Ulin v 550 Madison Fifth, LLC
2017 NY Slip Op 32150(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 158826/2014
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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SUSAN ULIN and RICHARD ULIN,

Plaintiffs,

-against- Index No.: 158826/2014

550 MADISON FIFTH, LLC, SONY CORPORATION OF AMERICA, 550 MADISON AVENUE TRUST LTD., and ABM JANITORIAL SERVICES, INC.,

Defendants.

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DEBRA A. JAMES, J.:

In this personal injury action, plaintiffs allege that defendants were negligent in causing or permitting a debris condition to exist on the sidewalk, near large planters, placed on the exterior of the building (the building) located at 550 Madison Avenue in New York City (the premises), causing plaintiff wife injury when she slipped and fell.

In this motion (sequence number 002), defendant ABM Janitorial Services, Inc. (ABM) moves for an order granting summary judgment dismissing the complaint[1] against it pursuant to CPLR 3212.

CONCLUSION

The motion for summary judgment dismissing the complaint

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[1] The complaint against ABM was filed in March 2015, under Index No. 152876/15, which was not annexed to ABM's moving papers. However, sua sponte, the court notices such complaint, which is located in the NYSCEF efiling system, since the complaint dated October 2014, attached to ABM's moving papers, was interposed against the co-defendants and not ABM, which actions were ultimately consolidated.

against ABM Janitorial Services, Inc. shall be denied.

BACKGROUND

Plaintiff wife was a pedestrian returning from a work-related meeting, and planning to visit a watch repair shop, when she was involved in the accident at the premises on April 4, 2014 around 5 PM. At her deposition plaintiff wife testified that she fell on some dirt or soil located near one of the planters. At her examination before trial, she testified that she "believed" the dirt came from the planter, and that the basis of her belief was that her fall was a few inches from the planter, at which time she observed the same color dirt in the planter, as on the ground. She also testified that she felt some sort of grime under her foot before or as she was falling, that she saw the substance on the ground, and that the substance was on her hand after she fell.

Plaintiffs alleges that as owner, SONY breached its non-delegable duty to carefully maintain the premises, and that ABM, as Sony's independent contractor, caused and allowed water, earth, planting materials, pebbles, stones and other debris to leak from planters onto the sidewalk, making the sidewalk dangerous.

The maintenance contract dated March 1, 2012 is between defendant SONY Corporation of America (SONY) and ABM Janitorial Services, Northeast, Inc. (Contractor) under which the Contractor

was to provide janitorial services for the premises. Sony owns the premises.

As to its scope, the maintenance contract, provides in pertinent part:

> Contractor agrees to furnish all skilled labor and/or materials, tools and equipment necessary to perform and complete the following work: Cleaning Services, the ("Work"). The Work shall be performed in a good and workmanlike manner with the highest standards of attention to detail and in accordance with the specifications set forth in Exhibit "A" attached hereto and interpreted herein by this reference (the "Scope of Work"). All work is to be performed during normal working hours (or at such other times as specifically addressed in the Scope of Work) and in such manner so as not to create any disturbance toe Owner, tenants, occupants, visitors, customers or the general public.
> ***
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> II. BUILDING CLEANING SPECIFICATIONS
> ATTACHMENT "A"- SONY TOWERS
> Location: 550 Madison SONY
> Shift 6am-3pm
>
> Tasks
>
> At 6 AM begin hosing the sidewalk.
> Water planters when hosing the sidewalk, daily.
> Inspect planters daily, as above tasks are completed.
> Police all sidewalks and curbs 18 inches into the street.
> Use push broom on curbs to remove debris.
> Police sidewalks throughout the day.

ABM, as Improper Party

ABM argues that plaintiffs sued the wrong corporate entity, as ABM Janitorial Services, Inc. is not a party to the maintenance contract. In support ABM provides copies of downloaded website pages from the New York State Department of State, Division of Corporations (DOS), dated December 16, 2016, for ABM Janitorial

Services, Inc., a Delaware corporation (ABM) and ABM Janitorial Services - Northeast, Inc., a California corporation (Northeast). These documents reveal that ABM and Northwest share a chief executive officer, principal executive office location, and registered agent for service. ABM is correct that only Northeast's name is printed on the maintenance contract.

