

<b>Dembele v Action Carting Env'tl. Servs., Inc.</b>
2020 NY Slip Op 32982(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 152346/2013
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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YOUSSOUF DEMBELE,

Plaintiff,

- v -

ACTION CARTING ENVIRONMENTAL SERVICES, INC.,  
BCRE GRAND STREET OWNER LLC, BCRE GRAND  
HOTEL LLC, BCRE GRAND RESTAURANT LLC, BCRE  
GRAND CAFE, LLC, DHG NEW YORK HOTEL  
MANAGEMENT COMPANY, LLC, DENIHAN OWNERSHIP  
COMPANY LLC, JAMES HOTEL MANAGEMENT  
COMPANY LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 316, 319, 320, 333, 334, 335, 336, 337, 338, 348, 351, 354, 361, 362, 363, 364, 367

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 317, 339, 340, 341, 349, 352, 355, 365, 368

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 012) 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 318, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 342, 343, 344, 345, 346, 347, 350, 353, 356, 358, 359, 360, 366, 369

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

In motion sequence no. 010, defendants BCRE Grand Street Owner (Owner) BCRE Grand Hotel LLC (Hotel), BCRE Grand Restaurant LLC (Restaurant), and BCRE Grand Café LLC (Café) (together, the BCRE defendants) move, pursuant to CPLR 3211 (a), for summary judgment dismissing the complaint as to them, and for an order sealing their exhibits M, Q, and R. In motion sequence no. 011, defendant Action Carting Environmental Services (Action)

moves for summary judgment dismissing the complaint as to it. In motion sequence no. 012, defendants DHG New York Hotel Management Company, LLC (DHG), Denihan Ownership Company, LLC (Denihan), and James Hotel Management Company, LLC (Hotel) move for summary judgment dismissing the complaint and any cross claims and granting Hotel contractual indemnification from the BCRE defendants. Motion sequence nos. 010, 011, and 012 are consolidated for disposition.

This action arises out of an accident, in which plaintiff Youssouf Dembele a/k/a Malaha Salik was injured as he was throwing a bag of garbage into a dumpster. At the time, plaintiff was an employee of nonparty David Burke Kitchen, located in the James Hotel at 23 Grand Street in New York City (the Site). The dumpster was owned and serviced by Carting. Owner owns the land located at the Site. Hotel was the lessor of the premises located at the Site; Restaurant and Café were sub lessees at those premises.

Plaintiff argues that the motion of the BCRE defendants must be denied, because their previous motion for summary judgment was denied by Justice Braun, and multiple motions for summary judgment are disfavored, absent newly discovered evidence. *See Vasquez v G.A.P.L.W. Realty*, 254 AD2d 232, 232-33 (1st Dept 1998); *National Enters. Corp. v Dechert Price & Rhoads*, 246 AD2d 481, 482 (1st Dept 1998). The BCRE defendants argue both that Justice Braun's order was based on the need for further discovery, and that a subsequent deposition of plaintiff constitutes newly discovered evidence, specifically that, whereas he earlier consistently claimed that he had slipped on a piece of cardboard, he later stated that he had slipped on oil and leaves. Both of those arguments fail.

Justice Braun's order is based not only on the need for further discovery, but also on his holding, regarding all of the defendants who were before him, that they had not shown either that

they “did not launch a force or instrument of harm” or that they did not have constructive notice of a “latent hazard” which may have caused plaintiff to slip and fall. *See* NYSCEF Doc No. 257, at 15, line 8; 16, line 5.

The BCRE defendants’ second argument is based on the fact that, at his first deposition, as well as in his bill or particulars, plaintiff stated that he had slipped on a piece of cardboard that had been placed against one wheel of the dumpster to keep it from rolling. The BCRE defendants contend that, at his subsequent deposition, plaintiff stated, instead, that he slipped on oil and leaves. This contention does not aid defendants for two reasons. First, it is inaccurate. At his later deposition, plaintiff testified as follows:

Q: What did you slide on?

A: I don’t know. I was just trying to throw it [the bag of garbage]. And having my foot on - my feet on the water and oils. I just slide

\* \* \*

Q: Did your arm or your side come in contact with the garbage bin?

A: Just as I came in contact with the cardboard, my other side’s coming into contact with the ground.

Q: Did your right foot slip on leaves?

A: I don’t remember, I don’t remember. But what I know, it’s that when I slide, my right feet coming in contact with the cardboard and with oils and the water, and that the other side come in contact with the ground.

\* \* \*

Q: Did you step on a leaf and then slip? Or did you step on the cement and slip and hit leaves, or something like that?

A: My right foot came in touch with oil and water, and then the cardboard. And the carton - how you - the carton. . . . After falling, I knew there was oil and water.”

NYSCEF Doc No. 36 at 8-9. While plaintiff had not previously mentioned water and oil, he has consistently claimed that he slipped, or slid, on the cardboard. More significantly, plaintiff's addition of oil, water and, possibly, leaves, as precipitating conditions of his fall, does not call into question Justice Braun's holding, that defendants had failed to show that they lacked constructive knowledge of the condition causing plaintiff to slip and fall.

Finally, the BCRE defendants argue that, in his later deposition, plaintiff acknowledged that he had placed the piece of cardboard, on which he subsequently slipped, at the dumpster. That argument is based on the following passage from the deposition:

“Q: Is there artificial lighting on the side of the building in that area?”

A; There was leaves all around here (indicating) and kind of things that we use to block the garbage from moving.”

While, at a trial, a jury could conclude that plaintiff had, indeed, placed the cardboard on which he slipped at the dumpster, this passage, which does not identify “the kind of thing” referred to, does not entitle the BCRE defendants to summary judgment. Accordingly, the BCRE defendants' current motion for summary judgment is improper, and it is denied. No party objects to that branch of the BCRE defendants' motion that seeks to have certain exhibits sealed.

Action makes the same arguments as the BCRE defendants, but adds evidence, in the form of depositions of two of its employees, who testified that Action did not create a dangerous condition that could have caused plaintiff's accident. That evidence is irrelevant to the second basis of Justice Braun's decision. Accordingly, Action's motion is no less improper than that of the BCRE defendants.

The DHG defendants were strangers to this action at the time of Justice Braun's decision. Accordingly, that decision does not bar their current motion. As an initial matter, with regard to this motion, Thomas Felderman (Felderman), executive vice president of nonparty Denihan

Hospitality Group, avers in his affidavit that neither DHG, nor Denihan, owned, occupied, managed, or controlled the Site. *See* NYSCEF Doc No. 288. That averment is uncontradicted. Accordingly, those parties owed no duty to plaintiff, and, absent any claim by plaintiff that they launched an instrument of harm, the complaint against them must be dismissed. *Santos v Daniello Carting Co.* 148 AD3d 463, 464 (1st Dept 2017).

Hotel, which is the managing agent for the Site, makes the same unavailing arguments about plaintiff's two depositions as its co-defendants. In addition, Hotel relies on contradictions in what plaintiff purportedly told various medical personnel who treated him. Reports of what plaintiff may have said, without more, are hearsay, and it is established that hearsay may not be used to support a motion for summary judgment. *U.S. Bank Trust, N.A. v Ellis*, 181 AD3d 451, 454 (1st Dept 2020); *Matter of Kenneth J. v Lesley B.*, 165 AD3d 439, 440 (1st Dept 2018). Finally, Hotel argues that plaintiff failed to demonstrate that Hotel had actual or constructive notice of any dangerous condition. As Justice Braun held with regard to the other defendants, while plaintiff will have the burden of proof at trial, the burden currently rests on Hotel as the proponent of a motion for summary judgment. *See Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 (1st Dept 2020), citing *Winegard v New York Univ, Med. Ctr.*, 64 NY2d 851, 853 (1985).

Hotel's claim to indemnification rests, inexplicably, on exhibits K and V to Felderman's affirmation. *See* NYSCEF Doc No 272, ¶¶ 53 and 54. Exhibit K (NYSCEF Doc No. 283) is an EMS report. Exhibit V (NYSCEF Doc No 294) is Justice Braun's decision and order. Consequently, Hotel has not shown that it is entitled to indemnification.

Accordingly, it is hereby

ORDERED that in motion sequence number 010, that branch of the motion of defendants BCRE Grand Street Owner, LLC, BCRE Grand Hotel, LLC, BCRE Grand Restaurant, LLC, and BCRE Grand Café, LLC that seeks summary judgment is denied; and it is further

ORDERED that in motion sequence number 010 that branch of said defendants' motion which seeks to have exhibits M, Q, and R sealed is granted; and it is further

ORDERED that the Clerk is directed to seal said exhibits; and it is further

ORDERED that, in motion sequence number 011, the motion of defendant Action Carting Environmental Services, Inc. for summary judgment is denied; and it is further

ORDERED that, in motion sequence number 012, that branch of the motion of defendants DRG New York Hotel Management Company, LLC and Denihan Ownership Company, LLC for summary judgment is granted and the complaint is dismissed as against said defendants with costs as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence number 012, the motion of defendant James Hotel Management Company, LLC for summary judgment and for indemnification is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this Court.

9/11/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

  
W. FRANC PERRY, J.S.C.