

**Murphy v Goldman Sachs Group, Inc.**

2020 NY Slip Op 32554(U)

July 29, 2020

Supreme Court, New York County

Docket Number: 150517/2017

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32
Acting Justice
INDEX NO. 150517/2017
MOTION DATE N/A
MOTION SEQ. NO. 003, 004, 005

JAMES MURPHY,
Plaintiff,

- v -

THE GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS
HEADQUARTERS, LLC., ABM INDUSTRIES
INCORPORATED, ABM JANITORIAL SERVICES -
NORTHEAST, INC., JONES LANG LASALLE AMERICAS,
INC.,

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103-121, 146, 150-154, 165, 166, 173, 177, 179, 182 (Motion 004) 122-143, 147, 155-159, 167, 168, 174, 178, 180, 185, 186 (Motion 005) 84-102, 148, 160-164, 169-172, 175, 176, 181, 183, 184

were read on these motions to/for SUMMARY JUDGMENT

Upon the foregoing documents, the motions are decided as follows:

In this action, Plaintiff alleges that on January 18, 2015 at approximately 7:15 a.m. he slipped and fell on ice on the sidewalk adjacent to the building at 200 West Street, New York, New York, while he was patrolling the property perimeter as a security guard employed by non-party Michael Stapelton Associates. Goldman Sachs Headquarters, LLC., ("Goldman HQ") was the tenant with right to exclusive possession of 200 West Street. Goldman Sachs Group, Inc. ("Goldman Group") was the parent company which wholly owned Goldman HQ. Jones Lang LaSalle Americas, Inc., ("Jones") was the managing agent for the property. Jones contracted with ABM Janitorial Services-Northeast, Inc., ("ABM") to provide janitorial services, including snow and ice removal, for 200 West Street.

Plaintiff commenced this action against Defendants to recover for his injuries alleging common law negligence. In his bill of particulars, Plaintiff further claims that Defendants violated New York City Administrative Code §16-123. Defendant ABM asserted a crossclaim against Goldman Defendants for common law indemnification. Defendant Jones asserted crossclaims against Goldman Defendants and ABM for common law indemnification and contribution, contractual indemnification as well as for breach of contract for failure to obtain liability insurance. Goldman Defendant asserted no crossclaims in their answer.

Now, Goldman Defendants move for summary judgment dismissing Plaintiff's complaint and all crossclaims (Seq No. 3). Jones moves for summary judgment dismissing Plaintiff's complaint and all crossclaims and for summary judgment on its cross claim for contractual

indemnification (Seq No. 4). ABM moves for summary judgment dismissing Plaintiff's complaint and all crossclaims (Seq No. 5).

While it is ultimately the Plaintiff's burden at trial to establish a *prima facie* case of negligence against the Defendants, on a motion for summary judgment, it is incumbent upon the moving party to present evidence in admissible form, showing their entitlement to judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Castro v Hatim*, 174 AD3d 464 [1<sup>st</sup> Dept 2019]).

The branch of the motion by the Goldman Defendants to dismiss Plaintiff's complaint as against Goldman Group is granted without opposition. In their motion, the Goldman Defendants demonstrated that The Goldman Sachs Group, Inc., did not "own, operate, lease, manage, maintain or control the subject property or the adjacent sidewalk" (*see Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1<sup>st</sup> Dept 1988]; *see also Moonstone Judge, LLC v Shainwald*, 38 AD3d 215 [1<sup>st</sup> Dept 2007]).