The DOS documents are dated over two years after plaintiff's fall, and ABM does not submit an affidavit addressing its relationship, or lack thereof, with Northeast. In addition, the record reflects that ABM produced a witness at the deposition, who testified that one of her duties was to become familiar with the terms and conditions of contracts to which ABM is a party, and identified one of the contracts as between SONY and Northeast for services at 550 Madison Avenue. Moreover, searching the record, ABM fails to raise any issue of fact that it was not authorized to accept service for Northeast; thus, personal jurisdiction was effectuated over the correct company has been demonstrated, as the mere omission of the word "Northeast" from the name of the company is not dispositive (see Pinto v House, 79 AD2d 361 [1st Dept 1981]['if a corporate entity is served under an incorrect name, the court may permit this mistake to be cured if that corporate entity was fairly apprised that it was the party the action was intended to affect"]). In any event, to the extent that ABM's argument implicates personal jurisdiction, such defense was waived

when ABM neither pled such affirmative defense in its answer nor moved for dismissal within sixty (60) days of such pleading. See McGowan v Hoffmeiser, 15 AD3d 2007 (1st Dept 2005).

Summary Judgment on the Merits

It is a well settled standard that on summary judgment, the movant must tender evidence, by proof in admissible form, eliminating material issues of fact so as to "warrant the court as a matter of law in directing judgment in favor of" that party (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If the moving burden is met, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact" (Zuckerman, 49 NY2d at 562 [citation and internal quotation marks omitted]).

ABM's Argument That It Does Not Owe Plaintiff a Duty

ABM argues that it owes no duty to plaintiffs as plaintiffs are not parties or third-party beneficiaries to ABM's contract with SONY. In Espinal v Melville Snow Contrs. (98 NY2d 136 [2002]), the Court of Appeals held that a party who enters into a contract to render services may be potentially liable in tort to third persons:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties,

> launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(id. at 140).

To support its moving burden on the issues of duty and notice, ABM submits the affidavit of one of its porters, who avers that his job was to clean the sidewalk outside of the building. He avers that: (1) prior to and including April leaking or spilling out of the potted plants at the building's entrance; (2) since the planters were installed, he has never seen or been advised of anyone slipping or falling on dirt coming from or near the planters; and (3) he has never been advised by anyone to clean up dirt from the planters on the sidewalk. Vargas states that after he cleans the sidewalk, he would be advised by the building manager or a security guard, who also inspect the sidewalks and advises ABM of any issues, to clean observed dirt, debris, or spills. ABM argues that this evidence demonstrates that none of the Espinal factors are demonstrated.

In Torres, supra, 95 AD3d at 742, the First Department stated that a maintenance company contract that provides for the maintenance company's "exclusive control over cleaning in the area where [a] plaintiff allegedly slipped and fell" is sufficient to impose upon the maintenance company a duty of care toward the noncontracting plaintiff. The maintenance contract at bar required ABM to provide an outside porter who had duties of

policing and cleaning the area where Ulin claims that she fell. It also required ABM to prepare a work assignment plan and develop schedules to provide "full coverage" in all of the areas stated, which included the sidewalks, and ABM provided a day and an evening porter, the latter of whom was Mr. Vargas, to do so. Such porter was required to water and inspect the planters, and to clean stains around them. ABM was responsible for (1) supervision and direction of the work performed by its employee; (2) maintaining on-premises supervisory personnel to carry out this responsibility; (3) provision of all equipment and supplies, obtaining sufficient space in the building for the storage of cleaning implements and for locker space for its employees. Thus, the maintenance agreement is comprehensive and exclusive. Although ABM is correct, that the fact that the contract includes snow removal is not dispositive, it is not necessary that the contract include every building function, such as plumbing and heating, to be comprehensive. Nor does the fact that the contract provides an owner, or its agent, a right to give a cleaning assignment to a porter change the exclusive and comprehensive nature of the contract (see Record on Appeal at 1873 for Torres v Merrill Lynch Purch. [95 AD3d 741] [contract states that porters were to perform work as directed by client]).

As the contract is sufficiently comprehensive, ABM owed a duty to plaintiff under Espinal, and whether ABM can be said to

have launched an instrument of harm or whether plaintiff detrimentally relied upon ABM need not be addressed.

ABM Argument that Duty Was Not Breached As It Did Not Create A Dangerous Condition or Have Actual or Constructive Notice of Such Condition

ABM argues that it is entitled to summary judgment because: (1) no dangerous or defective condition existed and ABM acted reasonably in performing its cleaning duties on the date of the accident and (2) ABM did not create or have knowledge of the alleged condition.

