Von Saspe v Flik Intl. Corp.
2020 NY Slip Op 33576(U)
October 30, 2020
Supreme Court, New York County
Docket Number: 150556/2015
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. DAVID BENJAMIN COHEN *Justice*	PART	IAS MOTION 58EFM

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PHYLLIS VON SASPE,

Plaintiff,

- v -

FLIK INTERNATIONAL CORP, 1285 LLC, JONES LANG LASALLE AMERICAS, INC., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, COLLINS BUILDING SERVICES, INC.

Defendant.

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INDEX NO. 150556/2015

MOTION DATE 10/14/2020, 10/14/2020, 10/14/2020

MOTION SEQ. NO. 008 009 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 237, 241

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 236, 238, 239, 240, 242, 243

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

Motion sequences 008, 009 and 010 are consolidated herein for decision.

This is a personal injury action arising out of an accident that occurred on June 27, 2014. The plaintiff alleges that she slipped and fell on a wet hallway floor adjacent to a cafeteria area on the 29th floor of an office building located at 1285 Avenue of the Americas, New York, New York. Immediately after her fall, the plaintiff observed wet streaks on the floor and a yellow pail or bucket a short distance away, an indication that the floor had been recently mopped. At the time of the accident, the plaintiff was an employee of the law firm of Paul, Weiss, Rifkind,

Wharton & Garrison, LLP ("Paul Weiss"). The defendants include FLIK International Corp. ("FLIK"), the entity responsible for managing and maintaining the cafeteria, Collins Building Services ("Collins"), the cleaning service hired by the owners of the building and 1285 LLC and Jones Lang Lasalle Americas, Inc. ("1285 LLC/JLL"), the owners and managing agents of the building. [1]

In motion sequence 008, Collins moves for summary judgment. In motion sequence 009, FLIK moves for summary judgment. In motion sequence 010, 1285 LLC and JLL move for summary judgment.

MOTION SEQUENCE 008

In motion sequence 008, Collins moves for summary judgment. While Collins had a contract with the building's owner to provide maintenance and cleaning, it claims that it owed no duty to the plaintiff because it was not responsible for maintaining the cafeteria. Collins also claims that it lacked actual or constructive notice of the wet surface that caused the plaintiff to fall. In order to prevail on its summary judgment motion, Collins must make a *prima facie* showing of entitlement to judgment as a matter of law by putting forth evidence which eliminates all material issues of fact from the case (*see Smalls v AJI Indus. Inc.,* 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). The failing to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Here, Collins bears the burden of demonstrating, as a matter of law, that it owed no duty to the plaintiff, or, alternatively, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or

[1] The plaintiff originally named Paul Weiss as a direct defendant, but her claims were dismissed due to the exclusivity provisions of the Workers Compensation Law.

that it did not have actual or constructive notice of the condition (*see Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]).

The plaintiff argues that Collins has failed to meet its initial burden. The Court agrees. With regards to its alleged lack of duty to the plaintiff, Collins maintains that it did not have any control over the subject hallway or the cafeteria and that it was the sole responsibility of FLIK to maintain and clean the area where the plaintiff had her accident. Collins maintains that it did not perform any sweeping or mopping of the subject hallway where the plaintiff had her accident during the daytime hours. Collins claims it was only hired by Paul Weiss to clean the cafeteria area at nighttime, starting at approximately 11:00 PM. During the daytime hours when the plaintiff had her accident, Collins believes it was only responsible for cleaning the bathrooms in the offices of Paul Weiss, including those next to the cafeteria.

Collins points to the deposition testimony of multiple witnesses from FLIK and Collins, all of whom allegedly confirm that Collins performed no cleaning of the hallways during the daylight business hours, and that it was the responsibility of FLIK to clean the corridors adjacent to the cafeteria during that time. However, the deposition testimony is not nearly as definitive as Collins claims. In fact, some of the same witnesses relied upon by Collins also testified that Collins sometimes employed workers in the area that performed cleaning services during the daytime. Collins own supervisor in the building, Fatos Prelvukaj, testified that Collins would sometimes inspect the subject area and if it observed a defect such as a spill or liquid on the floor, would direct that the condition be remedied (*see* NYSCEF Doc. No 161, Collins Exh. N, Prelvukaj Feb. 14, 2017 Tr at 19). Mr. Prelvukaj also testified that Collins employed porters on the floor during daylight hours in order to clean the bathrooms and he acknowledged that if the

porters observed spills in the hallways, they would clean them if they were readily cleanable (*Id.* at 32). Addionally, Prelvukaj also testified that Collins would sometimes receive notifications or complaints about spills in the area and would take action to remedy the condition. He acknowledged that Collins porters had access to mops and would respond to an emergency, such as a sudden spill or condition that required mopping (NYSCEF Doc. No. 162, Collins Exh. O, Prelvukaj Dec. 4, 2018 Tr at 20, 28, 33-34; NYSCEF Doc. No. 167, Collins Exh. T, Supplemental Specifications ¶ G).