Turning to the branches of the motions by Goldman HQ and Jones to dismiss Plaintiff's complaint, both posit that liability against them is precluded because there was a storm in progress at the time of Plaintiff's slip and fall on ice. Generally, "[t]he duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*see Ross v Lewis*, 181 AD3d 423 [1<sup>st</sup> Dept 2020] *citing Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]). This storm-in-progress doctrine equally applies to property managers and cleaning companies (*see Lowenstern v Sherman Square Realty Corp.*, 165 AD3d 432 [1<sup>st</sup> Dept 2018]; *Smilowitz v GCA Service Group, Inc.*, 101 AD3d 1101, 1102 [2d Dept 2012]). "In order to establish a *prima facie* entitlement to judgment on the 'storm in progress' doctrine, [a defendant] must establish that [a] plaintiff's fall was precipitated by a hazardous snow or ice-related condition caused by an ongoing storm" (*see Battaglia v MDC Concourse Center, LLC.*, 175 AD3d 1026 [4<sup>th</sup> Dept 2019]; *see also Solazzo v New York City Tr. Auth.*, 6 NY3d at 735). The Administrative Code of New York City §16-123(a) "requires building owners to clear ice and snow from an abutting sidewalk within four hours after the snow ceases to fall, excluding the hours between 9:00 p.m. and 7:00 a.m." (*Ghoneim v Vision Enterprises Management, LLC.*, 165 AD3d 893 [2d Dept 2018]; *see also Colon v 36 Rivington Street, Inc.*, 107 AD3d 508 [1<sup>st</sup> Dept 2013]; *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299, 300 [1<sup>st</sup> Dept 2008]).

On the date of his accident, Plaintiff stated he arrived at work at 5:30 a.m. and that it was raining and very cold. After checking in to work, he completed at least one perimeter check of the property, that included walking at the accident location and did not observe any ice. At the time of his accident, at approximately 7:00 a.m.-7:15 a.m., as he was performing another perimeter check, he described the sidewalk at that location to be completely covered in clear sheet of ice to the point he attempted to reach the asphalt of the abutting street when he fell. Directly after his fall, as he laid on his back, rain fell onto his face.

In further support of their motions, two of the Defendants, Goldman and Jones, rely on certified weather records as well as the affidavits of their meteorological experts, Thomas M.

Else and James Bria, respectively, to further demonstrate that there was a light freezing rainstorm occurring at time of Plaintiff's accident. After reviewing materials that included Plaintiff's bill of particulars, Plaintiff's deposition testimony and review of certified weather data, both experts aver that on the two days preceding Plaintiff's accident, there was no precipitation. Furthermore, they both state that on the date of Plaintiff's accident, but directly prior to it, the ground was clear of any naturally precipitated snow and/or ice. They both opine that light freezing rain occurred in Manhattan beginning approximately at 6:45 a.m., and continued until about 9:00 a.m. Else further stated that during the time of this freezing rain, the temperature was 32-33 degrees Fahrenheit.

Based on the foregoing, Defendants established their entitlement to summary judgment (*see Mitchell v Davidson*, 164 AD3d 1160 [1<sup>st</sup> Dept 2018]; *Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept. 2013]).<sup>1</sup>

In opposition, Plaintiff failed to raise an issue of fact. Plaintiff's reliance on unauthenticated surveillance footage and weather records to show that it was not raining at the time of Plaintiff's accident is unavailing. In addition to not being in admissible form, even if it was not raining at the exact moment of Plaintiff's fall --a fact contradicted by Plaintiff's admission in his deposition testimony-- this fact would not defeat application of the storm-in-progress doctrine. Defendants are afforded a reasonable time after the cessation of precipitation to remedy any dangerous condition created by the storm. Indeed, NYC Administrative Code §16-123[a] affords owners/tenants of abutting properties four hours from the time the precipitation ceases to clear ice and snow from adjacent sidewalks, excluding the hours between 9:00 p.m. and 7:00 a.m. Since that period had not yet expired at the time of Plaintiff's fall, Defendants demonstrated their absence of liability for Plaintiff's accident (*see Colon v 36 Rivington St., Inc.*, 107 AD3d at 508; *Huguens v Village of Spring Val.*, 86 AD3d 593, 594 [2d Dept 2011]; *Cangemi v Burgan*, 81 AD3d 583, 584 [2d Dept 2011]).

As to the branch of ABM's motion for summary judgment dismissing Plaintiff's complaint, it established that despite its contractual obligation to Jones for snow and ice removal, ABM owed no duty of care to Plaintiff (*see Espinal v Melville Snow Contractors*, 98 NY2d 136 [2002]). Where a contractor has entered into a contract to render services, it may only be held to have assumed a duty of care to nonparties to the contract in three situations:

“(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, ‘launche[s] a force or instrument of harm’; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; or (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely” (*see Espinal v Melville Snow Contractors*, supra at 140 [2002]).

At the outset, Plaintiff never pled any of these factors in his complaint or bill of particulars as a basis for ABM's liability. In any event, ABM demonstrated that none of the *Espinal*

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<sup>1</sup> Parenthetically, although ABM did not rely on this argument in its moving papers, the *prima facie* proof of the applicability of the storm in progress doctrine applies to absolve ABM, *prima facie*, of liability as well (*see Lowenstern v Sherman Square Realty Corp.*, supra).

exception apply to this case. ABM demonstrated by Plaintiff's deposition testimony, that the ice appeared shortly before his accident and that ABM did not create or exacerbate the ice condition at issue. Furthermore, while Plaintiff was aware of ABM's presence on site, his encounters with ABM workers were only at the service entrance and not in the performance of their duties for him to rely on. Moreover, Plaintiff did not know that Jones was the property manager and thus could not be aware of its contract with ABM. Lastly, by the affidavit of Gorian Papa, Senior Branch Manager for ABM, this Defendant demonstrated that in its contract with Jones for ice remediation services, they are performed as needed and only after Jones directs them to do so, thereby negating the third *Espinal* exception (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007]; *Cason-Payano v Damiano*, 58 AD3d 472, 473 [1<sup>st</sup> Dept 2009]).

In opposition, Plaintiff argues that its contract with Jones for ice remediation was comprehensive and exclusive so to entirely displace Jones' duty to maintain the premises safely and created a duty of care owed to Plaintiff. However, this ignores Exhibit A, page 33 of the contract which lists the snow removal duties in a chart under the letter "O" which ABM indicates means "as needed" and is only to be performed after receiving direction from Jones. The deposition testimony relied upon by Plaintiff wherein Nickolas G. Hayden, Director for Jones stated that ABM is responsible on the weekends for inspecting the sidewalk for snow does not contradict this. Moreover, Hayden also testified at his deposition that if Jones is notified of a snow or ice condition, it would direct ABM to remove it. Thus, as ABM's contract with Jones for ice removal did not entirely absolve Jones' completely of its obligation to maintain the premises, it does not create a duty of care owed to Plaintiff (*see DeCanio v Principal Bldg. Services, Inc.*, 115 AD3d 579, 580 [1<sup>st</sup> Dept 2014]; *Gartmann v City of New York*, 67 AD3d 468 [1<sup>st</sup> Dept 2009]).

The branches of the motions to dismiss the common law indemnification and contribution crossclaims asserted by ABM against the Goldman Defendants and Jones asserted against the Goldman Defendants and ABM must be dismissed as these parties have been found not negligent (*see eg Astrakan v City of New York*, \_\_\_ AD3d \_\_\_, 2020 NY Slip Op 03276 [1<sup>st</sup> Dept 2020]; *Ramos v Pet Mkt. W. 57th St., Inc.*, 114 AD3d 423 [1<sup>st</sup> Dept 2014] ).

The branch of ABM's motion to dismiss Jones' crossclaim for failure to procure insurance is grated since ABM demonstrated it procured the contractually required insurance with proof that a policy with a blanket endorsement to provide insurance coverage for contractually designated additional insureds was in effect at the time of the accident (*see Perez v Morse Diesel Int'l, Inc.*, 10 AD3d 497, 498 [1<sup>st</sup> Dept 2004]).

The branches of ABM's motion for summary judgment dismissing Jones' crossclaim for contractual indemnification and Jones' motion for summary judgment on this crossclaim are denied<sup>2</sup>. The right to contractual indemnification is dependent "upon the specific language of the contract" (*see Trawally v City of New York*, 137 AD3d 492, 493 [1<sup>st</sup> Dept 2016]). In addition, "a party seeking full contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava*

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<sup>2</sup> To the extent Jones sought contractual indemnification on behalf of Goldman Defendants, that branch of the motion is also denied as Jones only pled a crossclaim for contractual indemnification *against* Goldman Defendants. Moreover, Goldman Defendants pled no crossclaims at all.

*Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 A.D3d 660, 662 [2d Dept 2009]; see General Obligations Law § 5-322.1).

In its contract with ABM, Jones seeks to enforce the indemnification provision that reads [in pertinent part]:

“To the fullest extent permitted by applicable law, Service Contractor (ABM) shall defend, indemnify and hold harmless Owner (Goldman) and Manager (Jones)...from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, fines, judgments, settlements, and penalties, including, without limitation, costs, expenses and attorneys’ fees incident thereto, arising out of, based upon, or occasioned by or in connection with:

- (a) Service Contractor’s (ABM’s) performance of (or failure to perform) the Contract Duties;

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The aforesaid obligation of indemnity shall be construed so as to extend to all legal, defense and investigation costs, as well as all other reasonable costs, expenses and liabilities incurred by the party indemnified from and after the time at which the party indemnified receives notification (whether verbal or written) that a claim or demand is to be made or may be made.

Except as may be otherwise provided by applicable law or any governmental authority, Owner’s (Goldman) or Manager’s (Jones) right to indemnification under this section shall not be impaired or diminished by an act, omission, conduct, misconduct, negligence or default (other than gross negligence or willful misconduct) of Owner or Manager or any employee of Owner or Manager who contributed or may be alleged to have contributed thereto.”

ABM’s contract duties include:

“All sidewalk and plaza areas plus from curb into the streets, to be maintained completely clear of snow/ice, spread snowmelt chemicals (approved by Agent) as conditions require throughout the storm and after the storm as conditions warrant.”

Based on the indemnification language, Jones and Goldman are entitled to indemnification from ABM based upon ABM’s performance of or failure to perform its contract duties. In this case, since all parties agree ABM did not act before Plaintiff’s accident, this cause of action hinges upon whether ABM failed to perform its contract duties.

Since the contractual indemnification provisions here do not condition indemnification on the negligence of ABM, this provision may be triggered even though ABM has been found not negligent to Plaintiff (see *Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 178 [1990]). Nevertheless, the evidence adduced established the existence of issues of fact as to whether

ABM fulfilled its contract duties under the circumstances (see *Spector v Cushman & Wakefield, Inc.*, 34 Misc. 3d 1204(A), *aff'd* 100 AD3d 575 [1<sup>st</sup> Dept 2012]).

The branch of Goldman Defendant's motion to dismiss the crossclaims against it for contractual indemnification and breach of contract for failure to procure insurance is denied as it was unaddressed in the movant's papers. The court notes, however, that no contract containing these obligations was annexed to the moving papers.

Accordingly, it is

ORDERED that Plaintiff's complaint is dismissed as against Defendants The Goldman Sachs Group, Inc., Goldman Sachs Headquarters, LLC, ABM Industries Incorporated, ABM Janitorial Services - Northeast, Inc. and Jones Lang Lasalle Americas, Inc., it is further

ORDERED that the crossclaims for common law indemnification and contribution asserted by ABM and Jones are dismissed, it is further

ORDERED that Jones' crossclaim against ABM for breach of contract for failure to obtain insurance is dismissed, and it is further

ORDERED that the balance of the motions are denied.

7/29/2020  
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

FRANCIS A. KAHN, III A.J.S.C.

**HON. FRANCIS A. KAHN III**

**J.S.C.**