Court, New York County

Docket Number: 0103228/2004

Judge: Barbara Kapnick

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

PRESENT. **BARBARA R. KAPNICK**  
J.S.C.

PART 12

Index Number : 103228/2004

MANDELL, ALAN B.

vs

SMII FIFTH AVE. LLC

Sequence Number : 003

DISMISS COMPLAINT

INDEX NO. 103228/04

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION 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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

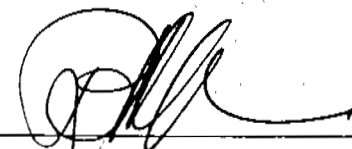
*and cross motion are decided  
in accordance with the  
accompanying memorandum  
decision.*

**FILED**

MAR 12 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/10/08



**BARBARA R. KAPNICK**  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X

ALAN B. MANDELL,

Plaintiff,

-against-

SMII FIFTH AVENUE LLC, JONES LANG  
LASALLE AMERICAS, INC., and GUARDIAN  
SERVICE INDUSTRIES, INC.

Defendants.

-----X

SMII FIFTH AVENUE LLC,

Third-Party Plaintiff,

-against-

GUARDIAN SERVICE INDUSTRIES, INC.,

Third-Party Defendant.

-----X

GUARDIAN SERVICE INDUSTRIES, INC.,

Fourth-Party Plaintiff,

-against-

ARLEE HOME FASHIONS, INC.,

Fourth-Party Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 103228/04  
Motion Seq. No. 003

Third-Party  
Index No. 591170/04

Fourth-Party  
Index No. 590647/06

**FILED**

MAR 12 2008

NEW YORK  
COUNTY

In this action, plaintiff Alan B. Mandell seeks to recover damages for personal injuries he allegedly sustained on July 23, 2003 at the building located at 261 Fifth Avenue, New York, New York.

Plaintiff claims to have slipped and fallen in a puddle of water located in the hallway near the elevators on the fourth floor of the building where he is employed by fourth-party defendant Arlee Home Fashions, Inc. ("Arlee").

At the time of plaintiff's accident, the building was owned by defendant/third-party plaintiff SMII Fifth Avenue LLC ("SMII") and managed by defendant Jones Lang La Salle Americas, Inc. ("Jones Lang").

Defendant/third-party defendant/fourth-party plaintiff Guardian Service Industries, Inc. ("Guardian") was the service contractor for the building. In that capacity, it was required to maintain and clean the public areas of the building.

Plaintiff testified that there were no mats on the floor in the area where he fell, even though it was apparently raining heavily outside.<sup>1</sup> In addition, plaintiff claims that the floor was a highly polished vinyl tile.

However, plaintiff also acknowledges that he does "not know the source of the puddle of water." Specifically, he indicates

---

<sup>1</sup> Plaintiff noticed that his co-workers who were arriving to work at about the time of his accident had umbrellas and were wet.

that "[a]lthough the puddle of water could have resulted from the rain, it could have also resulted from anything including spilling the contents of a water bottle on the floor."

Defendant/third-party defendant/fourth-party plaintiff Guardian now moves for summary judgment pursuant to CPLR §§ 3211(a) and 3212 dismissing the Complaint and all cross-claims against it on the grounds that: (i) it owed no duty to plaintiff; and (ii) there is no proof that it created and/or had actual or constructive notice of the alleged condition.<sup>2</sup>

Defendants SMII and Jones Lang cross-move for summary judgment dismissing plaintiffs' Complaint and all cross-claims and counterclaims against them on the ground that there is no evidence that they created and/or had actual or constructive notice of the alleged condition.

Fourth-party defendant Arlee cross-moves for summary judgment dismissing the Fourth-party Complaint and all cross-claims against it on the grounds that: (i) all claims against it for common law indemnification are barred by Workers' Compensation Law § 11; and (ii) all claims for contractual indemnification, based on the

---

<sup>2</sup> Guardian also claims that it performed the vast majority of its required services at night, and that its only daytime responsibility was to visit, inspect and keep the restrooms in a neat condition.

Indemnity provision of the Lease ("Tenant shall indemnify, defend and save Landlord harmless from and against any liability or expense arising from the use or occupation of the premises by Tenant, or anyone on the premises with Tenant's permission, or from any breach of this lease") must fail because the accident occurred outside its leased premises; i.e., plaintiff fell in a public portion of the building.

That portion of Arlee's cross-motion seeking to dismiss Guardian's claims against it is moot, Guardian having already discontinued said claims. That portion of Arlee's cross-motion seeking to dismiss the cross-claims asserted against it by defendants SMII and Jones Lang is granted without opposition.

Plaintiff opposes the motion by Guardian on the ground that Guardian had the sole responsibility for cleaning and maintaining the area where he fell, and opposes the cross-motion by SMII and Jones on the ground that both entities had a duty to maintain the building in a safe and clean condition.

Plaintiff further argues that the defendants and third-party defendant have failed to demonstrate that they did not create the condition or that they did not have actual or constructive notice of the condition.

However, plaintiff concedes that he himself does not know where the water came from. Moreover, "[e]ven assuming that the water on the floor was visible and apparent, there is no proof in the record as to how long the water was on the floor." Gibbs v. Port Auth. of N.Y., 17 A.D.3d 252, 255 (1<sup>st</sup> Dep't 2005). Defendants "did not have an obligation to provide a constant remedy to the problem of water being tracked into a building in rainy weather" (Gibbs v. Port Authority of New York, supra at 255; see also, Bernhard v. Bank of Montreal, 41 A.D.3d 180 [1<sup>st</sup> Dep't 2007]).

Finally, plaintiffs have failed to submit an expert's report or any other evidence showing that the floor itself was inherently slippery.

Accordingly, based on the papers submitted and the oral argument held on the record on January 9, 2008, the motion by Guardian and cross-motion by SMII and Jones Lang are granted.

The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: March 10, 2008

**FILED**  
 MAR 12 2008  
 NEW YORK  
 COUNTY CLERK'S OFFICE

  
 Barbara R. Kapnick  
 J.S.C.  
**BARBARA R. KAPNICK**  
 J.S.C.