

Vicial v Collins Bldg. Servs., Inc.

2020 NY Slip Op 32553(U)

August 7, 2020

Supreme Court, New York County

Docket Number: 150052/2016

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

-----X

VANESSA VICITAL,

Plaintiff,

- v -

COLLINS BUILDING SERVICES, INC. AND NEW YORK
UNIVERSITY,

Defendants.

-----X

INDEX NO.	150052/2016
MOTION DATE	
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36-75 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Vanessa Vicital commenced this action after she slipped and fell on a puddle of water in the public bathroom located at 345 East 24th Street, New York, New York, on August 6, 2014 at approximately 4:30 p.m. Defendant New York University, the owner of the building, now moves pursuant to CPLR 3212 seeking dismissal of plaintiff's complaint and for summary judgment on its cross-claims against co-defendant Collins Building Services for contractual indemnification, breach of contract for failure to procure insurance and common law indemnification. Co-defendant Collins Building Services opposes the motion and also cross-moves pursuant to CPLR 3212 seeking dismissal of plaintiff's complaint and defendant NYU's cross-claims. Plaintiff opposes both motions.

In support of its motion, defendant NYU argues that plaintiff's claim must be dismissed because it did not create nor have actual or constructive notice of the condition. Defendant NYU cites to the testimony of its security offices, who were on duty on the date of the incident, who did not recall receiving any complaints about wetness on the floor of the women's bathroom on the day of the incident. Affirmation of Emmett D. Donnelly dated May 7, 2020, Exh. Y (Rodriguez

Dep. Tr. 23, 25, 34), Exh. AA (Moonsammy Dep. Tr. 23, 36, 42), Exh. BB (Gorea Dep. Tr. 27, 29). However, plaintiff testified that earlier on the date of the incident, at approximately 1:45 p.m., she noticed water on the floor in the women's bathroom and brought this to the attention of a security guard near the bathroom. Donnelly Aff., Exh. V (Vicial Dep. Tr. 45-46, 59-60, 63). Thus, there is an issue of fact as to whether defendant NYU had actual notice of the dangerous condition and summary judgment must be denied.

Defendant NYU also seeks summary judgment on its cross-claims against defendant Collins for contractual indemnification and breach of contract for failure to procure insurance. In support, defendant NYU submits its maintenance agreement with Collins, which contains an indemnification and insurance provision. Donnelly Aff., Exh. D. However, the agreement is submitted via an attorney affirmation and defendant NYU fails to cite to any testimony authenticating this agreement. *Clarke v. American Truck & Trailer Inc.*, 171 A.D.3d 405, 406 (1st Dep't 2019) (holding that an agreement between parties, annexed to an attorney affirmation, was not authenticated and therefore was not admissible and not an appropriate basis to grant summary judgment). Accordingly, summary judgment on defendant NYU's cross-claims must be denied.

Turning to the cross-motion, defendant Collins Building Services argues that it cannot be held liable for plaintiff's injuries because, as a contractor, it did not owe a duty of care to plaintiff and that none of the *Espinal* exceptions are applicable. *Espinal v. Melville Snow Removal*, 98 N.Y.2d 136 (2002). However, like defendant NYU, defendant Collins fails to submit an authenticated and admissible copy of its maintenance contract with NYU and in fact cites to the exhibit attached to NYU affirmation in support of its motion. Affirmation of Paul Carney dated May 20, 2020, paras. 12-15. Thus, it is has failed to provide proof that its contract with NYU was

not so comprehensive and exclusive so as to entirely displace NYU's duty to maintain the premises. *See Clark v. Kaplan*, 47 A.D.3d 462 (1st Dep't 2008).

Defendant Collins also argues that it cannot be held liable for plaintiff's injuries because it had no notice of the alleged condition and that the only prior complaint about the condition was made by plaintiff to defendant NYU. On a motion for summary judgment based on lack of notice, defendants have the initial burden of making a prima facie showing that they neither created the hazardous condition nor had actual or constructive notice of its existence. *Infante v. Jerome Car Wash*, 52 A.D.3d 319, 320 (1st Dep't 2008). To meet their prima facie burden on the issue of constructive notice in a slip-and-fall case, defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. *Hobbs v. New York City Hous. Auth.*, 168 A.D.3d 634 (1st Dep't 2019) (citing *Gautier v. 941 Intervale Realty LLC*, 108 A.D.3d 481 [1st Dep't 2013]). Reference to general cleaning practices is insufficient to establish a lack of constructive notice. *Gautier*, 108 A.D.3d at 481. Here, defendant Collins submits no evidence of either its general cleaning practices or when the area was last inspected and cleaned prior to plaintiff's accident. Thus, defendant Collins has failed to meet its burden of proof on the issue of constructive notice and summary judgment must be denied.

Finally, defendant Collins' cross-motion seeking dismissal of the cross-claims must be denied because, like defendant NYU, defendant Collins has failed to submit an admissible copy of its contract in support of the motion. Accordingly, it is

ORDERED that defendant NYU's motion for summary judgment and defendant Collins Buildings Services' cross-motion are denied.

8/7/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER		