

**Natale v Alexander's Dept. Stores of
Lexington Ave., Inc.**

2009 NY Slip Op 31064(U)

May 14, 2009

Supreme Court, New York County

Docket Number: 106750/05

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106750/2005

NATALE, WILLIAM

VS.

ALEXANDER'S DEPARTMENT STORES

SEQUENCE NUMBER : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 2/2/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAGES NUMBERED

1-3
4-5
6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the enclosed memorandum decision and order.*

N.B. -- pre-trial conference is scheduled for June 8, 2009 at 2 PM.

MAILED

MAY 15 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/14/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
WILLIAM NATALE and JOANNE NATALE,

Plaintiffs,

Index No.: 106750/05

-against-

DECISION AND ORDER

ALEXANDER'S DEPARTMENT STORES of
LEXINGTON AVENUE, INC., VORNADO
REALTY TRUST, BUILDING MAINTENANCE
SERVICE LLC and BLOOMBERG, L.P.,

Defendants.

-----x
SOLOMON, J.

This action arises from an accident that occurred on the roof of a building located at 731 Lexington Avenue in Manhattan, owned by defendant Alexander's Department Store of Lexington Avenue, Inc. (Alexander's) and managed by Vornado Realty Trust (Alexander's and Vornado Realty Trust are together referred to as Vornado). Plaintiff William Natale (Natale) slipped and fell on ice while walking on an exterior ninth floor roof setback, suffering personal injuries. At issue in this motion to reargue is the cross-claim between Vornado and a tenant in the building, Bloomberg, L.P.

Bloomberg leased office space from Alexander's. Natale was an employee of a company (ABM Engineering Services) hired by Bloomberg to maintain refrigeration equipment in the leased premises. Some of the equipment was situated in a mechanical room in an exterior cooling tower. To reach it, he was required

to exit from the Bloomberg premises to an enclosed stairway, then exit from the stairway onto the roof setback. On the roof was a walkway used to access the cooling towers. He alleges that the walkway was covered with snow and ice, and he slipped and fell on it.

Since neither Vornado nor Bloomberg submitted a copy of Vornado's answer and cross-claim, the court must intuit from their arguments that the cross-claim seeks contribution in negligence. Bloomberg contends that it had no duty to keep the roof setback clear of snow and ice, and that Vornado had the sole duty to keep the walkway clear. Vornado does not deny that it had that duty, but argues that Bloomberg had a duty to notify Vornado if the roof area was unsafe. Vornado further claims that Bloomberg shared in the obligation to keep the roof setback clear of snow and ice because it was not possible to access its mechanical equipment without walking outside.

The property manager, Bert Lok, was deposed, and he testified that Vornado's building engineers were responsible for removing snow and ice from the ninth floor roof setback.¹ Vornado's engineers would visit the roof daily. Bloomberg had a cleaning and maintenance contractor for its premises, but only Vornado employees were responsible for the roof. If an ABM

¹ Lok's employer was 731 Commercial, LLC, a subsidiary of Alexander's.

employee had difficulty getting to the equipment, he was expected to notify Bloomberg, which would contact Lok's office. Lok was not aware of any complaints. Bloomberg's witness, Anthony Guzzone, testified that Bloomberg did not maintain the roof setback. Guzzone was unaware of complaints from ABM regarding the condition of the roof preceding Natale's accident.

Natale filed and served a note of issue, and defendants moved for summary judgment. In motion 01, Vornado sought summary judgment dismissing the complaint and cross-claims against it. In motion 02, Bloomberg also sought summary judgment dismissing the complaint and Vornado's cross-claims against it. The motions were returnable in the submissions part. A pre-trial conference was scheduled to take place on September 8, 2008. However, Vornado's motion was adjourned by counsel in the submissions part to September 15, 2008, and then further adjourned to October 6. Counsel intended to adjourn both motions in the submissions part (see Stipulation Adjourning Motions, annexed to Schmidt Aff. In Opposition, Ex. A), but only the Vornado motion was adjourned, and the Bloomberg motion was submitted in the submissions part on August 29. By an interim order, the court adjourned Bloomberg's motion to join the pre-trial conference on September 8, at which time the motion was granted in part. The order reads in part that it is "granted without plaintiffs' opposition and the complaint is dismissed as against Bloomberg, L.P. There being no

written cross-claim in the motion or 'partial opposition' of Alexander's or Vornado, which as may exist are preserved" (September 8, 2008 Order, Notice of Motion, Ex. C). The motion papers, which are Exhibit A to the present motion, show that Bloomberg's counsel made reference to a Vornado cross-claim, but did not submit a copy of Vornado's answer and cross-claim.

On the day after the Bloomberg motion was decided, Bloomberg's lawyer received Vornado's opposition, which was dated the business day before the pre-trial conference, and she served a reply to it on September 15, 2008.

Bloomberg contends that reargument is appropriate because the court overlooked issues regarding Vornado's cross-claim (CPLR 2221[d]). Although the court did not overlook Vornado's cross-claim (the motion clearly addresses it), it is apparent that counsel for Bloomberg and Vornado intended to submit additional papers and the September 8 Order short-circuited their briefing schedule. Accordingly, reargument is granted, and the court will review the full set of papers on Bloomberg's motion as counsel intended.

In the decision and order denying Vornado's motion for summary judgment, dated January 6, 2009, I found that there is a material question of fact as to whether defendants had constructive notice of the snow and ice condition. Therefore, the lack of actual notice to either party is not dispositive.

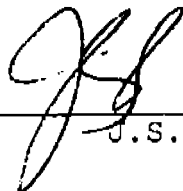
Bloomberg, however, has shown as a matter of law that it was not charged with maintaining the roof setback, and that Vornado was charged with that duty and had employees on the subject roof walkway on a daily basis, and these employees were expected to rectify hazardous snow and ice conditions they observed. Also, Vornado was aware of ABM employees using the roof walkway every day. Accordingly, upon reargument, Bloomberg's motion for summary judgment dismissing the complaint and cross-claims is granted. It hereby is

ORDERED that Bloomberg's motion to reargue is granted, and upon reargument, the September 8, 2008 order deciding Bloomberg's motion for summary judgment under motion sequence 02 is amended to grant summary judgment dismissing Vornado's cross-claim, and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements as taxed; and it further is

ORDERED that counsel for the remaining parties shall appear in Part 55 for a pre-trial conference on June 8, 2009 at 2 PM.

Dated: May 14, 2009

ENTER:



 J.S.C.

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 NEW YORK

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