Baguidy v RA 55 CLB LLC
2020 NY Slip Op 35228(U)
November 30, 2020
Supreme Court, Nassau County
Docket Number: Index No. 603226/2016
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 25
Present: Hon. Helen Voutsinas, J.S.C.

---X

MARIJOSE BAGUIDY,

Plaintiff,

Index No.: 603226/2016
Motion Seq. Nos.: 003, 004, 005, 006

-against-

RA 55 CLB LLC, BRITE BUILDING SERVICES, INC., ANGION BIOMEDICA CORP. and NOVAPARK, LLC,

Short Form Order

Defendants.

---X

NOVAPARK, LLC,

Third-Party Plaintiff,

-against-

LABORATORY CORPORATION OF AMERICA AND LABORATORY CORPORATION OF AMERICA HOLDINGS,

Third-Party Defendants.

---X

The following papers have been read on these motions and are consolidated by this Court for a single determination, *sua sponte*, as an exercise of discretion and in order to make "such other orders concerning proceedings therein, as may tend to avoid unnecessary costs or delay." (See, CPLR §602[a]). Their determination is made upon consideration and careful review of the following papers:

Motion Seq. No. 003
Defendant/Third-Party Plaintiff's Notice of Motion, Affirmation, Exhibits..........1
Third-Party Defendants' Affirmation in Partial Opposition, Exhibits................ 2
Defendant/Third-Party Plaintiff's Reply Affirmation.................................. 3
Defendant's Affirmation in Partial Opposition to Third-Party Defendant's Affirmation in Partial Opposition.. 4
Plaintiff's Affirmation in Opposition...5
Defendant/Third-Party Plaintiff's Reply Affirmation.................................. 6

Motion Seq. No. 004
Defendant's Notice of Motion, Affirmation in Support, Exhibits.......................1
Third-Party Defendants' Affirmation in Partial Opposition............................ 2

Defendant's Reply Affirmation..3
Plaintiff's Affirmation in Opposition...4
Defendant's Reply Affirmation..5

Motion Seq. No. 005
Defendant's Notice of Motion, Affirmation, Exhibits,
Memorandum of Law..1
Plaintiff's Affirmation in Opposition...2
Defendant's Reply Affirmation..3

Motion Seq. No. 006
Third-Party Defendants', Affirmation in Support, Exhibits...........................1
Defendant's Partial Affirmation in Opposition...2
Defendant/Third-Party Plaintiff's Affirmation in Opposition, Exhibit...............3
Plaintiff's Affirmation in Opposition...4
Third-Party Defendants' Reply Affirmation, Exhibits.................................5
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Defendant/third-party plaintiff Novapark, LLC (hereinafter "Novapark") moves for an Order (motions seq. no. 003) granting summary judgment pursuant to CPLR §3212 dismissing the complaint and any and all cross claims as against said defendant and compelling third-party defendants Laboratory Corporation of America and Laboratory Corporation of America Holdings (hereinafter, jointly, "Labcorp") to indemnify Novapark and to pay Novapark's defense costs, attorneys' fees and costs incurred in this action. Defendant Brite Building Services, Inc. (hereinafter "Brite") moves for an Order (motion seq. no. 004) granting summary judgment pursuant to CPLR §3212 dismissing the complaint and any and all cross claims as against said defendant. Defendant Angion Biomedica Corp. (hereinafter "Angion") moves for an Order (motion seq. no. 005) granting summary judgment pursuant to CPLR §3212 dismissing the complaint and any and all cross claims as against said defendant. Third-party defendant Labcorp moves for an Order (motion seq. no. 006) granting summary judgment pursuant to CPLR §3212 dismissing all claims and cross claims against third-party defendant and compelling defendant Brite to indemnify Labcorp to indemnify Labcorp in this action. The motions are decided as hereinafter provided.

Factual and Procedural Background

This is a negligence action where the plaintiff, an employee of third-party defendant Labcorp, alleges that she slipped and fell on April 9, 2015 because of water droplets in a hallway within space leased by Labcorp from Novapark in a building located at 51 Charles Lindbergh Boulevard, Uniondale, New York (hereinafter "the building"). Novapark owned the building. Defendant Brite Building was hired by Labcorp to clean the hallways in its rented space. Defendant Angion Biomedica Corp. was the only other tenant in the building, occupying space on the other side of the building from Labcorp.

