

**N'Jie v RXR Po Owner LLC**

2022 NY Slip Op 33607(U)

October 21, 2022

Supreme Court, New York County

Docket Number: Index No. 151047/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

-----X

MIGNONE N'JIE,

Plaintiff,

- v -

RXR PO OWNER LLC, ABM INDUSTRIES
INCORPORATED, and ABM INDUSTRIES, INC.,

Defendants.

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INDEX NO. 151047/2018

MOTION DATE 05/03/2021,
05/06/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 89, 91, 98, 99, 100, 101, 102, 103, 104, 105, 106, 113, 114, 115, 116, 117, 120, 121, 122, and 125

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 92, 93, 94, 95, 96, 97, 107, 108, 109, 110, 111, 112, 118, and 119

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that the defendants' motions for summary judgment (Motion Seq. Nos. 002, 003) are consolidated and decided in accordance with the follow memorandum.

Background

In this action, plaintiff, Mignone N'Jie ("Plaintiff") asserts a negligence cause of action against RXR Po Owner LLC and ABM Industries ("RXR" and "ABM," respectively) for an alleged slip and fall. Defendants now separately move for summary judgment dismissing the complaint against them, and ABM additionally moves for summary judgment dismissing all cross-claims.

RXR owns the building located at 450 Lexington Avenue (NYSCEF Doc. No. 62 ¶ 39). ABM has a service contract with RXR to provide cleaning, janitorial, and porter service to the building (NYSCEF Doc. No. 57, NYSCEF Doc. No. 62 ¶ 40). Non-party Herbert Smith Freehills LLP – a law office – is a subtenant occupying the entirety of the 14<sup>th</sup> floor (NYSCEF Doc. No. 62 ¶ 43). Plaintiff was employed by Herbert Smith Freehills LLP as an Executive Assistant to the managing partner (NYSCEF Doc. No. 45 ¶ 19).

At approximately 5:00 p.m. on October 3, 2017, Plaintiff walked into the restroom servicing said law office, pushing the door open, and slipped (NYSCEF Doc. No. 47 [Plaintiff's EBT] at 143-144). Plaintiff was wearing three-to-four-inch stiletto high-heeled shoes at the time (NYSCEF Doc. No. 46 [Plaintiff's EBT] at 104-105). Plaintiff “fell backwards” and while “trying to get up [she] fell on [her] side, on [her] left knee, on [her] left side” (NYSCEF Doc. No. 47 at 146-147). Plaintiff testified that she fell a second time while trying to get up because it was “slippery” and “there was water everywhere” (NYSCEF Doc. No. 47 at 148). Plaintiff testified that she first noticed the water on the floor after she fell and describes there being a “flood of water” on the floor “like somebody threw a bucket of water” (NYSCEF Doc. No. 47 at 153-154).

After Plaintiff had gotten up off the floor, an attorney at said law firm, Laura Poliani, walked in (NYSCEF Doc. No. 47 at 161). Plaintiff told Ms. Poliani about her fall and warned Ms. Poliani about the hazard (*id.* at 162). After leaving the restroom, Plaintiff notified the firm's Human Resource representative, Anna Andriani, about her fall (*id.* at 163, 165). Plaintiff then had a brief conversation about the fall with the firm's office services manager, Jeffrey Dotel, before going home (*id.* at 166, 178).

Plaintiff states that when she returned to her home in Kinnelon, New Jersey, her left ankle and leg were swollen, and she visited the emergency room at Chilton Hospital (NYSCEF Doc. No. 47 at 184-187). There, emergency room personnel diagnosed Plaintiff with a sprained left ankle and knee, as well as a contusion (NYSCEF Doc. 47 at 192). Plaintiff was fitted for crutches and given pain medication and an ace bandage (*id.* at 193-194). Plaintiff later began physical therapy and cortisone injections for her injuries (*id.* at 211).

A week after the accident, Plaintiff states that Jonah Rodriguez, an employee of ABM, approached her to apologize (NYSCEF Doc. No 47 at 154-157). Plaintiff states that Rodriguez told her that “he just finished mopping,” but he did not tell her the time (NYSCEF Doc. No. 47 at 159). He indicated that he was recently hired to clean the restroom and that ABM “didn’t give him any caution sign and tell him exactly what to do” (NYSCEF Doc. No 47 at 154-157). Based on the floor being wet and Rodriguez’ apology, Plaintiff testified that she believes that the floor was mopped prior to her walking into the restroom (NYSCEF Doc. No 47 at 154-157). However, it is disputed whether ABM had mopped the floor prior to Plaintiff’s accident. Ms. Zoja Jakaj, an ABM supervisor, was notified of the accident and went to the restroom to see what had occurred (NYSCEF Doc. No. 49 [Jakaj EBT] at 13). While at the elevator, Jakaj saw Rodriguez and Rodriguez told her that he took care of a clog in the restroom (NYSCEF Doc. No. 49 at 57). When Jakaj entered the restroom, she saw “a few drops of water. Nothing major” (NYSCEF Doc. No. 49, 14:3-4). Diego Leon, a project manager for ABM, went to the restroom with Jakaj (NYSCEF Doc. 50). Leon testified that the floor “was not wet” and took pictures at approximately 5:05 p.m. (NYSCEF Doc. 50 [Leon EBT] at 25-27). Leon was told that Rodriguez “did what we always do. He unclogged the toilet, mopped the floor, and he left when

it was right” (NYSCEF Doc. No. 50, 29:13-16). It is unclear what time Rodriguez unclogged the toilet and mopped the floor.

Plaintiff testified that there was no signage outside the restroom to indicate it had been cleaned recently or that there was wetness (NYSCEF Doc. No. 47 at 144). Terrance Fraser, the commercial property manager for RXR, testified that “general practice” is for ABM to place wet floor signs around areas after cleaning (NYSCEF Doc. No. 48 [Fraser EBT] at 47-48).

### **Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party’s evidence as true (*Hotopp Assocs. Ltd. v Victoria’s Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

### **Discussion**

#### **ABM**

ABM moves for summary judgment dismissing the negligence claims against it. “Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property” (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710 [2d Dept 2012]). ABM contracted with RXR to provide maintenance services for the building. ABM argues that it cannot be held liable for negligence because it owed no duty of care to Plaintiff given that Plaintiff is not a party to the contract

(NYSCEF Doc. No. 61 [ABM's Mem.]). However, the Court of Appeals has outlined three instances in which there can be tort liability toward a nonparty to a defendant's contract:

- (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, 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].)

Turning to the first instance described in *Espinal*, a trier of fact might find that ABM "launched a form of harm" when its employee, Rodriguez, did not put a wet floor sign outside of the restroom, or otherwise caused a slippery condition to be present without proper warning just prior to Plaintiff's fall. "Slippery conditions created by defendants in the course of cleaning a premises can give rise to liability" (*DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486 [1<sup>st</sup> Dept 2014]). *DiVetri* held that a jury could reasonably conclude that a cleaning contractor created a dangerous condition by hosing down a sidewalk outside of a building and not taking precautions to prevent the water from entering the building, creating a slippery floor. At issue here is whether the restroom had been mopped prior to the plaintiff's fall. Plaintiff asserts the floor was wet and that Rodriguez later told Plaintiff that he had mopped, but he did not place caution signs at the area. Leon and Jakaj testify that the floor had a few drops of water. On the way to observe the condition of the restroom after Plaintiff's fall, Rodriguez told Jakaj he had taken care of the clogged toilet. Leon testified that he was told that Rodriguez unclogged the toilet and mopped the floor. Plaintiff asserts that there was water everywhere. Based on the conflicting testimony, it is unclear from the record what the condition of the restroom was in the absence of cautionary signage; hence, it is possible that ABM created a dangerous condition giving rise to liability (*Espinal, supra*). Thus, summary judgment in favor of ABM cannot be granted.

**RXR**

RXR also moves for summary judgment dismissing the negligence claims against it, focusing on the assertion that it is an out-of-possession landlord (NYSCEF Doc. No. 88 at 2). RXR leased the entire 14<sup>th</sup> floor, where the accident occurred, to sublandlord Davis Polk & Wardwell LLP, which then subleased it to Plaintiff's employer, Herbert Smith Freehills LLP (NYSCEF Doc. No. 88 at 5). The negligence liability rule for an out-of-possession landlord is as follows:

An out-of-possession landlord is generally not liable for negligence with respect to the condition of property unless it is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.

