

Skerrett v LIC Site B2 Owner, LLC
2019 NY Slip Op 34720(U)
March 20, 2019
Supreme Court, Queens County
Docket Number: Index No. 710014/2015
Judge: Maureen A. Healy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MAUREEN A. HEALY
Justice

IA Part 13

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RICHARD SKERRETT,

Index Number: 710014/2015

Plaintiff,

Motion Date: 1/9/19

-against-

Sequence No. 2

**LIC SITE B2 OWNER, LLC, H&R REIT,
H&R REIT MANAGEMENT SERVICES, L.P.,
H&R DEVELOPMENT MANAGEMENT (U.S.)
LTD., HR GOTHAM TOWER, LP.,
2 GOTHAM CENTER CONDOMINIUM and THE
BOARD OF MANAGERS OF 2 GOTHAM CENTER
CONDOMINIUM,**

Defendants.

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**LIC SITE B2 OWNER, LLC, H&R REIT,
H&R REIT MANAGEMENT SERVICES, L.P.,
H&R DEVELOPMENT MANAGEMENT (U.S.)
LTD., HR GOTHAM TOWER, LP.,
2 GOTHAM CENTER CONDOMINIUM and THE
BOARD OF MANAGERS OF 2 GOTHAM CENTER
CONDOMINIUM,**

Third-Party Plaintiffs,

-against-

ABM JANITORIAL SERVICES NORTHEAST, INC.,

Third- Party Defendant.

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FILED
APR - 5 - 2019
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 49 - 84 read on this motion by Defendants, LIC SITE B2 OWNER LLC (LIC), H&R REIT, H&R REIT MANAGEMENT SERVICES, L.P., H&R DEVELOPMENT MANAGEMENT (U.S.) LTD., HR GOTHAM TOWER, LP. (H&R), 2 GOTHAM CENTER CONDOMINIUM and THE BOARD OF MANAGERS OF 2 GOTHAM CENTER CONDOMINIUM (Gotham) hereinafter defendants, for an order pursuant to CPLR 3212 for Summary Judgment dismissing this action, and for Summary Judgment on their 3rd

party complaint seeking indemnification from 3rd party defendant ABM Janitorial Services, Northeast, Inc., ('ABM') and such further relief as may be just and proper, and Cross-Motion by plaintiff to amend his Bill of Particulars. The court notes that a motion for Summary Judgment by third-party defendant ABM JANITORIAL SERVICES NORTHEAST, INC., was denied for their failure to appear on the January 9, 2019 adjourned return date.

Papers

Numbered

Notice of Motion - Affidavits - Exhibits.....	49-61
Notice of Cross-Motion/Affirmation in opposition.....	77-82
Reply.....	84

Upon the foregoing papers, defendants' Motion for Summary Judgment and plaintiff's motion to amend their Bill of Particulars are decided as follows:

This action arises from a slip and fall accident. On May 29, 2012, plaintiff was allegedly injured when he slipped and fell on a loading dock at 42-09 28th Street in Long Island City, NY ('The Location'). At the time of the accident, plaintiff was employed as a delivery driver for United Parcel Service ('UPS').

According to the description of the accident offered by plaintiff at his deposition, he had left the UPS depot between 9:00am and 9:30am on May 29, 2012, and had made a couple of stops before arriving at The Location between 10:00am and 10:30am. He testified that May 29, 2012 was a clear sunny day and it had not rained in the 24 hours preceding the accident. The loading dock at The Location is an indoor loading dock. He had made deliveries to The Location many times before the date of the accident. While deliveries were being made, his truck was completely inside the loading dock. When his truck was backed completely up to the loading dock there was a gap between one and two feet between the back of his truck and the loading dock. Plaintiff testified that he was loading the packages for delivery from the truck onto a hand truck that he had placed on the loading dock. He had to make two trips from his truck to the loading dock. As he started to step back into his truck to gather a third load of packages, his left foot, which was still on the dock, slipped and he fell between the truck and loading dock. A security guard named Louis (sic) helped him up. After plaintiff fell he noticed that his pants and the back of his jacket were wet. He had not noticed that the dock was wet before he fell and does not know what the wet substance was. He also testified that he did not see water on the dock after his fall.

At his deposition, Luis Arias testified that he is employed as a security guard by Guardians Security Services and was assigned to the loading dock at the time of the accident. The loading dock is usually cleaned by the building porters before he starts his shift at 7:00am, but it would be cleaned as needed during the day if it became wet or dirty. Mr Arias testified that the day of the accident was a rainy day with no sun. He did not see plaintiff fall, but when he saw that plaintiff was on the floor he went to pick him up. He testified that it was a rainy day and the interior of the loading area including the dock was wet due to water being tracked into the loading bay by trucks. Sometimes water would drip from the top of the trucks onto the loading dock. He never saw the porters mopping the loading dock because they did it before he arrived

for work. He testified that he checked the loading area every half hour during the day and did not actually see any water on the loading dock before plaintiff fell.

Lawrence Spahn is employed as a property manager for defendant H&R REIT ('H&R'). He testified that he was property manager at The Location on the day of plaintiff's fall. He had started working for H&R as property manager at The Location when they purchased the property in 2011 from defendant LIC SITE B2 Owner, LLC ('B2'). Security for the building was contracted out to Guardian Security. There are security cameras in the loading area but any footage from the date of the incident was not preserved and had been automatically recorded over. Janitorial duties are contracted out to third-party defendant ABM Janitorial Services ('ABM'). ABM's cleaning responsibilities included the loading bay area. The contract dated November 15, 2010 between B2 and ABM was still in effect on the date of the accident. ABM's responsibilities with regard to the loading dock was to clean it between 6am and 8am each work day and to check it every two hours to ensure against trash buildup or wet conditions. They would also respond if they were called because an area required attention. The area is regularly hosed down on Saturdays after the garbage bins are cleaned, but on other days only as needed. Mr. Spahn has no direct knowledge of plaintiff's fall. He did not learn of the incident until two years later and does not know anything about any allegation of wetness on the loading dock at the time of the incident.

Mujo Selinaj testified at deposition that on the date of the incident he was employed as a Foreman for ABM at The Location. There were four cleaners working under him that day. ABM was responsible for cleaning the building, including the loading dock. The loading dock would be swept at about 6:00am each morning, but only washed if necessary. Workers would check it every hour or two and maintain as necessary. If water is used to clean the dock, it is done early in the morning so that it is dry by the time trucks start to arrive. Only sweeping is done during the day. Water is not used during the day to ensure the area remains dry. He is aware that in wet weather, trucks may track water into the loading bay, but he has never seen water or snow tracked by a delivery truck onto the dock itself. He did not learn of plaintiff's fall until after it happened. He testified that the loading dock would not have been wet on the day of the accident unless it was raining. He does not know whether the loading dock was hosed down that day.

Defendants/ third-party plaintiffs now move for summary judgment dismissing the complaint and for summary judgment on their indemnification claim against third-party defendant ABM. To grant summary judgment it must clearly appear that no triable issue of fact is presented (Miceli v Purex Corp., 84 AD2d 562; Moskowitz v Garlock, 23 AD2d 943). The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. (Bronson v March, 127 AD2d 810; Bracie v Yeshiva Univ., 88 AD2d 823.)

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. (Mehta v. Stop & Shop Supermarket Co., LLC, 129 A.D.3d 1037.) To meet its burden on the issue of lack of constructive notice, a defendant is

required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall. (*Id.*) Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice. (*Id.*) Here, defendant has presented the testimony of plaintiff and the security guard, Mr. Arias. Mr. Arias testified that during the day he would inspect the loading dock area every half hour and did not see any water on the loading dock before plaintiff fell. Therefore, it is clear that defendants had no actual notice of any wet condition on the loading dock. Plaintiff likewise testified that he did not see any wetness on the loading dock before he fell. Plaintiff also testified that the day of the incident was a sunny dry day. Although Mr. Arias offered contradictory testimony, testifying that it was raining on the day of the incident and that delivery trucks would sometimes track water into the loading bay on rainy days, the NOAA weather records submitted by plaintiff as an exhibit to its cross-motion clearly indicate that there had been no rain with in the 30 hours preceding plaintiff's accident nor in the 11 hours following the incident. Therefore, even if there were a recurring condition of wetness on rainy day that would provide a basis to find that defendants had constructive notice, the weather conditions on the day in question were clear and dry. Defendant's motion for summary judgment dismissing this action is therefore **GRANTED and this action is dismissed.**


Third-Party plaintiff's Motion for Summary Judgment on their indemnification claim against third-party defendant ABM is **GRANTED**. The contract between ABM and H&R's predecessor in interest, B2, contains an indemnification provision at section 5.2 of the contract. The provision states that ABM will indemnify and hold the Owner (B2) harmless "from and against all liability, claims, damages, losses and expenses, including, without limitation reasonable legal fees and court costs, arising out of or alleged to arise out of the negligence or willful misconduct of the Contractor, its agents and/or employees." ABM in opposition contends that the indemnification clause has not been triggered because the complaint does not make any allegation against ABM. To the contrary, the complaint alleges that plaintiff's fall occurred, "as a result of the negligence, carelessness and recklessness of the defendants, **their agents, servants and/or employees**, in the ownership, **maintenance**, management, control, inspection, **cleaning**, repair and operation of the aforementioned premises." (Emphases added). As ABM was, at the time of the incident, the sole party responsible for providing cleaning and janitorial services for the building, including the loading dock area, it is clear that the complaint alleges that plaintiff's fall occurred due to negligence by ABM as an agent of B2.

The matter is set down for a hearing on third-party plaintiff's costs and attorneys and other fees incurred, to be held on April 2, 2019 at 10:00 AM.

Plaintiff's cross-motion to amend the Bill of Particulars is denied as academic in light of the dismissal of this action.

The foregoing constitutes the decision and order of this court.

Dated: March 20, 2019


 MAUREEN A. HEALY, J.S.C.

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 APR - 5 2019
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 QUEENS COUNTY