Plaintiff commenced this action against Novapark, Angion and RA 55 CLB LLC by filing a summons and complaint on May 9, 2016. Plaintiff subsequently commenced another action on September 21, 2016 against Marathon Structured Finance Fund, L.P., Marathon Structured Finance GP, LLC, Marathon Asset Management, L.P. and Marathon Asset Management GP, L.L.C. (hereinafter, jointly and collectively, "the Marathon Defendants") under index number 607381/2016. By Order dated June 12, 2017 (J. Parga), the action was consolidated with this action. By Order dated July 27, 2017 (J. Parga), the Court dismissed all claims and cross claims asserted against the Marathon Defendants, based upon documentary evidence establishing that none of the Marathon Defendants had any relationship whatsoever to the Building since 2011. On September 23, 2019, a stipulation of discontinuance was filed through which all claims and cross claims as against defendant RA 55 CLB LLC were discontinued.

Novapark commenced a third-party action against Labcorp, contending inter alia that Labcorp is liable to Novapark for contractual indemnity and breach of its lease for failure to obtain liability insurance covering Novapark for the claims made against Novapark in this action.

The movants have each submitted voluminous exhibits including copies of the pleadings, transcripts of depositions of plaintiff, Novapark, Brite, Angion and Labcorp, photograph marked at the depositions, and documentary evidence.

To a large extent, the facts relevant to the disposition of the motions are undisputed.

Plaintiff testified as follows. Her accident occurred on April 9, 2015 within a hallway inside the Building. At time of the accident, she was employed by Labcorp as a customer service representative. Labcorp was a tenant in the Building. The accident occurred as she was going to work, sometime before 9:00 a.m. She entered the building while it was raining by using an entrance used solely by Labcorp's employees. Plaintiff walked over a carpet located at the entrance of the building, then walked through a series of hallways, some of which had carpet runners. She slipped and fell in a hallway because of water droplets in the hallway. The accident occurred within Labcorp's space. Plaintiff identified the location of her fall using several photographs marked at her deposition. The floor of the area where plaintiff slipped consisted of vinyl tile. It had rained during her commute to work. Patricia Janovsky, who was a supervisor employed by Labcorp, and Tara Jones, who was one of plaintiff's coworkers, assisted plaintiff immediately after her fall.

Plaintiff testified that prior to her accident, she never complained to anyone about water in the hallway where she fell, nor was she aware of any such complaints. Plaintiff admitted she did not know how long the water that caused her fall had been on the floor before her fall. Although plaintiff testified she had complained about a leaking water fountain prior to her accident, the fountain was nowhere near where plaintiff fell.

Dr. Itzhak Goldberg testified on behalf of Novapark. He testified as follows. Novapark is a limited liability company and that he is a member. His wife, Rina Kurz, and codefendant Angion, are also members of Novapark. Novapark owned the Building on the date of plaintiff's alleged accident. Labcorp leased approximately 58,000 square feet in the building and Angion leased approximately 40,000 square feet. Labcorp and Angion were the only tenants in the Building. Labcorp maintained and cleaned its own space. Novapark did not clean Labcorp's hallways or

maintain and clean Labcorp's carpets and mats. Novapark did not hire Brite to clean Labcorp's space. Novapark handled only roof repairs.

Dr. Goldberg testified further that he is a member of Angion and that Angion had an office in the Building. Novapark's office was located in New Jersey. Joanne Basilio-Johnson was Angion's Office Manager and reported to Dr. Goldberg. If Angion or Labcorp had a roof leak, they would contact Ms. Basilio-Johnson, who would then contact Dr. Goldberg. Dr. Goldberg did not receive any complaints regarding water in Labcorp's hallways.

Joanne Bazilio-Johnson testified at a deposition on behalf of Angion. Ms. Bazilio-Johnson testified that Novapark owned the building and had no cleaning or mopping responsibilities for Labcorp's space. Labcorp was one of two tenants; Angion was the other tenant. Novapark was responsible only for roof leaks; when a leak occurred, Ms. Bazilio-Johnson would transmit information about the leak to Dr. Goldberg. Ms. Bazilio-Johnson did not receive any complaints about slippery floors in Labcorp's hallways.

Labcorp produced Patricia Janovsky for a deposition. Ms. Janovsky testified she was a supervisor at Labcorp and responded to the scene of plaintiff's accident. Ms. Janovsky testified when she arrived at the hallway where plaintiff was situated right after plaintiff's fall, she looked at the floor and it was dry. Ms. Janovsky filled out Labcorp's accident report; the report makes no mention of a wet or dangerous condition because there was none. The hallway at issue was within Labcorp's rented space. Ms. Janovsky testified that Brite mops and maintains Labcorp's hallways. Although there had been a few roof leaks, none were in Labcorp's hallways. Water did not penetrate the roof when it rained. Plaintiff did not fall near the water fountain depicted in one of the photographs.

Brite produced Carlos Guzman for a deposition. Mr. Guzman testified he works for Brite and was responsible for mopping Labcorp's space and hallways on the date of the accident. Mr. Guzman received instructions from Brite. Mr. Guzman testified he does not know who owned the building and was unaware of other alleged falls in Labcorp's hallways caused by a wet floor. Nor was he aware of complaints about a leak in the water fountain.

Tara Jones, a former employee of Labcorp, testified at a deposition pursuant to a subpoena. Although Ms. Jones testified she saw orange sized water puddles in the hallway where plaintiff fell, she admitted she did not know how long the puddles had been present before the accident and was unaware of any complaints about water in the hallway before the accident. Ms. Jones was unaware of any complaints about leaks or drips in the hallway before plaintiff's accident. Ms. Jones had never seen puddles in the hallway before plaintiff's accident nor was she aware of any falls in the area where plaintiff fell.

It is well established that a proponent of a summary judgment motion must make a prima facie case of entitlement to judgment as a matter of law when there are no material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists. (*Id.* at 325; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls

upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc*., 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]).

In deciding a summary judgment motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]), and the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988)]). "[E]ven the color of a triable issue forecloses the remedy". (*Rudnitsky v. Rabbins*, 191 AD2d 488, 489 [2d Dept 1993]. Furthermore, the credibility of the parties is not an appropriate consideration for the Court. (*See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp*., 34 NY2d 338 [1974]).

Motion Seq. No. 003)

Novapark moves for an Order granting summary judgment compelling Labcorp to indemnify Novapark and pay its defense costs, including attorneys' fees and costs, incurred in this action. Novapark relies on the terms of the lease between the parties.

Article 5 of the lease provides:

> 5.01 Throughout the entire term of this Agreement, Tenant shall, at Tenant's sole cost and expense, maintain and repair the structure, exterior and interior of the Building and all of the Demised Premises and all systems installed therein and thereon and shall make all repairs to the Demised Premises at its own cost and expense including, without limitation, to the loading areas, parking areas, electrical lines, air conditioning, sprinkler, sewer, drainage, ventilation, heating, plumbing and all other Building systems, all maintenance and repair of the parking area on the Demised Premises and the driveways servicing same, and shall remove rubbish, snow and ice therefrom as and when necessary, using only contractors approved by Landlord, which approval shall not be unreasonably withheld or delayed.

Article 18 of the lease provides:

> NO SERVICES
>
> 18.01 Landlord shall not be required to furnish any services for the Demised Premises.

Article 8 of the lease provides:

> INSURANCE

> 8.01 Tenant shall throughout the term of this Agreement provide and keep in force the following policies of 9 insurance which comply with the following provision:
>
> * * *
>
> B. Comprehensive general personal injury and property damage liability insurance against claims for bodily injury, death and property damage, including broad form general liability endorsement, and contractual liability during construction of the Building and following its completion, such insurance to afford minimum protection during the term of this Agreement, of not less than ten million ($10,000,000) Dollars combined single limit. Such insurance policy shall name Landlord as additional insured. Such policy will be first dollar coverage on payment of claims or legal defense coverage, without any deductible.

Article 33 of the lease provides, in relevant part:

> A. Tenant does hereby indemnify Landlord and agree to hold it harmless from claims, suits, actions, damages, penalties, costs, liability, obligations and expense, including reasonable counsel fees, suffered or incurred as a result of any . . . failure of tenant to perform or observe any term, provision, covenant, agreement or condition of this Agreement, . . . any ground lease or underlying lease, or any other agreement or instrument to which this Agreement is subject . . . any accident, injury or damage whatsoever, or in connection with loss of life, bodily injury or personal injury . . . arising from or out of any occurrence in, upon, at, near or from the demised premises or the occupancy or use by tenant, Tenant's agents, subtenants, contractors, employees, invitees, licensees, concessionaires, servants or representatives of the demised Premises or any part thereof, or occasioned wholly or in part by any act or omission of Tenant, its agents, subtenants, contractors, employees, servants, invitees, licensees, concessionaires or representatives and tenant . . . Tenant's liability under this Agreement extends to the acts and omissions of any subtenants, agent, contractor, employee, servant, invitee, licensee or concessionaire or representative of any subtenant . . . .
>
> G. In case Landlord shall without fault on its part be made a party to any litigation . . . or an action or proceeding is brought against Landlord by reason of any claim for which tenant has agreed to indemnify Landlord, then Tenant shall indemnify and hold Landlord harmless and shall pay all costs, expenses and reasonable

> counsel fees of such action and shall promptly resist or undertake the defense of such action or proceeding, using attorneys approved by Landlord, at the option of landlord . . . .

Article 13 of the lease provides, in relevant part:

> INSPECTION OF PREMISES BY LANDLORD
>
> 13.01 Tenant agrees to permit Landlord and its authorized representative to enter the Demised Premises at any time in an emergency and at all reasonable times upon reasonable advance notice . . . during usual business hours for the purpose of: A. Inspecting the same for any reason whatsoever with due regard to any business conducted on the Demised Premises; and B. After giving Tenant notice of any defaults by Tenant in performing any of the terms, covenants and conditions of this Agreement and giving Tenant the period to cure such default as set forth in this Agreement, making any repairs to the Demised Premises and performing any work therein that may be necessary by reason of Tenant's default under the terms of this Agreement. Nothing contained herein shall impose any duty upon Landlord to do any such work which under any provisions of this Agreement, Tenant may be required to perform, and the performance thereof by Landlord shall not constitute a waiver of Tenant's default in failing to perform the same.
> . . .

Novapark 's Motion for Summary Judgment Dismissing the Complaint and Cross Claims

In order for a plaintiff to establish a prima facie case of negligence as against Novapark, plaintiff must demonstrate that the defendant owed a legal duty of care to the plaintiff, that Novapark breached that duty, and that the defendant's breach was a proximate cause of plaintiff's injuries. (*Pasternack v. Laboratory Corp. of America Holdings*, 27 NY3d 817 [2016]; *Banca Di Roma v. Mutual of America Life Ins. Co. Inc*., 17 AD 3d 119 [1st Dept 2005]; *Marasco v. C.D.R. Electronics Security & Surveillance Systems Company*, 1 AD3d 578 [2d Dept. 2003]).

Where there is no duty, there is no negligence. (*Martinez v. City of New York*, 90 AD3d 718 [2d Dept 2011]). An out-of-possession landlord is not liable under a negligence theory for injuries that occur within the demised premises unless the landlord has retained control over the premises and has a duty imposed by a statute, or assumed by contract or a course of conduct. and [3] the condition is a significant structural or design defect that violates a specific statutory provision. (*Feraro v. 270 Skip Lane LLC,* 177 AD3d 651 [2d Dept 2019]; *Goggins v. Nido Realty Corp*., 93 AD3d 757 [2d Dept. 2012]; *Alnashmi v. Certified Analytical Group, Inc*., 89 AD3d 10 [2d Dept. 2011]). If a statutory violation is claimed, the alleged defect must be a significant structural or design defect in violation of a specific statutory provision. *Behluli v 228 Hotel Corp.*, 172 AD3d 1151, 1152 [2d Dept 2019]).

Alnashmi v. Certified Analytical Group, Inc., 89 AD3d 10 [2d Dept. 2011] is almost identical to this case. In that case, plaintiff slipped and fell on water in a hallway located within space in a commercial building leased by plaintiff's employer from the property owner. Plaintiff's employer, the tenant, cleaned and repaired the demised premises. The lease granted the landlord a general right to inspect the premises and repair equipment in the demised premises. Plaintiff sued the landlord alleging the landlord was liable under a negligence theory, and the landlord moved for summary judgment. The Second Department held the landlord was entitled to summary judgment and reversed the trial court's denial of the landlord's motion.

In the case at bar, it is undisputed that Novapark, like the landlord in *Alnashmi*, was an out-of-possession landlord and that plaintiff's alleged accident occurred within space leased by her employer. Also undisputed is that Labcorp, not Novapark, was responsible for cleaning, mopping, and maintaining the hallway where plaintiff's alleged accident occurred. Novapark did not assume any such duty to mop, clean, and maintain the hallways within Labcorp's space. Plaintiff does not allege that Novapark is liable because it violated a statutory duty. Nor does plaintiff allege that the water droplets that allegedly caused plaintiff to fall constitute a significant structural or design defect that violated a specific statutory provision. Also, as in *Alshani*, the fact that Novapark, as landlord, retained the right to enter Labcorp's space under certain circumstances, does not equate to control over the premises or create a duty. (See *Alnashmi*, supra, 89 AD3d at 17-18).

The Court finds that Novapark has established its prima facie entitlement to summary judgment dismissing the complaint as against it. In opposition, plaintiff has failed to raise a triable issue of fact.

In her opposition papers, plaintiff fails to dispute any of the relevant facts. Plaintiff does not discuss any of the testimony or documentary evidence or applicable case law. Plaintiff argues only that Dr. Goldberg is a member of Novapark, and that he is also a principal of codefendant Angion, and that this somehow raises an issue of fact regarding Novapark's control over the mopping of Labcorp's rented space. The Court finds no merit to this argument. As such Defendant, Novapark's motion for summary judgment is **GRANTED.**

Novapark 's Motion for Summary Judgment For Indemnification, Costs and Attorneys' Fees from Labcorp.

A party is entitled to full contractual indemnification where the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. (*Great Northern Ins. Co. v. Interior Const. Corp.*, 7 NY3d 412 [2006]; *Hogeland v. Sibley, Lindsay & Cull*, 42 NY3d 153 [1977]; *Brooklyn Union Gas v. Interboro Asphalt*, 303 AD2d 532 [2d Dept 2003]. Where the plain terms of a commercial lease show an intention by a lessee to indemnify a lessor, then the indemnity clause should be enforced. *Bilska v. Truszowski*, 171 AD 3d 685 [2d Dept 2019]; *Campisi v. Gambar Food Corp.*, 130 AD3d 854 [2d Dept 2015]; *Pritchard v. Suburban Carting Corp.*, 90 AD3d 729 [2d Dept 2011].

The case of *Bilska v. Truszowski*, 171 AD 3d 685 [2d Dept 2019] is very similar to the case at bar. In *Bilska*, plaintiff was employed by a restaurant that leased its space from the defendant landlord. Plaintiff sued the landlord for negligence, and the landlord implead the restaurant

contending the restaurant was obligated to indemnify the landlord pursuant to the broad indemnification clause contained in the lease triggered by "any . . . claim . . . arising from the tenant's possession, use, or occupancy of the premises . . . ." The lease also provided that the tenant shall pay the landlord's defense costs. The Second Department granted the defendant-third party plaintiff landlord summary judgment dismissing the plaintiff's complaint and also granted the landlord summary judgment against the tenant for indemnity, attorneys' fees, expenses, costs, and disbursements incurred in the defense of the primary action.

Novapark argues that the lease provisions here are clear and undisputable, that the plain language of the indemnity clause set forth in Article 33, together with the clause in Article 8 that obligated Labcorp to obtain liability insurance that covers Novapark for claims such as those made by plaintiff in this action, clearly demonstrates Labcorp's intent and obligation to indemnify Novapark in this action.

In opposition to the motion, Labcorp does not dispute that the accident occurred in a hallway within its leased portion of the Building, or that Labcorp hired defendant Brite to clean and mop the hallway. Labcorp argues that indemnification provision of the lease is only triggered when there is negligence found on the part of Labcorp.

The Court finds that Labcorp's argument is based on an incorrect reading of the indemnification provision set forth in Article 33 of the lease. Under the provision, the duty to indemnify is triggered in any one of four (4) instances [1] Labcorp fails to "perform or observe" a provision in the lease or [2] an accident occurs causing personal injuries "arising from or out of any occurrence in . . . the demised premises" or [3] an accident occurs causing personal injuries "arising from . . . the occupancy or use by tenant, tenant's agents, . . . employees . . . of the demised premises" or [4] an accident occurs causing personal injuries "occasioned wholly or in part by any act or omission of Tenant, its agents, . . . contractors, employees . . . ."

Only the fourth category involves negligence on the part of Labcorp. Here, even if Labcorp (or its contractor) is not found to have been negligent, the obligation to indemnify clearly arose under each of the first three (3) categories. Labcorp's argument to the contrary is totally devoid of merit.

Labcorp also argues that it contracted with defendant Brite to mop and clean the hallways of its space, and refers to the indemnity clause in Labcorp's contract with Brite. Labcorp suggests that Brite's indemnity obligation to Labcorp somehow nullifies Labcorp's obligation to indemnify Novapark. Labcorp offers no legal authority in support of this argument, and the Court finds it to be meritless. Indeed, the fact that Labcorp hired Brite to mop the hallway at issue is further indicative that Labcorp was responsible for cleaning and mopping the hallway.

Accordingly, defendant/third-party plaintiff Novapark LLC's motion for summary judgment dismissing the complaint and any cross claims against said defendant is **GRANTED**. Novapark's motion for summary judgment compelling third-party defendants Laboratory Corporation of America and Laboratory Corporation of America Holdings, is **GRANTED**, to the extent a hearing is ordered with respect to attorney fees, costs and expenses to be awarded to the plaintiff.

Motion Seq. No. 004

Defendant Brite Building Services, Inc. moves for an Order granting summary judgment pursuant to CPLR §3212 dismissing the complaint and any and all cross claims as against said defendant.

In support of the motion, Brite submits, inter alia, the parties' deposition transcripts, as well as the affidavit of Daniel Lorenzo, Brite's executive vice president. Brite argues that it is entitled to summary judgment on several grounds, including that the water plaintiff complained of came from an ongoing rainstorm, the condition was open and obvious, mats were in place, plaintiff has failed to establish notice, and Brite owed no duty to plaintiff. Brite also points to instances of apparent inconsistencies in plaintiff's testimony.

"To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries." *Coral v State of New York*, 29 AD3d 851, 851 [2d Dept 2006]. Where the plaintiff fails to establish a duty of care, there is no breach and no liability. *Schindler v Ahearn*, 69 AD3d 837, 838 [2d Dept 2010].

There are three situations where a party who enters into a contract assumes a duty of care and can therefore be potentially liable 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 relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]).

Brite argues that none of the exceptions set forth in *Espinal* apply here. However, plaintiff testified that she knew Brite was the maintenance company for Labcorp, and that she knew Brite employee, Carlos Guzman, who she observed mopping and cleaning the Labcorp area, and who she would inform if she observed a spill on the floor.

It is undisputed that Labcorp contracted with BRITE as the exclusive maintenance company for the premises with the specific duty to mop and maintain the hallways of the LabCorp space. The contract provided, inter alia, that "[Brite] will provide Cleaning Services to [Labcorp] 6 days each week, such days to be Monday - Saturday, 24 hours per day." Attached to the contract as part of "Exhibit A" was a schedule setting forth the specific obligations with regard to hallways:

CORRIDORS AND HALLS

A. Daily Work Schedule
1. Dust mop or sweep floors.
2. Remove all debris and items identified as trash.
3. Clean and sanitize water fountains, if any.
4. Remove specimen boxes and sponge spacers. Check

sponges spacers for specimen containers. Contact your Supervisor if specimens are found.
5. Remove and breakdown cardboard for removal by outside CONTRACTOR, if applicable.
6. Spot clean walls and interior glass,
7. Mop all floors.
8. Vacuum carpeted halls and corridors, if any.
9. Remove any cobwebs.

B. Weekly Work Schedule
1. Dust railings, etc, as needed.
2. Spot clean carpet, if any.
3. Clean ledges, window sills and door entrances.
4. Sweep and mop tile floors.
5. Spray buff tile floors, minimum of three times per week.

C. Monthly Work Schedule
1. Dust all vents and returns.
2. Clean wall mounted appurtenances and fixtures.

D. Semiannual Work Schedule
1. Clean walls as necessary
2. Strip and wax floors.

Viewing the facts in a light most favorable to plaintiff as the nonmoving party, the Court finds that plaintiff has alleged facts that raise the possible applicability of the *Espinal* exceptions. Accordingly, Brite, in order to establish its prima facie entitlement to judgment as a matter of law, was required to eliminate all triable issues of fact related thereto. (*Santos v Deanco Services, Inc.*, 104 AD3d 933, 934 [2d Dept 2013]).

"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 neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." (*Birnbaum v New York Racing Ass'n, Inc*., 57 AD3d 598, 598 [2d Dept 2008]).

Plaintiff testified that she observed footprints on the floor prior to falling which were brownish, and that there were no wet floor signs in the area of her accident. Brite's employee, Carlos Guzman, testified that he mopped the floors once a day, in the morning, sometime between 6:30 a.m and 8:30 a.m. There was no specific set time to mop. He did not keep any records of when he performed his mopping duties.

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]). Brite cites to *Gordon*, and argues that it had no actual or constructive notice of any wet condition, that there was no evidence that Brite knew or should have known there was water on the floor.

To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*Birnbaum v New York Racing Ass'n, Inc*., 57 AD3d 598, 598-99 [2d Dept 2008]). "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" (*Johnson v 101-105 S. Eighth St. Apartments Hous. Dev. Fund Corp*., 185 AD3d 671 [2d Dept 2020], citing *Herman v. Lifeplex, LLC,* 106 AD3d 1050, 1051 [2d Dept 2013]. Here, Brite failed to meet this burden.

Brite points to plaintiff's testimony that she saw marks on the floor and brownish footprints, and water, and she walked more carefully because she saw the water. Accordingly, Brite argues, the condition was open and obvious and readily observable. However, this argument also works against Brite, as it raises the question of how long this readily observable condition alleged by plaintiff existed and went undetected by Brite and/or Labcorp.

Brite also argues that, as plaintiff testified that it was raining as she drove to work, any water condition was produced by an ongoing rainstorm. Accordingly, Brite cites to cases which hold that defendants are not required to cover all their floors with mats or to continuously mop up moisture resulting from tracked in precipitation. However, in the case at bar, it is undisputed that the alleged accident occurred after plaintiff had traversed well into Labcorp's space, having walked through an entrance area, and then at least two (2) hallways. While it is unclear exactly how far she walked before the incident, what is apparent is that accident did not take place in the lobby, vestibule or entranceway, or immediately beyond such point, as in the cases cited. (See *Garcia v. Delgado Travel Agency*, 4 A.3d 204 [1st Dept 2004]; *Negron v. St. Patrick's Nursing Home*, 248 AD2d 687 [2d Dept 1998]; *Dubensky v. 2900 Westchester Co*., 27AD3d 514 [2d Dept 2006]; *Gonzales-Jarrin v. NYC Dept. of Ed*., 50 AD3d 334 [1st Dept 2008].

As to the truthfulness and accuracy of testimony, whether contradicted or not, credibility of witnesses, and the significance of weaknesses and discrepancies are all issues for the trier of fact (*Pedone v. B&B Equipment Co., Inc*., 239 AD2d 397 [2d Dept 1997]).

The Court, having carefully reviewed and considered the evidence submitted, drawing all reasonable inferences in favor of the nonmoving party and construing the evidence in a light most favorable to the nonmoving party, as it must, finds that triable issues of fact exist precluding summary judgment in favor of defendant Brite.

Accordingly, defendant Brite Building Services, Inc.'s motion for summary judgment dismissing the complaint and any cross claims against said defendant is **DENIED**.

Motion Seq. No. 005

Defendant Angion Biomedica Corp. (hereinafter "Angion") moves for an Order granting summary judgment pursuant to CPLR §3212 dismissing the complaint and any and all cross claims as against said defendant.

The undisputed evidence in the form of testimony and documentary evidence shows that Angion did not own the Building and had no involvement whatsoever in the maintenance or repair of Labcorp tenant space. It was not a party to the contract LabCorp entered into with Brite Building as regards cleaning services to be undertaken in LabCorp's tenant space. Angion is simply a tenant in the same building in which LabCorp also has tenant space, occupying space separate and apart from that of LabCorp. It is undisputed that the accident at issue occurred in LabCorp's tenant space and not in that of Angion. Angion had no obligations in regard to the maintenance or repair of LabCorp's tenant space. Angion owed no duty to the plaintiff. It did not create the water condition alleged and had no actual or constructive notice of same.

The Court finds that Angion has established its prima facie entitlement to summary judgment dismissing the complaint and any and all cross claims as against it. In opposition, plaintiff has failed to raise a triable issue of fact.

As a tenant in the building, Angion did not owe a duty to the plaintiff unless it created or contributed to the dangerous condition complained of. (See *Hennessy v Palmer Video*, 237 AD2d 571 [2d Dept 1997]). There is no proof that anyone employed by Angion was in the LabCorp tenant space on the date of the alleged accident and no proof that anyone employed by Angion carried an umbrella into the LabCorp tenant space or in any way created or contributed to the rain water condition alleged. As Angion did not create or contribute to the dangerous condition complained of, as a tenant in the building it owed no duty to the plaintiff and cannot be liable to the plaintiff herein.

In her opposition papers, plaintiff fails to dispute any of the relevant facts. Plaintiff does not discuss any of the testimony or documentary evidence or applicable case law. Plaintiff asserts only that Dr. Goldberg is a member of Novapark, and that he is also a principal of codefendant Angion, that Angion is a member of Novapark. Plaintiff maintains that the motion should be denied as there are questions of fact regarding the nature of the relationship between these defendants, a duty owed to plaintiff and the interpretation of the contracts involved. The Court finds no merit to plaintiff's argument.

Accordingly, defendant Angion Biomedica Corp's motion for summary judgment dismissing the complaint and any cross claims against said defendant is **GRANTED**.

Motion Seq. No. 006

Third-party defendant Labcorp moves for an Order granting summary judgment pursuant to CPLR §3212 dismissing all claims and cross claims against Labcorp and compelling defendant Brite to indemnify Labcorp in this action.

In support of its motion for summary judgment as against Brite, Labcorp relies upon the terms of the contract between the parties. Labcorp cites to paragraph "X" of the contract, which provides:

> INDEMNIFICATION. CONTRACTOR shall defend, indemnify and hold CLIENT, its parents, subsidiaries and affiliates wholly

> harmless from and against any and all liabilities, awards, judgments, losses, costs, damages, attorneys fees, and expenses caused by or arising out of the negligence or willful misconduct of CONTRACTOR or any of CONTRACTOR's employees or representatives during performance by said personnel of Cleaning Services for CLIENT or the presence of said personnel on the premises of CLIENT. The obligation of CONTRACTOR to defend, indemnify and hold Client wholly harmless against claims, actions, suits, and proceedings in which CONTRACTOR's personnel, parent, subsidiaries, affiliated and related companies, directors, officers, employees, agents or their representatives claim compensation, benefits or damages for personal injuries, including death or property damage caused by or arising out of the performance by said personnel of Cleaning Services for CLIENT or the presence of said personnel on the premises of Client, shall not be affected, but shall continue in full force, unless said personal injuries or property damages were caused by or arose out of the sole negligence of the CLIENT.

LabCorp argues that it contracted with Brite to provide 24 hour cleaning services six days a week, that Brite was responsible for maintaining and mopping the subject hallway, and that Brite Buildings failed its duty to LabCorp and caused plaintiff's injury. Accordingly, Labcorp argues that Brite is obligated to indemnify LabCorp pursuant to the indemnification clause in the contract, as well as under common law indemnification and contribution.

The indemnification provision contained in Labcorp's contract with Brite is more limited than the broad indemnification clause contained in the lease between Novapark and Labcorp. This clause is limited to "liabilities, awards, judgments . . . caused by or arising out of the negligence or willful misconduct of [Brite]". Accordingly, for the obligation to indemnify to be triggered, there must first be a finding that Brite was negligent. No such finding has yet been made.

In addition, there is conflicting testimony from Labcorp's own witness as to whether Brite was responsible for cleaning up situations such as the one at issue. Ms. Janovsky testified that if she saw such a problem, she would call Will, a LabCorp employee. Ms. Janovsky testified that LabCorp employees clean up spills. Mr. Guzman, Brite's employee, testified that when a water fountain leaked, he called Will from LabCorp.

Accordingly, the Court finds that triable issues of fact exist precluding summary judgment. Third-party defendants Laboratory Corporation of America and Laboratory Corporation of America Holdings' motion for summary judgment as against defendant Brite Building Services, Inc. is **DENIED.**

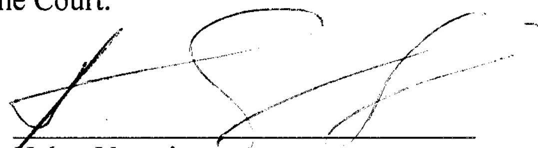
In light of the Court's granting defendant/third-party plaintiff Novapark's motion for summary judgment as against Labcorp, Labcorp's motion for summary judgment, to the extent it seeks dismissal of the third-party complaint, is also **DENIED.**

Any other relief sought herein but not specifically ruled upon is **DENIED.**

The case is presently scheduled for a Pre-Trial Conference on March 16, 2021, in the Calendar Control Part. Due to the ongoing coronavirus pandemic and potential changes in Court operations, the parties should monitor for changes in the status of the next scheduled appearance on the Court's website.

This constitutes the Decision and Order of the Court.

Dated: November 30, 2020
Mineola, NY



Helen Voutsinas
Justice of the Supreme Court

ENTERED
Dec 09 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE