

Asare v Port Auth. of N.Y. & N.J.

2009 NY Slip Op 32038(U)

September 7, 2009

Supreme Court, New York County

Docket Number: 106194/05

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

Index Number : 106194/2005
ASARE, PHILOMENA
vs.
PORT AUTHORITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 106194/05

MOTION DATE 6/10/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 4

The following papers, numbered 1 to 9 were read on this motion and cross motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-DD

PAPERS NUMBERED

1-2

Notice of Cross Motion—Answering Affirmation Exhibits A-R

3-4

Affirmation In Opposition— Exhibits A-B

5

Reply Affirmation—Exhibits A-B—Affidavit—Exhibit 1

6-7

Reply Affirmation; Reply Affirmation

8-9

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order

Dated: 09/07/09
New York, New York



J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

HON. MICHAEL D. STALLMAN

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 7

-----X
PHILOMENA ASARE,

Plaintiff,

-against-

Index No.: 106194/05

DECISION and ORDER

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Defendant.

-----X
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Third-Party Plaintiff,

-against-

T.U.C.S. CLEANING SERVICE, INC.,

Third-Party Defendant.
-----X

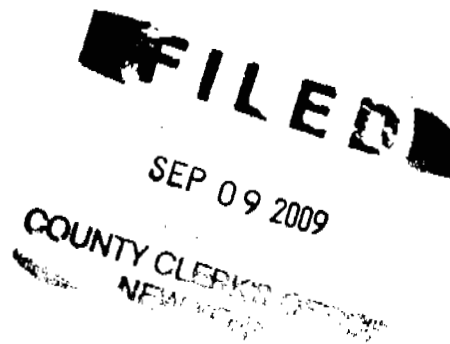
HON. MICHAEL D. STALLMAN, J.:

Third-party defendant T.U.C.S. Cleaning Service, Inc. (TUCS) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's amended complaint as against it, and dismissing all claims asserted by third-party plaintiff. Defendant/third-party plaintiff The Port Authority of New York and New Jersey (Port Authority) cross-moves, pursuant to CPLR 3212, to dismiss the complaint as against it, and to reconsolidate the actions.¹

BACKGROUND

Plaintiff Philomena Asare (Asare) alleges that, during a rainy morning on May 11, 2004, at approximately 7:20 A.M., she slipped and fell while traversing the World Trade Center PATH station, which had been rebuilt after September 11, 2001 (Asare EBT, at 16). Asare claims that she was

¹ The third-party action was severed from the main action and stayed by order dated August 5, 2008, because of Port Authority's failure to provide outstanding discovery.



walking down a ramp within the PATH station, intending to go to the R train, when her left foot slipped and she fell down on her left foot (*id.*). According to the complaint, rainwater seeped into the temporary PATH station because of Port Authority's failure to maintain the structural aspects of the ceiling. Asare further stated that she saw water on the ramp prior to her falling (*id.* at 22-23), that she would see water on the ramp whenever it rained (*id.* at 24-25), but that she never complained about the wet conditions to anyone at Port Authority (*id.* at 53). Port Authority impleaded TUCS, alleging that TUCS, as the contracted janitorial service for the PATH station, was negligent, is required to defend and indemnify Port Authority, and breached its contract. Asare thereafter amended her complaint to add TUCS as a direct defendant.

According to the amended complaint, Asare asserts that TUCS failed to warn her of the dangerous condition of the ramp by not placing warning cones at the top of the ramp, and by failing to mop up the wet condition.

At the EBT of John Reidy (Reidy), the general maintenance supervisor of the Port Authority Trans-Hudson Corporation, Reidy testified that TUCS was hired by the Port Authority Trans-Hudson Corporation, a non-party, wholly-owned subsidiary of Port Authority, to perform janitorial services at the temporary PATH station, such services including the removal of litter, graffiti, and mopping up of any spillages (Reidy EBT, at 12). Reidy also testified that he was aware of leaking issues at the station (*id.* at 14), and that Port Authority was responsible for repairing any leaks at the station (*id.* at 16). He further stated that any structural problems would not fall under TUCS's duties at the station (*id.* at 13).

John Burkhard, the chief maintenance supervisor of the Port Authority Trans-Hudson Corporation, at his examination before trial stated that PATH was responsible for maintaining and

[* 4]
repairing the temporary PATH station (Burkhard EBT, at 9).

Nara Gomes (Gomes), TUCS's manager for the site, testified that, on the day in question, she was made aware of leaks in the upper mezzanine of the station, but not where the accident occurred, and that she notified Port Authority about that leak (Gomes EBT, at 22). Gomes further averred that it was TUCS's procedure, once it became aware of a leaking condition, to place warning cones and signs in the area, and to notify Port Authority (*id.* at 21). According to the log records maintained by Gomes, there was no report of a leaking condition at the place where the accident occurred on the day in question (Opp. Ex. I).

TUCS has included a copy of its contract, which states that TUCS is to perform general cleaning services 24-hours a day, seven days a week, at the temporary PATH station (Ex. R). This document indicates that TUCS was required to place floor mats provided by PATH at entranceways during inclement weather, as necessary, and that TUCS was required to obtain commercial general liability insurance, naming PATH as an additional insured under the policy. There is no evidence in the record that TUCS acquired such insurance. It is also noted that, in its memorandum in opposition to TUCS' motion, Port Authority admits that there is no direct evidence that TUCS knew, or should have known, of the wet condition where the accident took place so as to take corrective measures (Memo, at 3).

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to “present

[* 5]

facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

TUCS’s motion for summary judgment dismissing Asare’s amended complaint as against it is granted.

In order for TUCS to owe a duty of care to Asare, a non-contracting party, it must be demonstrated that the cleaning services contract was both comprehensive and exclusive, to such an extent that TUCS’s contractual obligations displaced Port Authority’s duty to maintain the premises in a safe condition. *Min v ABM, Inc.*, 47 AD3d 699 (2d Dept 2008). However, despite Port Authority’s assertions that the contract was that comprehensive and exclusive, such is not the case.

The contract in question, although comprehensive in time frame (24 hours a day, seven days a week), only called for TUCS to provide general janitorial services. As indicated by the testimony of Port Authority’s own witnesses, TUCS had no responsibility to maintain or repair defective pipes, rails, flooring, and so forth. Those obligations, to maintain the station in a safe condition, remained with Port Authority. *Torchio v New York City Housing Authority*, 40 AD3d 970 (2d Dept 2007). Therefore, TUCS cannot be held directly responsible to Asare for any injuries she allegedly sustained.

Additionally, no evidence has been provided that TUCS either created the alleged hazardous condition or had actual or constructive notice thereof. *Gordon v American Museum of Natural History*, 67 NY2d 836 (1986). Furthermore, TUCS did not owe a duty to Asare by virtue of its cleaning service contract with Port Authority. *Troise v New Water Street Corp.*, 11 AD3d 529 (2d

* 6]
Dept 2004).

Port Authority's cross motion to dismiss the complaint as against it is denied.

Although "[a] general awareness that [the ramp] became wet during inclement weather [is] insufficient to establish constructive notice of the specific condition causing plaintiff's injury" (*Solazza v New York City Transit Authority*, 6 NY3d 734, 735 [2005]), "liability could be predicated ... on failure of defendants to remedy the danger presented by the liquid after actual or constructive notice of the condition" (*Piacquadio v Racine Realty Corp.*, 84 NY2d 967, 969 [1994]).

"A plaintiff may satisfy his or her burden on notice by producing evidence that an ongoing and recurring condition existed in the area of the accident which was routinely left unaddressed by the landlord. In light of plaintiff's testimony that [she] slipped on the [ramp] that had become wet due to a leaking pipe, and that [she] had observed the same dangerous condition at that location on many prior occasions, a triable issue is raised as to whether [Port] Authority had constructive notice of the alleged hazard [internal quotation marks and citations omitted]."

Talavera v New York City Transit Authority, 41 AD3d 135, 136 (1st Dept 2007).

In the instant case, plaintiff stated that the wet condition was caused by a leak in the ceiling, and Port Authority's own witness testified that he was aware of leaking issues for a period of time. This evidence "raises the possibility that plaintiff will be able to make a showing of [Port] Authority's actual or constructive notice." *Tucker v New York City Transit Authority*, 42 AD3d 316, 317-318 (1st Dept 2007). Consequently, Port Authority's motion for summary judgment dismissing the complaint as against it is denied.

TUCS's motion for summary judgment dismissing the third-party claims against it is granted to the extent of dismissing the causes of action based on negligence and a contractual duty to defend and indemnify Port Authority, since there has been no showing that TUCS was in any way responsible for the condition that caused Asare's accident. However, TUCS's motion for summary

* 7]
judgment dismissing the third-party action against it is denied with respect to the third cause of action for breach of contract, since there is no evidence that TUCS acquired the general commercial liability insurance, naming Port Authority as an additional insured, as it was required to do.

Port Authority's cross motion to consolidate the actions is denied. Because the only cause of action remaining in the third-party claim is one for breach of contract, there is no common question of law or fact involved with the main action so as to warrant consolidation. CPLR 602 (a).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that T.U.C.S. Cleaning Service, Inc.'s motion for summary judgment dismissing plaintiff's amended verified complaint as against it is granted and the amended complaint is hereby severed and dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that T.U.C.S. Cleaning Service, Inc.'s motion for summary judgment dismissing the third-party complaint against it is granted to the extent of dismissing the first and second causes of action against it; and it is further


ORDERED that the part of The Port Authority of New York and New Jersey's cross motion seeking summary judgment is denied; and it is further

ORDERED that the part of The Port Authority of New York and New Jersey's cross motion to consolidate the actions is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 7, 2009
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED
SEP 09 2009
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NEW YORK