To support its argument that there was no dangerous condition, ABM submits Ulin's testimony that she did not notice the substance before she fell and believed the planter was the source of the substance, as there was dirt in the planter and on the ground. ABM argues that the inference, that there was a connection between what was in the planter and the substance on the sidewalk, is tenuous, as it is highly likely that anyone who falls on a New York City street would have dirt or grime on his or her hand. Viewing Ulin's testimony in a light favorable to plaintiffs, the nonmoving parties, and granting them the benefit of favorable reasonable inferences, as is required on this motion (Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 [1ST Dept 1992] [court must draw all reasonable inferences in favor of the nonmoving party]), there is a fact issue as to the nature of the

substance, and whether it was merely transitory New York City grime, or an unsafe condition of which ABM had sufficient notice to rectify.

In his affidavit, plaintiff's expert opines that the condition was a recurring one based on his analysis of the stain and the similarity of the dirt in the planter to that which plaintiff claims precipitated her fall, and that such circumstances left a residue that would act like ball bearings, which evidence is sufficient to raise an issue of fact that an unsafe condition existed at the time of plaintiff's fall.[2] See Anderson v Park Central Associates, 250 AD2d 473 (1st Dept. 1998). Nor is the circumstance that plaintiffs may not be able to meet their burden at trial dispositive of summary judgment (see Torres v Merrill Lynch Purch., 95 AD3d 741, 742 [1st Dept 2012] [summary judgment should not be based on movant pointing to gaps in nonmovant's evidence]).

ABM's Argument Concerning Creation or Notice of the Alleged Condition

ABM argues that it did not create or have actual or constructive notice of a defective condition.

"A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing

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[2]The opinion of plaintiffs' expert concerning the co-efficient of the pavers is disregarded as the expert does not reference specific safety standards (see Lovell v Thompson, 143 AD3d 511 -512 (1st Dept. 2016).

> that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury. . . . Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition. A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell"

(Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 421 [1st Dept 2011] [internal citations omitted]).

A general awareness that litter, or some other unsafe condition, may be present on an outdoor, public sidewalk is not sufficient to support a conclusion of a defendant's constructive notice (Gordon v American Museum of Natural History, 67 NY2d 836, 838 [1986]). However, to meet its burden, a defendant must provide "specific evidence as to its activities on the day of the accident" (Sada v August Wilson Theater, 140 AD3d 574, 574 [1st Dept 2016]; see also Covington v New York City Hous. Auth., 135 AD3d 665, 666 [1st Dept 2016] [no affidavit or testimony submitted setting forth what caretaker observed during inspection/walk through]; Dylan P. v Webster Place Assoc., L.P., 132 AD3d 537, 538 [1st Dept 2015], *affd* 27 NY3d 1055 [2016]).

In support of its motion, ABM relies upon the porter's averments as to when he customarily began work, and how long it took him to perform work outside, and plaintiff's testimony that the accident occurred around 4:45 p.m. The porter also testified

that on or before April 4, 2014, he never received any complaints of dirt or water draining on the sidewalk. Based upon this evidence, ABM contends that any alleged condition would have existed for an insufficient length of time to permit ABM's employees to discover and remedy it.

Plaintiffs' expert, relying upon stain evidence, opined that there was an ongoing condition caused by drainage from the planters, which ABM maintained. Thus, plaintiffs have raised a fact issue as to whether or not there was a recurring condition of wet sediment, which drained from the planters onto the sidewalk. Plaintiff's expert opinion that the staining would not derive from water alone is sufficient to raise a fact issue as to notice of a recurring drainage condition (see Andersen v Park Ctr Assoc., 250 AD2d 473, 474 [1st Dept 1998]).

Nor does the porter's affidavit establish a prima facie defense since it does not specifically set forth what he saw, or did not see, on the alleged date of the incident (Covington, 135 AD3d at 666 [no affidavit or testimony submitted setting forth what caretaker observed during inspection/walk through]).[3]

In light of the foregoing it is

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[3] Vargas' affidavit clearly state his recollection of the condition of the sidewalk on the incident date, which is understandable, as the accident was not reported to SONY until July 2014, or three months after it occurred (Signorelli, 70 AD3d at 440-441 [defendant did not make prima facie case where employee did not remember water condition or whether remedial measures were taken]).

ORDERED that the motion for summary judgment is denied.

Dated:

October 10, 2017

ENTER:

DEBRA A. JAMES J.S.C.