(*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 525 [1st Dept 2017].)

The lease between RXR and Davis Polk & Wardwell LLP provides: "Tenant shall keep the Premises (excluding those portions of the Building systems which constitute part of the Tenant Special Requirements, the Tenant Work or Alterations) in good condition, reasonable wear and tear" (Lease, NYSCEF Doc. 60 ¶ 4.05). It further provides that "upon the reasonable advance request of Tenant, cleaning services in addition to the cleaning services specified in Exhibit G" is a "Special Tenant Service" (Lease, NYSCEF Doc. No. 60 at 105). Within Exhibit G to the lease, RXR obligates itself to a variety of cleaning responsibilities, including the responsibility to "damp mop floors where spillage occurred" as necessary (NYSCEF Doc. No. 126 at 2). Therefore, RXR may be held liable for negligence since it is "contractually obligated to make repairs and/or maintain the premises" (*Sapp, supra*). Thus, summary judgment in favor of RXR cannot be granted.

### Other Factors Relevant to Denial of Summary Judgment

Given ABM and RXR can possibly be held liable as aforementioned, Plaintiff “must show that the defendant either created a dangerous condition or had actual or constructive knowledge of the condition” (*Segretti v Shorestein Co., E., L.P.*, 256 AD2d 234, 234 [1st Dept 1998]). In *Segretti*, the court held “the mere existence of a foreign substance, without more, is insufficient to support a claim of negligence” where the plaintiff noticed an oily substance on the bottom of his shoes after he slipped and fell in the lobby of an office building. The plaintiff did not know how long the substance was on the floor or how the substance had been on the floor.

Similarly here, Plaintiff did not immediately observe anything on the floor before falling; but rather, noticed water on the floor after she fell (NYSCEF Doc. No. 88 at 145, 152). Plaintiff did not know how long the water was on the floor and speculates that it was from mopping after ABM employee, Jonah Rodriguez, said he mopped without specifying the time (NYSCEF Doc. No. 88 at 345, 331). As previously discussed, a “force or instrument of harm” may have been created by ABM employee Rodriguez mopping the bathroom after fixing a clogged toilet and failing to post appropriate signage (*Espinal, supra*). Rodriguez, acting on behalf of ABM and thus RXR, may have created a dangerous condition leading to Plaintiff’s fall.

Turning to whether there was actual or constructive knowledge of the condition, it is unclear as to whether ABM and RXR had actual or constructive knowledge. When asked if she knew of any problems with the toilets, Plaintiff stated: “Not that I’m aware of” (NYSCEF Doc. No. 47 at 325). However, Leon, ABM’s project manager, testifies that that there are “many spills and clogs, toilets always at least two or three a day” (NYSCEF Doc. No. 50 at 22). Given the frequency of spills in the bathrooms and testimony from Rodriguez that he did not have the

proper signage to post after mopping the floor, it is possible that there was actual or constructive knowledge of the condition by ABM employees of the condition.

Given the genuine issues of material facts as to how the floor became wet, allegedly causing Plaintiff's fall, summary judgment on behalf of ABM and/or RXR is inappropriate (*see, Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

ABM also moves for summary judgment dismissing all cross-claims. However, there are only affirmative defenses and no cross-claims asserted in RXR's answer (NYSCEF Doc. 5). The court, therefore, denies the motion as there is nothing to dismiss.

Accordingly, it is hereby

ORDERED that the defendants' motions for summary judgment are denied.

This shall constitute the decision and order of the court.

ENTER:

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|---------------------------|--------------------------|----------------------------|--|--------------------------|--|
| <u>10/21/2022</u><br>DATE |                          |                            |  |                          | <u>LOUIS L. NOCK, J.S.C.</u>                             |
| CHECK ONE:                | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/>        | NON-FINAL DISPOSITION    |  |
|                           | <input type="checkbox"/> | GRANTED                    | <input checked="" type="checkbox"/> DENIED | <input type="checkbox"/> | GRANTED IN PART <input type="checkbox"/> OTHER           |
| APPLICATION:              | <input type="checkbox"/> | SETTLE ORDER               |  | <input type="checkbox"/> | SUBMIT ORDER   |
| CHECK IF APPROPRIATE:     | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN |  | <input type="checkbox"/> | FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |