

**Ramos v City of New York**

2011 NY Slip Op 31256(U)

May 11, 2011

Sup Ct, NY County

Docket Number: 112856/03

Judge: Barbara Jaffe

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

JAFFE

BARBARA JAFFE  
J.S.C.

PART

5

Index Number : 112856/2003

RAMOS, GUILLERMO

vs

CITY OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

CAL # 93

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for summary judgment

PAPERS NUMBERED

1

2

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAY 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/11/11  
MAY 11 2011

[Signature]  
BARBARA JAFFE 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 STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
GUILLERMO RAMOS,

Plaintiff,

-against-

Index No.: 112856/03

Mot. Date: 3/15/11

Mot. Seq. No.: 005

**DECISION AND ORDER**

THE CITY OF NEW YORK, and P & M ELECTRICAL  
CONTRACTING CORP.,

Defendants.

-----X  
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

P&M ELECTRICAL CONTRACTING CORP. and  
TRISTAR PATROL SERVICE, INC.,

Third-Party Defendants.

Index No. 101426/05

**FILED**

**MAY 12 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

-----X  
BARBARA JAFFE, J.S.C.:

**For plaintiff:**

Steven J. Zaloudek, Esq.  
Paul B. Weitz & Assocs., P.C.  
233 Broadway, 5<sup>th</sup> Fl.  
New York, NY 10279  
212-346-0045

**For defendant New York City:**

Paraskevi V. Migdalis, Sr. Counsel  
Michael A. Cardozo  
Corporation Counsel  
100 Church St.  
New York, NY 10007  
212-442-8599

By notice of motion dated October 15, 2010, defendant City of New York moves

pursuant to CPLR 3212 for an order granting it summary judgment and dismissing the complaint against it. Plaintiff opposes the motion.

### I. BACKGROUND

On November 5, 2002, plaintiff, an employee of third-party defendant Tristar Patrol Services, Inc. (Tristar), was electrocuted after he touched an on/off switch attached to a heater/fan (fan) in a utility room at One Centre Street in Manhattan (the premises). (Affirmation of Paraskevi V. Migdalis, Esq., dated Oct. 15, 2010 [Migdalis Aff.], Exh. A). At the time, plaintiff was working at the premises as a security guard pursuant to a bid-upon contract between Tristar and City, dated August 6, 2002, which required Tristar to provide uniformed security guard services to City between September 1, 2002 and August 31, 2005 at various City buildings, including the premises at issue here. (*Id.*, Exh. N). Pursuant to the contract, Tristar was responsible for providing its security guards with certain equipment, including an operable flashlight, and for its employees' work. The guards' duties included those duties that could be prescribed as directed by the City agency at the building or its representative, and the security guards were required to report to a City-employed individual at each building, who would give the guard instructions or equipment as outlined in the contract. (*Id.*). The bid agreement provides that "employees employed by [Tristar] . . . are neither employees of the City nor under contract to the City and [Tristar] alone is responsible for their work, direction, compensation and personal conduct while engaged under this Contract," that Tristar is "solely responsible for the safety and protection of all of its employees . . . and for all physical injuries or death to . . . its employees. . . resulting from any act of omission or commission or error in judgment of any of its employees," and that Tristar would hold harmless and indemnify City from liability for any claims resulting

from its employees' injuries "on account of neglect, fault or default of [Tristar] or its employees." (*Id.*).

A Tristar Patrol Service Incident Report dated November 5, 2002 and filled out by an Officer Santos reflects that plaintiff was told by Louis Trombetta, a Department of Citywide Administrative Services (DCAS) officer, to shut off the fan which was located in the the lobby of the premises, and that plaintiff was electrocuted when he touched the fan's switch. (*Id.*, Exh. N).

A DCAS incident report from the same day, prepared by Trombetta, indicates that plaintiff was electrocuted when he touched the fan's switch. Trombetta speculates in the report that there may have been some kind a short in the fan's system, observing that wires were protruding from the switch. (*Id.*, Exh. N).

By Job Order dated November 5, 2002, the wiring on the fan was reconnected at the request of DCAS. (*Id.*, Exh. N).

On or about November 26, 2002, plaintiff served on City a notice of claim, and on January 8, 2003, he testified at a 50-h hearing that his supervisor, Trombetta, told him to turn the heater off, that he had never turned it off before, that the switch was located in an unlit utility closet, and that when he touched the switch, he was electrocuted. (*Id.*, Exhs. A, B).

On or about July 11, 2003, plaintiff served his summons and complaint on City, and on or about May 12, 2005, served a supplemental summons and complaint on City and defendant P & M Electrical Contracting Corp. (P&M). (*Id.*, Exh. C). On or about August 30, 2005, City served an amended answer, and on or about June 7, 2005, P & M served its answer and cross-claim on City. (*Id.*).

On or about May 2, 2005, City commenced a third-party action against P & M, and on or

about August 30, 2005, served on P & M and Tristar a supplemental third-party summons and complaint. (*Id.*, Exh. D). On or about June 7, 2005, P&M served its answer to the third-party complaint, and on or about November 30, 2005, Tristar served its answer. (*Id.*).

At an examination before trial held on August 2, 2005, plaintiff testified that Trombetta was his supervisor, that on the night of the accident Trombetta told him to shut off the heater, that he went into the closet where the light was located but could not find the switch because it was dark inside, that he returned to Trombetta and asked for a flashlight, and that Trombetta directed him to go back to the closet and turn off the heater. Plaintiff had never before entered the closet, and he attempted to turn off the heater at Trombetta's direction. While working at the premises, plaintiff took orders from Trombetta, and he would make complaints about the premises to Trombetta. (*Id.*, Exh. G).

By affidavit dated December 8, 2005, Joseph Houghton, a DCAS employee and Chief Engineer at the premises, stated that he searched records maintained by DCAS' Division of Facilities Management and Construction and found no work or other records related to service, maintenance, or repair for the heater or fan or attached switch unit at the premises performed prior to November 5, 2002, that he searched all locations where the records would likely be found, and that he was unaware of any other locations where the records would likely exist. (*Id.*, Exh. N).

At an examination before trial held on May 31, 2006, plaintiff testified that Trombetta told him what job duties to perform, that it was his understanding that Trombetta had the authority to direct and control his work and tell him what to do, and that it was not part of his job duties to turn off the heat. (*Id.*, Exh. H).

[\* 6]

At an examination before trial held on November 20, 2006, Houghton testified that DCAS was responsible for repairing and maintaining the heating equipment at the premises, including the heater switch at issue, and that currently DCAS examines the heater once a year for preventive maintenance purposes by conducting a visual inspection of it. However, Houghton was not working at the premises before or at the time of plaintiff's accident, and thus had no personal knowledge as to the condition of the heater or switch or whether DCAS had a prior procedure or policy for inspecting the unit. (*Id.*, Exh. J).

At an examination before trial held on June 6, 2007, Trombetta testified that on the date of plaintiff's accident, plaintiff told him he was hot and Trombetta told him to turn off the heat. Sometime before plaintiff's accident, a DCAS employee had performed work on the heater because the fan was not working, and the day after the accident, a DCAS engineer examined the switch and told Trombetta that it looked old. Trombetta was plaintiff's supervisor at the premises and if he gave plaintiff a direct order to do something that was within plaintiff's job duties, plaintiff would have to obey it, and while Trombetta and his supervisors told plaintiff what to do at the premises on a daily basis, it was not part of plaintiff's job duties to turn the heater on and off. (*Id.*, Exh. L).

On or about November 18, 2008, P&M moved for summary dismissal of the complaint and third-party complaint, and on or about December 12, 2008, Tristar cross-moved for summary judgment of the third-party complaint, alleging that City was solely responsible for plaintiff's accident as the owner of the premises. City opposed Tristar's motion. By decision and order dated April 7, 2009, P&M's motion was granted and Tristar's motion was denied. (*Id.*, Exh. O).

## II. CONTENTIONS

City denies that it had actual or constructive notice that the heater, fan, and/or switch was defective, and alleges that Tristar is solely responsible for the accident as it did not properly train plaintiff to refrain from turning off the heat. It also denies that Trombetta or anyone else employed by DCAS was responsible for supervising plaintiff, and asserts that Tristar was contractually responsible for its employees' work and training. (Migdalis Aff.).

Plaintiff maintains that plaintiff's accident was caused by the dangerous and defective condition of the fan switch, including the exposed wires, which was either known to City or should have been discovered if it had performed a reasonable inspection of the heater unit, and that as it is undisputed that City was responsible for maintaining the heater unit, its failure to find any records related to it reflects its failure to inspect it reasonably. Plaintiff also argues that absent evidence of when City last inspected the unit or the condition of the unit prior to his accident, City has failed to establish that it lacked constructive notice of the unit's defective condition. (Affirmation of Steven J. Zaloudek, Esq., dated Jan. 21, 2011).

## III. ANALYSIS

"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." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must “lay bare” its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1<sup>st</sup> Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d 557, 562).

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]). When it is alleged that there exists a dangerous or defective condition on the premises, a duty arises from occupancy, ownership, control, or a special use of the premises. (*Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1<sup>st</sup> Dept 1998], *lv denied* 73 NY2d 783).

In order to hold a premises owner liable for a dangerous or defective condition on the premises, the plaintiff must show that the owner had actual or constructive notice of the condition or should have known of it “in the exercise of due care in the maintenance of the premises, as by a reasonable inspection.” (85 NY Jur 2d, Premises Liability § 199 [2011]). “If a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition.” (*Colon v Bet Torah, Inc.*, 66 AD3d 731 [2d Dept 2009]; *see also Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272 [1<sup>st</sup> Dept 2010] [owner has duty to conduct reasonable inspections when an object capable of deteriorating is concealed from view]). A failure to conduct reasonable inspections constitutes negligence only if an inspection would

have disclosed the defect. (*Lee v Bethel First Pentecostal Church of Am., Inc.*, 304 AD2d 798 [2d Dept 2003]). Whether a defect should have been apparent upon reasonable inspection is a question of fact bearing on the defendant's liability. (*Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553 [1<sup>st</sup> Dept 2009]).

The premises owner in moving a for summary dismissal must establish, *prima facie*, that it maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of a dangerous condition. (*Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958 [3d Dept 2011]; *Mitchell v City of New York*, 29 AD3d 372 [1<sup>st</sup> Dept 2006]).

Absent any statement based on personal knowledge addressing the condition of the heater, fan, or switch prior to plaintiff's accident, City has failed to establish that it lacked actual notice of any defective condition, especially as evidence indicates that the unit had not been working before plaintiff's accident and DCAS had performed work on it and exposed wires protruded from it. (*Compare with Early v Hilton Hotels Corp.*, 73 AD3d 559 [1<sup>st</sup> Dept 2010] [defendants established lack of actual notice through testimony of employee that he never saw dangerous condition on sidewalk prior to plaintiff's accident and no complaints were received]; *Burko v Friedland*, 62 AD3d 462 [1<sup>st</sup> Dept 2009] [defendants testified they had no knowledge of prior accidents, never saw defective condition on sidewalk, and made no alterations to sidewalk]; *Williams v Church Home Assocs., L.P.*, 49 AD3d 386 [1<sup>st</sup> Dept 2008] [building superintendent testified that he closed allegedly defective gate every day as part of job duties and never had problems with or received complaints about gate]; *Rodriguez v 105 East Clarke Assocs. and LLC*, 26 AD3d 204 [1<sup>st</sup> Dept 2006] [defendant provided evidence that door was checked on regular basis and immediately before accident and found to be operating normally, and no record

of complaints or prior accidents]).

Similarly, absent evidence of when City last inspected the heater unit or that an inspection would not have disclosed the defect, City has failed to show that it lacked constructive notice of the unsafe condition of the unit, especially in light of proof that exposed wires protruded from the unit and the heater switch was old. (See *Reynolds v Knibbs*, 15 NY3d 879 [2010] [reversing appellate division and finding plaintiff raised issue of constructive notice through expert affidavit stating that stairs were improperly secured to wall and defect would have been obvious upon inspection]; *Hoffman v United Methodist Church*, 76 AD3d 541 [2d Dept 2010] [factual question as to whether defendant failed to make reasonable inspection in light of evidence that stair had detached from wall due to deteriorating nails or screws, which were visible]; *Colon*, 66 AD3d at 732 [defendant failed to establish lack of constructive notice absent evidence of when it last inspected allegedly defective item or that defect would not have been discovered upon reasonable inspection]).

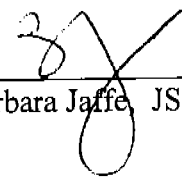
Moreover, to the extent that City contends that plaintiff should not have turned off the heat or that Tristar failed to train plaintiff to not turn off the heat and that either was the sole proximate cause of the accident, the contention lacks any factual support as the testimony of the deposed witnesses reflects that DCAS, and specifically Trombetta, supervised plaintiff while he worked at the premises and that Trombetta was authorized to give plaintiff orders which plaintiff was obliged to obey, the contract between City and Tristar provided that City employees were authorized to give directions to Tristar's security guards and required the guards to report to a City employee at each building who would give them instructions, and it is undisputed that Trombetta directed plaintiff to turn off the heat that day.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is denied.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: May 11, 2011  
New York, New York  
MAY 11 2011

**BARBARA JAFFE**  
**J.S.C.**

**FILED**

**MAY 12 2011**

NEW YORK  
COUNTY CLERK'S OFFICE