

Lopez v New York Life Ins. Co.
2010 NY Slip Op 31595(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 105737/2007
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 105737/2007
LOPEZ, BERNARDO
VS.
NEW YORK LIFE INSURANCE CO
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ... _____
Answering Affidavits – Exhibits _____
Replying Affidavits _____

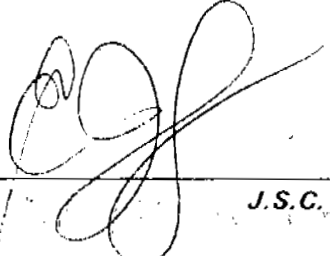
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided as deemed*
at hand to motion seq 002.

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

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/21/10



J.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 17

BERNARDO LOPEZ,
Plaintiff,

-against-

NEW YORK LIFE INSURANCE COMPANY
and COLLINS BUILDING SERVICES, INC.,
Defendants.

INDEX NO. 105737/2007
Motion Sequence 002, 003 & 004
DECISION & ORDER

NEW YORK LIFE INSURANCE COMPANY,
Third-Party Plaintiff,

-against-

JONES LANG LASALLE AMERICAS, INC.,
Third-Party Defendant.

Third-Party Index No. 590643/2008

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.:

Motions with the sequence numbers 002, 003, and 004 are hereby consolidated for decision. Defendant Collins Building Services, Inc. (Collins) moves for summary judgment dismissing the complaint and all cross claims against it (mot. seq. 002). Defendant and third-party plaintiff New York Life Insurance Company (NY Life) moves for summary judgment dismissing the complaint and all cross claims against it, granting its cross claims for common-law and contractual indemnification against Collins, and granting its third-party complaint for common-law and contractual indemnification as against third-party defendant Jones Lang Lasalle Americas, Inc. (JLL) (mot. seq. 003). JLL moves for summary judgment dismissing the third-party complaint against it and granting its counterclaims against third-party plaintiff NY Life for contractual indemnity, contribution and breach of contract (mot. seq. 004).

Plaintiff was allegedly injured on December 27, 2004, when he tripped and fell at 51 Madison Avenue, New York County (the building or the premises), where he was employed as a baker by Aramark, the food services company operating an in-house cafeteria. NY Life owned the building and contracted with Collins to perform janitorial services there. JLL managed the building for NY Life.

Plaintiff alleges that, when returning to his workplace on level 1B, the first basement level, from the locker room on level 2B, the second basement level, he slipped and fell on a puddle of water in a hallway within a foot or two of a men's bathroom. He testified, at an examination before trial (EBT) on March 10, 2008 (Exhibit H attached to Notice of Motion), that he went to his locker around 7 A.M. to retrieve recipes. On his way back, because of crowded hallways, he took a different route than he had taken about one hour earlier when he began work, although it was a path he had used three days before and other times in the past. He was on the 2B level approaching a staircase leading to the 1B level in an area where he described the lighting as "normal" (Lopez transcript at 37-38), when he turned the corner at the intersection of two hallways and slipped. He stated that the location of the incident was in front of a men's bathroom and he "got all wet" when he fell down. *Id.* at 46. He tried to get up quickly to get away from "the water coming from the bathroom," but he slipped again. *Id.* The water was coming from underneath the closed bathroom door. *Id.* at 50-51. After he got on his feet, he reported to Paul Thompson (Thompson) and John Bello (Bello), his supervisors, and showed them the still-wet floor. *Id.* at 65.

Thompson's EBT was conducted on March 13, 2009 (Exhibit K attached to Notice of Motion), and he testified that, when he went to the location with plaintiff, he "saw about a half inch of water and about six feet in diameter." Thompson transcript at 20. Bello's EBT was also

conducted on March 13, 2009 (Exhibit L attached to Notice of Motion), and he testified that he saw water “flowing out at a slow pace” from under the bathroom door. Bello transcript at 16. Bello estimated that the water was less than half an inch deep and covered six to eight feet of the hallway. *Id.* at 19. At his EBT, plaintiff identified three photographs of the site that he took about one month after the incident.

To establish a prima facie case of negligence, “a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence.” *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st Dept), *affd* 64 NY2d 670 (1984). Actual notice arises when the defendant “create[s] or exacerbate[s] the conditions that caused plaintiff’s accident.” *Blair v Richards*, 63 AD3d 610, 610 (1st Dept 2009). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

Collins’s Motion for Summary Judgment – Mot. Seq. 002

Collins argues that there is no evidence that it created or had notice of the defective condition. Its contract with NY Life in effect at the time of the incident (Exhibit N attached to Notice of Motion) in part provides that:

- Collins furnish “all qualified labor, equipment, uniforms, supplies, and other materials required to successfully perform” the services detailed in Exhibit A.
- Collins “acknowledges that NYL (or other persons with the permission of NYL) may concurrently perform services of the same type.”
- Collins “shall promptly remedy all damage . . . at the site or at the Property but only if such damage or loss is caused by the [its] negligence, misconduct or fault.”
- Collins “shall develop a complete quality control program” including “an inspection system including scheduled and unscheduled inspections.”
- Collins shall record “the occurrence of any [nighttime] irregularities that should be

brought to the attention of NYL property management/security.”

- Collins shall nightly “[r]emove all dust, dirt, refuse and spills.”
- Collins shall “[c]lean all public areas of the building” during daytime.
- Collins shall “[i]nspect/clean all men’s and ladies[’] lavatories on all floors” during daytime.
- “Broken lavatory fixtures, accessories and plumbing stoppage should be noted in the [Collins] daily cleaning log” nightly.

Luis Meza (Meza), a supervisor with Collins who had been at the building for almost five years, including the time of the incident, was deposed on June 23, 2008. Exhibit I attached to Notice of Motion. He testified that he never saw a wet floor caused by water running off from a bathroom in the building while he was there and that Collins had two shifts at the building, 6 A.M. to 5 P.M., and 5 P.M. to 12:30 A.M. Meza transcript at 38. Meza supervised the night shift and Collins incorrectly cites his testimony to the effect that “the Collins day shift commenced at 8:00 A.M. and ended at 5 P.M.”¹ Affidavit in Support at para. 22. Collins repeats this error in citing the EBT of Margaret Brady (Brady), director of building operations for NY Life, held on February 10, 2009. Exhibit J attached to Notice of Motion. Brady actually testified that the porters “have a cleaning schedule, they typically finish around midnight. They start at 6:00 A.M., 6:30, somewhere in there.” Brady transcript at 28. If Collins began cleaning at 8 A.M., having left the premises seven-and-a-half hours earlier, it is highly unlikely to have created or have had notice of the dangerous condition that was manifest around 7 A.M. Without explaining the inconsistency, Collins later acknowledges that two employees were on duty at 7 A.M., but not “specifically assigned to level 2B.” Affidavit in Support at para. 25. According to Meza, one Collins employee is “outside of the building” at 6 A.M. and another is on the freight elevator starting at 7 A.M. Meza transcript at 41. The contract between Collins and NY Life contains

¹Meza testified that the day shift supervisor worked from “7:30, 8 o’clock A.M. to 5 P.M.” Meza transcript at 39.

“Exhibit E – Section List” naming eight Collins employees as “Day Staff” with their scheduled hours and duties. Seven of the eight are identified as day porters; two are scheduled from 6 A.M. to 3 P.M., one from 6:30 A.M. to 3:30 P.M. and one from 7 A.M. to 4 P.M. That means that more than half of the Collins employees responsible for daytime janitorial duties were supposed to be in the building by 7 A.M. on a normal workday.

Unfortunately, Collins relies on Meza, who ran the night shift from 5 P.M. to 12:30 A.M., for speculation as to what occurred at around 7 A.M. on December 27, 2004, and draws the conclusion that it received no notice from any source within the building of a wet floor that morning. Collins produced no log books or other documentation for the period in question. Brady also testified that JLL and NY Life had no record of the incident, but Aramark did. According to Brady, a report of a water condition before 8 A.M. was supposed to be made to NY Life’s security desk manned by NY Life employees. She reviewed JLL’s written work requests for six months up to the time of the incident and found nothing in the record “that there was an issue that day with that bathroom.” Brady transcript at 24. A few questions earlier, however, she responded that “I don’t know where the accident happened.” *Id.* at 23. This information gap, which none of the defendants is able to fill, makes it quite difficult to assign responsibility to or, on the other hand, accept deniability of any defendant that had responsibility for cleaning, maintaining or servicing the premises.

Gerard M. Davidson (Davidson), JLL’s director of operations in the building, was deposed on May 11, 2009. Exhibit M attached to Notice of Motion. He testified that JLL had an engineer and a mechanic on duty overnight at the building who made regular rounds of the premises. However, while on level 2B, their normal route did not pass by the bathroom at issue, because they were concerned about mechanical equipment located in another section of the floor.

A call about a leak or spill between midnight and 8 A.M. or a problem encountered making rounds would normally be entered in JLL's engineer's log and addressed by its staff. Davidson transcript at 93-94. JLL would not wait for Collins to begin its day shift to handle the matter. However, Davidson testified that building security might contact Collins directly between 6 A.M. and 8 A.M. when at least two Collins staff members are on site. *Id.* at 85. Davidson said JLL operated a computerized maintenance management system to track work orders of all sorts whether directed to JLL, Collins or another responsible party. Reviewing the contents of that system, he found no report dealing with pipes, toilets or plumbing on level 2B after December 6, 2004 to December 27, 2004. *Id.* at 48. Aramark, plaintiff's employer, however, had an incident report of the accident which noted "Building services was informed of the incident and told to correct the cause of the water overflow." *Id.* at 60-61; *see also* Thompson transcript at 14. In sum, the incident reporting and/or recordkeeping of Collins, NY Life and JLL in December 2004 appear to be sufficiently inadequate to allow a conclusion about actual or constructive notice to any of them of the events at issue.

Collins additionally argues that it had no liability to plaintiff who was not a third-party beneficiary of its contract with NY Life, citing the general rule found in *Church v Callanan Indus.* (99 NY2d 104, 111 [2002]), which is that "ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor." *See also Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 (1990) ("[i]n the ordinary case, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries"). Collins, however, acknowledges that there are three exceptions to the general rule: (1) contractor created or increased an unreasonable risk, (2) plaintiff's reasonable reliance upon performance of the

contract, or (3) contractor displaced the property owner's duty of care. *Church*, 99 NY2d at 111. Collins argues that none applies in the instant action without even citing the higher standard of *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]), which states the first exception as "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm" (internal quotation marks and citation omitted). However, in the absence of evidence of Collins' conduct on the building's 2B level from 6 A.M. to 7 A.M., when it should have had two or more porters working on the premises, the first and third exceptions cannot be excluded. Therefore, Collins is not necessarily shielded from liability to plaintiff.

The three motions by the various defendants all argue that they did not have requisite notice, either actual or constructive, of the alleged dangerous condition.

The incident occurred on a weekday morning at the start of a workday when the halls were crowded with employees clocking in. Both of plaintiff's supervisors, disinterested observers, witnessed the substantial accumulation of water that seemed to be increasing, and Aramark recorded the incident in its files. Collins and JLL had a contractual duty to inspect the premises on a regular basis, record problems, report them to each other and to NY Life where appropriate, and remedy or repair them. Computers were used to record and recap problems. Yet, the records of Collins and JLL (Exhibit J attached to NY Life Notice of Motion), the testimony of defendants and their motion papers all attempt to inform the court that nothing unusual occurred on the morning of December 27, 2004; the building experienced no problems. If summary judgment dismissing a complaint were granted on this basis, property owners and their agents might be encouraged to hear no evil, see no evil and speak no evil to avoid responsibility for negligent conduct.

The testimony of plaintiff, Thompson and Bello gives a credible picture of a large pool of water, growing slowly in a well-lighted area next to a men's room. Admittedly, none of them was at that spot earlier that morning and could not offer an estimate of the duration of the problem. However, under these circumstances, constructive notice may be attributed to Collins and JLL, each with a duty to inspect the premises, each with staff in the building at the time, Collins at least responsible for mopping up spills, remedying simple problems and reporting plumbing problems, JLL at least responsible for fixing plumbing problems and reporting them to NY Life. Additionally, constructive notice may be attributed to NY Life which had its own security staff responsible for receiving and routing some problem reports, and was in a position to learn about conditions in the building from its contractors and its own numerous employees distributed throughout the building. Therefore, Collins's motion for summary judgment (mot. seq. 002) dismissing the complaint and all cross claims as against it is denied.

NY Life's Motion for Summary Judgment – Mot. Seq. 003

NY Life, as owner of the building, has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable. *Tagle v Jakob*, 97 NY2d 165, 168 (2001) (“landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition”). Signing contracts for janitorial and building management services does not automatically eliminate this duty, as NY Life seems to imply in arguing that it had a contract with Collins “for the complete labor, equipment, and staffing necessary for all cleaning and janitorial services at the building, and JLL “for the sole, exclusive and comprehensive property management services” at the building. Affirmation in Support at para. 3. As discussed above, it cannot disclaim constructive notice of the defective condition.

The triable issues of fact regarding the source of, duration of and responsibility for the water on the floor at the time and place of the incident remain. Once the finder of fact resolves these issues, NY Life's applications for indemnification can be properly addressed. Under these circumstances, its motion for summary judgment dismissing the complaint as against it and granting its cross claims for common-law and contractual indemnification against Collins, and granting its third-party complaint for common-law and contractual indemnification as against JLL, is denied.

JLL's Motion for Summary Judgment – Mot. Seq. 004

NY Life's contract with JLL in effect at the time of the incident (Exhibit I attached to NY Life's Notice of Motion) in part provides that:

- NY Life grants to JLL "as its agent, the sole and exclusive right for the day to day operation of the Properties."
- JLL shall employ, subject to NY Life's approval, "personnel required to operate and maintain the Properties including . . . plumbers."
- JLL "shall, at Owner's expense, perform or cause to be performed all necessary or desirable repairs, maintenance . . . in or to the Properties."
- JLL shall give NY Life "written notice of any material or latent defect . . . in the sewer, water, electrical, structural, plumbing, heating, ventilation and air conditioning systems. Property manager shall make periodic visual inspections of the Properties."
- "Property Manager expressly understands that Owner reserves the right to directly engage other property managers and vendors . . . to perform services on the Properties."
- JLL shall "provide necessary maintenance and repair services to the cafeteria facilities located at the Property; such services shall include plumbing."
- JLL "shall have no responsibility for security operations at the Property, and that Owner shall be solely responsible for security guard service at the Property."

JLL argues that NY Life's claims for contribution, contractual indemnification and common-law indemnification should be dismissed, because there is no evidence of JLL's negligence or wrongful conduct in this action. This application fails because, as discussed above, there are triable issues of fact as to the source of, duration of and responsibility for the pool of water accumulated on level 2B of the building on the morning of December 27, 2004, especially

in light of its contractual duty to inspect the premises and make plumbing repairs.

JLL's answer asserts a breach of contract claim alleging that the property management agreement between NY Life and JLL obliged NY Life to purchase insurance coverage for JLL for the type of loss or injury plaintiff sustained. In the instant motion, it simply states that NY Life failed "to procure and maintain insurance for JLL," thereby breaching their agreement.

Affirmation in Support at para. 20. NY Life argues that their agreement requires just the opposite, that is, that JLL purchase and maintain general liability insurance in favor of NY Life. Both parties attach copies of the property management agreement (NY Life in full at Exhibit I attached to its Notice of Motion, JLL in relevant part as Exhibit J attached to its Notice of Motion), but do not offer more than their disapproval of the other's conduct. Neither side supplies evidence of its own actual insurance coverage, so the court cannot determine adherence to the terms of the agreement by either regarding insurance. Therefore, summary judgment at this time on this issue for either side is unwarranted.

Accordingly, it is

ORDERED that Collins Building Services, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it is denied (mot. seq. 002); and it is further

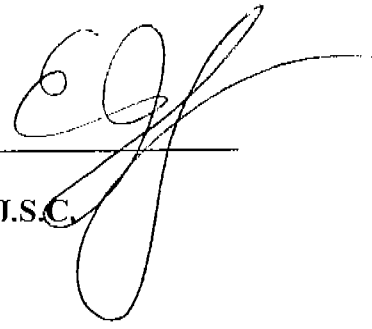
ORDERED that New York Life Insurance Company's motion for summary judgment dismissing the complaint and all cross claims against it, granting its cross claims for common-law and contractual indemnification against Collins Building Services, Inc., and granting its third-party complaint for common-law and contractual indemnification against Jones Lang Lasalle Americas, Inc. is denied (mot. seq. 003); and it is further

ORDERED that Jones Lang Lasalle Americas, Inc.'s motion for summary judgment dismissing the third-party complaint against it and granting its counterclaims as against

third-party plaintiff New York Life Insurance Company for contractual indemnity, contribution and breach of contract is denied (mot. seq. 004).

DATED: *June 21*, 2010

ENTER:



J.S.C.

FILED
JUN 25 2010
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