Diaz v Goldman Sachs Headquarters LLC
2019 NY Slip Op 30024(U)
January 2, 2019
Supreme Court, New York County
Docket Number: 155962/2014
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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DIEGO DIAZ,

Plaintiff,

- v -

GOLDMAN SACHS HEADQUARTERS LLC and ABM JANITORIAL SERVICES, INC.,

Defendant.

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INDEX NO. 155962/2014

MOTION DATE 12/11/2018

MOTION SEQ. NO. 002, 003, 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 93, 101, 102, 113, 114, 119, 122, 123, 124, 130, 131, 132, 133, 134, 135, 136, 141, 145

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 96, 97, 103, 115, 116, 121, 125, 126, 127, 137, 138, 142, 143, 144, 146

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 94, 98, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 117, 118, 120, 128, 129, 139, 140, 147

were read on this motion to/for JUDGMENT - SUMMARY.

Motions for summary judgment, pursuant to CPLR 3212, are decided in accordance with the annexed memorandum decision and order.

1/02/2019
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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DIEGO DIAZ,

Plaintiff,

Index No.: 155962/2014

-against-

Mot. Seq. Nos. 002-004

GOLDMAN SACHS HEADQUARTERS LLC and
ABM JANITORIAL SERVICES, INC.,

Defendants.

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ABM JANITORIAL SERVICES, INC.,

Third-Party Plaintiff,

Third-Party Index No.:
595886/2016

-against-

T&M PROTECTION SERVICES LLC,

Third-Party Defendant.

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ROBERT D. KALISH, J.S.C.:

Defendants ABM Janitorial Services, Inc. (ABM) (mot. seq. No. 002) and Goldman Sachs Headquarters LLC (Goldman) (mot. seq. No. 003) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Diego Diaz's complaint. Third-party defendant T&M Protection Services LLC (T&M) (mot. seq. No. 004) moves, pursuant to CPLR 3212, for summary judgment dismissing ABM's third-party complaint against it.

Motion sequence numbers 002 through 004 are hereby consolidated for disposition.

BACKGROUND

Goldman owns the building located at 200 West Street, New York, New York (the Premises). Goldman hired nonparty Jones Lang Lasalle (JLLto manage the Premises (Soberman affirmation dated 4/2/18, exhibit L, Hayden EBT dated 5/3/17 at 9:15-19). JLL, in turn,

subcontracted the Premises' janitorial services to ABM (Soberman affirmation, exhibit M, Gall EBT dated 5/9/17 at 10:6-10). Pursuant to its contract with JLL, ABM performed various cleaning and light handyman tasks throughout the Premises, including in the basement loading dock and receiving area (Domini affirmation dated 7/18/18, exhibit A, JLL-ABM contract, exhibit A at 35-36). The loading deck is accessed via a 150 foot long ramp leading down from a security entrance. While the ramp is not mentioned in the JLL-ABM contract, Matthew Gall, ABM's project manager (Gall EBT at 10:5-12), testified that ABM pressure washed the ramp once a week, and cleaned and scrubbed it nightly (*id.* at 14:21-25; Gall aff dated 4/2/18, ¶ 7). JLL administered the janitorial program, and also took care of any necessary plumbing or electrical maintenance (Hayden EBT at 12:2-21).

JLL also retained T&M to provide security guard services at the Premises (Hayden EBT at 13:22-25; Soberman affirmation, exhibit N, Gutstein EBT dated 5/8/17 at 21:21-22:2). Among other things, T&M staffed a security post at the top of the ramp to the loading dock (Hayden EBT at 29:19-22, 40:17-22). Goldman supervised T&M, and also maintained an in-house security department (Hayden EBT at 15:18-21, 40:13-16).

On December 18, 2012, Diaz was employed by Manhattan Beer Distributors as a driver and delivery person (Soberman affirmation, exhibit K, Diaz EBT dated 10/10/16 at 13:15-19). He arrived at the Premises for a delivery sometime between 8:30 a.m. and 9 a.m. (*id.* at 34:24-35:5). He testified that it had been raining for a few hours before his arrival. For reasons that he could not recall, the security guard at the top of the ramp told him that he could not drive his truck down the ramp (*id.* at 47:24-48:12). He elected to wheel his hand truck down the ramp on foot.

As stated above, the ramp is 150 feet long and descends down to the loading dock and

receiving area. According to Nick Hayden (Hayden), JLL's senior VP and Goldman account manager, on the western wall of the ramp there were fire alarm boxes and electrical conduits (Hayden EBT at 48:15-20). On the eastern wall there were two pipes that carried hot water (*id.* at 48:24-49:6). At the top of the ramp was a security gate, which Diaz testified was closed behind him as he started down the ramp, making it difficult to see the ramp clearly (Diaz EBT at 75:10-24; 115:14-18). Halfway down the ramp, he stated that he was looking at the floor in front of his hand truck when he began to slip (*id.* at 68:3-21). He noticed water on the floor of the ramp, but testified that he was already falling over when he saw it (*id.* at 74:6-9). He noticed that water was dripping out of a pipe on the wall "like a waterfall" (*id.* at 55:25-56-08, 73:6-14, 21-24, 95:10-14). While he was somewhat unclear as to the exact location of the pipe relative to the floor of the ramp, he testified that the water was continuously flowing (*id.* at 79:3-5). Further, he stated that the were no mats, cones, or warning signs (*id.* at 80:8-24). He landed on his back and legs, and the hand truck fell across his legs (*id.* at 73:14-17).

Hayden testified that he was unaware of any flood condition on the day of the accident, and that a work order would have been generated for such a condition (Hayden EBT at 35:23-36:16). He later stated, in conjunction with the instant motions, that he had searched the JLL database for work orders and complaints related to water conditions on the ramp, and found none prior to the day of the accident (Hayden aff dated 4/2/18, ¶¶ 7-12) or the day of the accident itself (Hayden reply aff dated 8/9/18, ¶¶ 3-6). Gall stated that ABM had no record of a work order or other document regarding a pipe or water condition on the ramp (Gall aff, ¶¶ 10-11).

Defendants now separately move for summary judgment dismissing the complaint against them, and T&M moves for summary judgment dismissing the third-party complaint.

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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

ABM's Motion (Mot. Seq. No. 002)

In support of its motion, ABM argues that it did not owe plaintiff any duty that would support a negligence claim, as plaintiff was a non-contracting third-party to ABM. Further, it claims that it had no notice of a dangerous condition on the ramp. In opposition, plaintiff, Goldman, and T&M argue that ABM owed plaintiff a duty because it performed inspection and cleaning services in the loading dock and on the ramp. Moreover, they state that issues of fact exist as to whether ABM created the condition or had notice of it, as ABM fails to submit evidence of when the ramp was last cleaned or inspected prior to the accident.

As the New York Court of Appeals has held "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). In three situations, a contracting party may assume a duty of care to a third party:

> "(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 [internal quotation marks and citations omitted]). Here, there is no evidence in the record that ABM launched an instrument of harm by creating the gushing pipe. Indeed, Diaz does not argue that ABM caused or created a dangerous condition by its actions but rather argues that ABM exacerbated a dangerous condition on the ramp by failing to notice and report the dripping pipe. (Oral Arg. At 10:14-14:16.) However, failure to act does not constitute launching an instrument of harm under *Espinal* unless there is evidence that the contractor "create[d] or exacerbate[d] an unsafe condition" (*e.g. Medinas v MILT Holdings LLC*, 131 AD3d 121, 128 [1st Dept 2015] [internal quotation marks and citations omitted]). No such evidence exists here, save for Diaz's speculation. Moreover, the record does not reflect that Diaz was in anyway relying on ABM's performance of its duties. As set forth above, JLL was responsible for building maintenance and plumbing services, and would have been the party responsible for remedying a gushing pipe (Hayden EBT at 12:2-21). Finally, the record reflects that ABM carried out its duties under JLL's supervision. As JLL was Goldman's managing agent for the Premises, ABM has not "entirely displaced" Goldman's duty to maintain the premises.

Diaz argues that ABM's failure to produce any documents reflecting its cleaning schedule, or the date and time when the ramp was last cleaned before the accident, raise questions of fact regarding whether ABM created or exacerbated a dangerous condition on the ramp. As an initial matter, and contrary to Diaz's claim, the JLL-ABM contract does not provide that ABM must clean the ramp four times a day; the contract is, in fact, silent with regard to the ramp. Moreover, the cases cited by Diaz are inapposite. With only one exception, none of the cases analyzes whether a non-owner contracting party owed a duty to the injured plaintiff under *Espinal*, instead analyzing a property owner's liability (*e.g. Gibbs v Albee Tomato Co., Inc.*, 121 AD3d 614, 614 [1st Dept 2014] [plaintiff slipped on a puddle on defendants' loading dock]; *Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013] [plaintiff slipped on staircase due to improper waxing and water which previously leaked from a skylight]; *see also Backiel v Citibank*, 299 AD2d 504, 506 [1st Dept 2002] [a property owner owes a non-delegable duty to safely maintain its premises]). As to the remaining case, *DiVetri v ABM Janitorial Serv., Inc.* (119 AD3d 486, 486 [1st Dept 2014]), there it was uncontested that the service-contractor defendant had launched an instrument of harm by power washing the sidewalk outside the building in question, which caused the plaintiff to slip. Here, as set forth above, Diaz submits no evidence that ABM caused or created the dangerous condition on the ramp, or that ABM would be responsible for correcting such a condition.

Accordingly, ABM's motion for summary judgment dismissing Diaz's complaint is granted.

Goldman's Motion (Mot. Seq. No. 003)

In support of its motion, Goldman argues that Diaz's accident could not have happened as he described because there are no pipes in the area. Moreover, it claims that it reasonably

maintained the Premises, and had no notice of any dangerous condition on the ramp. In opposition, plaintiff argues that issues of fact exist as to whether Goldman has made a prima facie case that it safely maintained the Premises and had no notice of the dangerous condition.

As stated above, a property owner owes a non-delegable duty to maintain its property in a safe manner, particularly the means of ingress and egress such as the ramp (*e.g. Edwards v BP/CG Ctr. I, Inc.*, 102 AD3d 413, 413-414 [1st Dept 2013]).

> "To impose liability on a defendant as a result of an allegedly dangerous condition on the premises, there must be evidence that the dangerous condition existed and that the defendant either created the condition, or had actual or constructive notice of it and failed to remedy it within a reasonable time. A defendant has constructive notice of a dangerous condition when it is visible and apparent, and existed for a sufficient length of time before the accident such that it could have been discovered and corrected"

(*Melo v LaGuardia Fitness Ctr. Corp.*, 72 AD3d 761, 762 [2d Dept 2010] [internal quotation marks and citation omitted]).

Here, material issues of fact preclude summary judgment for Goldman. As an initial matter, Goldman relies on Hayden's testimony and the affidavit of David Gushue, an engineer, to argue that plaintiff's accident was impossible as he described it. Gushue's affidavit was submitted for the first time as part of Goldman's reply papers, and Goldman did not disclose him as an expert. Accordingly, the court will not consider his affidavit at this time (*e.g. Adler v Suffolk County Water Auth.*, 306 AD2d 229, 230 [2d Dept 2003]). Moreover, while Hayden testified that there were no plumbing pipes above the ramp or on the western wall of the ramp (Hayden EBT at 32:13-22; 48:15-20), he also testified that there were two vertical pipes on the eastern wall of the ramp (*id.* at 48:24-49:6). Additionally, the fact that plaintiff observed water coming from a pipe when he fell "provides a nonspeculative basis for [his] version of the accident and sufficiently establishes a nexus between the hazardous condition and the

circumstances of [his] fall" (*Garcia v 1265 Morrison LLC*, 122 AD3d 512, 513 [1st Dept 2014]). Thus, Goldman has not established, as it argues, that Diaz's accident was an impossibility.

Further, Goldman has not established a prima facie case that it did not have notice of the dangerous condition on the ramp. Hayden stated that he could find no complaint or work order related to water or a gushing pipe on the ramp, either before or the day of the accident, in JLL's records (Hayden aff dated 4/2/18, ¶¶ 7-12; Hayden reply aff dated 8/9/18, ¶¶ 3-6). Such evidence, however, only establishes that Goldman may have lacked actual notice of water gushing from a pipe on the ramp. "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]). Here, the record is devoid of any evidence of the last cleaning or maintenance activities on the ramp prior to Diaz's accident. Nor is there any record evidence regarding how long the pipe was gushing water prior to Diaz falling. Goldman's reliance on *Dawson v Raimon Realty Corp.* (303 AD2d 708, 709 [2d Dept 2003]), for the proposition that such a submission is unnecessary, is unavailing. In *Dawson*, the defendant was an out-of-possession landlord, which are generally only liable where the defective condition is "a significant structural or design defect that is contrary to a specific statutory safety provision" (*Ross*, 86 AD3d at 420 [internal quotation marks and citation omitted]). Here, by contrast, Goldman does not dispute that it is the in-possession owner of the Premises.

Accordingly, Goldman's motion for summary judgment is denied.

T&M's Motion (Mot. Seq. No. 004)

T&M moves for summary judgement dismissing ABM's third-party complaint, in which

ABM alleges causes of action for common-law indemnification and contribution. Both claims require a finding of negligence against ABM (*e.g. Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005] [common-law negligence relies on finding against proposed indemnitee]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [contribution lies where there are multiple tortfeasors]). As set forth above, the court has granted ABM summary judgment dismissing the complaint against it on the grounds that ABM does not owe Diaz a duty. Thus, ABM will not be found negligent, and there is no longer a basis for the third-party complaint. Accordingly, T&M's motion for summary judgment dismissing the third-party complaint is granted.

CONCLUSION

Accordingly, it is hereby,

ORDERED that defendant ABM Janitorial Services, Inc.'s motion (mot. seq. No. 002) for summary judgment is granted, and the complaint is dismissed against ABM, with costs and disbursements to ABM as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Goldman Sachs Headquarters LLC's motion (mot. seq. No. 003) for summary judgment is denied; and it is further

ORDERED that third-party defendant T&M Protection Resource LLC's motion (mot. seq. No. 004) for summary judgment is granted, and the third-party complaint is dismissed against T&M, with costs and disbursements to T&M as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of this action is severed and continued.

Dated: 1/02/2019

ENTER:

HON. ROBERT D. KALISH, J.S.C.

HON. ROBERT D. KALISH
J.S.C.