Since there is a possibility that a Collins employee mopped the floor where the plaintiff fell, either at the request of a Paul Weiss employee, or in response to an emergency call, Collins has not met its burden and is not entitled to summary judgment. The fact that the chance may have been remote or, as Mr. Prelvukaj put it, "once in a million," still means that it is up to a trier of fact to determine whether such an event actually occurred (*see Koeppel v City of New York*, 205 AD2d 402 [1st Dept 1994] [Where there was no direct evidence of who had created the hazardous condition, issues of fact were raised by the circumstantial evidence as to the liability of each of the defendants]). Furthermore, Collins has also failed to demonstrate that there are no material issues of fact concerning its overall control and responsibility over the subject area, pursuant to its general maintenance agreement with the building owners and its supplemental contract with Paul Weiss. There are disputed issues of fact between the defendants as to which entity bore the ultimate responsibility for cleaning and maintaining the hallway where the plaintiff fell. In deposition testimony, the representative from FLIK asserted that while FLIK may have been the entity that would clean the area of spills or liquid during the daytime, the ultimate responsibility for the maintenance of the area belonged to Collins (NYSCEF Doc. No. 289, Collins Exh. L, Zarro Tr at 28-31). Indeed, the deposition testimony of both FLIK and 1285

LLC confirms that it was the obligation of Collins to maintain the subject area (*see Id.*; NYSCEF Doc. No.162, Collins Exh. O, Prelvukaj Dec 4, 2018 Tr at 19-21, 24, 28-29, 32-34 [Collins employees will clean spills if they see such, respond to emergency calls, or clean if directed by a Paul Weiss executive]) This is entirely consistent with the contractual provisions entered into between Collins and Paul Weiss wherein Collins explicitly agreed to respond to service calls as needed throughout the demised premises, including the hallways at or near the location of the plaintiff's accident (*see* NYSCEF Doc. No. 167, Collins Exh. T, Supplemental Specifications) (*see Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012]). The evidence indicates that even if FLIK may have been the primary entity responsible for maintaining the accident location during the day, Collins also played a role, at least on occasion. Thus, it cannot be said at this juncture that Collins, as a matter of law, owed no duty to the plaintiff.

Collins has also failed to demonstrate that it lacked actual or constructive notice of the condition which caused the plaintiff's fall. In order to obtain summary judgment on the issue of constructive notice, Collins must demonstrate that there is no evidence from which a jury could reasonably conclude that the condition existed for a sufficient period of time to allow defendants to have discovered and remedied it (*see Wallace v Doral Tuscany Hotel*, 302 AD2d 255 [1st Dept 2003]; *Keum Choi v Olympia & York Water Street Co.*, 278 AD2d 106, 106-07 [1st Dept 2000]. Here, there is nothing in the record to suggest that the condition could not have been discovered by a reasonable inspection of the area. Collins has admitted that it performed inspections of the area and that it would notify others to remedy a spill if such a condition was observed (*see* NYSCEF Doc. No. 161, Collins Exh. N, Prelvukaj Feb. 14, 2017 Tr at 31). Collins has failed to provide any inspection logs, reports or any other documentary evidence that would establish a lack of actual or constructive notice of the defective condition. Nor is there any evidence, such

as maintenance records showing when the floor was last mopped, that would establish that Collins itself could not have created the condition by failing to properly mop or remove excess moisture from the subject hallway. Since the plaintiff claims to have observed a yellow bucket, as well as a warning cone at the opposite end of the hallway from where she fell (*see* NYSCEF Doc. No. 157, Collins Exh. J, Von Saspe Nov. 9, 2015 Tr at 35; NYSCEF Doc. No. 158, Collins Exh. K, Von Saspe Sept. 21, 2018 Tr at 42), there is evidence that the condition could have existed long enough for someone from Collins to have observed and remedied it. Accordingly, in motion sequence 008, the motion for summary judgment is denied.

MOTION SEQUENCE 009

In motion sequence 009, Flik moves for summary judgment. Flik argues that because it is an independent contractor, it does not owe a duty to a third party such as the plaintiff and therefore cannot be liable to her in negligence. Although it is true that a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party, the Court of Appeals has identified three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care to third persons: (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 relied on the contracting party performing its contractual duties, and (3) when the contracting party has entirely displaced the other party's duty to maintain the property (*see Espinal v Melville Snow Contrs.,* 98 NY2d 136, 140 [2002]; *Palka v Servicemaster Mgt. Servs. Corp.,* 83 NY2d 579, 585-586 [1994]). It is Flik’s burden, as the party moving for summary judgment, to show that none of these situations apply to this case (*see Collins v J.P. Morgan Chase & Co.*, 72 AD3d 729 [2d Dept 2010] [denying summary judgment where a moving defendant failed to demonstrate that it “exercised

reasonable care in the performance of its duties and, if not, whether it did not thereby launch a force or instrument of harm."]; *Lopez v New York Life Ins. Co.*, 90 AD3d 446 [1st Dept 2011] [denying summary judgment where the moving defendants could not explain how a hazardous condition occurred].

Here, Flik is alleged to have launched an instrument of harm by creating a hazardous condition on the hallway floor by failing to mop the area properly or adequately. It is clear from the deposition testimony referenced above that Flik regularly maintained, mopped and/or cleaned up spills in the cafeteria area, including in the hallway where the plaintiff fell (*see* NYSCEF Doc. No. 159, Collins Exh. L, Zarro Sept 14, 2016 Tr at 28; NYSCEF Doc. No. 160, Collins Exh. M, Zarro Sept. 25, 2018 Tr at 15-16). While the FLIK representative was not willing to state that his employer bore the ultimate responsibility for maintaining that area, he did acknowledge that FLIK would generally clean any spill that would occur in that area (*Id.*). Accordingly, the complaint against FLIK cannot be dismissed on the ground that it owed no duty to the plaintiff, as there is evidence that FLIK may have launched a force or instrument of harm by negligently mopping or leaving a pool of water in the hallway adjacent to the cafeteria (*see Bruce v Edgewater Industrial Park*, 169 AD3d 753, 754 [2d Dept 2019]; *Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544, 545 [1st Dept 2011]). Accordingly, in motion sequence 009, the motion for summary judgment by defendant Flik is denied.

MOTION SEQUENCE 010

In motion sequence 010, defendants 1285 LLC/JLL move for summary judgment. They claim that as out-of-possession landowners of the subject premises, they owed no duty to the plaintiff and therefore cannot be held liable as a matter of law. The Court agrees. An out-of-possession landlord's duty to repair a dangerous condition on leased premises is imposed by

statute or regulation, by contract, or by a course of conduct (*see Rivera v Nelson Realty, LLC* , 7 NY3d 530, 534 [2006]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 14 [2d Dept 2011]; *Mercer v Hellas Glass Works Corp*., 87 AD3d 987, 988 [2d Dept 2011]). 1285 LLC/JLL have established their prima facie entitlement to summary judgment by establishing that they were out-of-possession landlords that did not retain control over the subject premises and were not contractually obligated to clean or maintain the subject hallway or cafeteria area. Additionally, there is no duty imposed by statute or regulation that obligates the moving defendants, as landlord or managing agents, to repair a transitory condition that occurred on premises under the exclusive control of their tenant, Paul Weiss (*see Mendoza v Manila Bar & Restaurant Corp.*, 140 AD3d 934, 935 [2d Dept 2016]).

In opposition, neither the plaintiff nor any other defendant has raised a triable issue of fact. The fact that the owners maintained an office in the building and hired Collins to perform general maintenance and cleaning in the building is not sufficient to impose a duty on the landlord to clean the subject premises and certainly cannot impose a duty to clean up a spill that they neither created or had any notice of. The terms of the lease agreement between 1285 LLC/JLL and Paul Weiss clearly indicate that 1285 LLC/JLL, through Collins as their agent, only agreed to maintain the structure of the building, common areas and elevators, and perform certain limited services (which do not include mopping) at night within Paul Weiss office space (*see* NYSCEF Doc. No. 209, 1285 LLC/JLL Exh. F, Lease Schedule C). It was for this reason that Paul Weiss entered into a supplemental agreement directly with Collins wherein Collins agreed to perform cleaning services within the leased premises, services that included cleaning floors, mopping and trash removal, and response to service calls (*see* NYSCEF Doc. No. 167, Collins Exh. T, Supplemental Specifications). The landlord was not a party to that supplemental

contract and cannot be said to have assumed a duty to a third party if the contract was not properly performed. Additionally, since the defective condition was non-structural and transitory, 1285 LLC/JLL were not obligated by any statute or regulation to remedy it (*see Wayman v Roy Stanley, Inc.,* 122 AD3d 1119 [3d Dept 2014]; *Boice v PCK Development Co., LLC,* 121 AD3d 1246 [3d Dept 2014]; *Khan v Bangla Motor and Body Shop, Inc.*, 27 AD3d 526, [2d Dept 2006], *lv dismissed* 7 NY3d 864; *McDonald v Riverbay Corp.,* 308 AD2d 345 [1st Dept 2003]). Accordingly, they are entitled to summary judgment. In motion sequence 010, the motion for summary judgment is granted and the complaint is dismissed as against defendants 1285 LLC and Jones Lang Lasalle Americas, Inc.

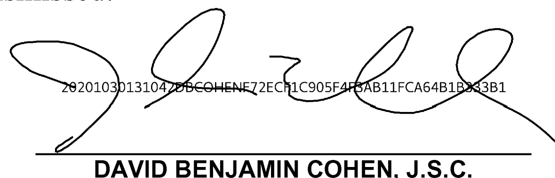
For the reasons set forth herein, it is hereby

ORDERED that defendant Collins' motion for summary judgment is DENIED; and it is further

ORDERED that defendant Flik's motion for summary judgment is DENIED; and it is further

ORDERED that defendant 1285 LLC's motion for summary judgment is GRANTED, and all claims against it are dismissed; and it is further

ORDERED that defendant Jones Lang Lasalle Americas, Inc.'s motion for summary judgment is GRANTED, and all claims against it are dismissed.



10/30/2020
DATE

DAVID BENJAMIN COHEN, 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	