

Potts v YMCA of Greater N.Y.

2022 NY Slip Op 34916(U)

November 23, 2022

Supreme Court, Kings County

Docket Number: Index No. 515633/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of November, 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
ROBERT POTTS,

Index No.: 515633/2017

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequence #6, #7

YMCA OF GREATER NEW YORK d/b/a PROSPECT PARK, YMCA, YOUNG MEN’S CHRISTIAN ASSOCIATION OF GREATER NEW YORK, COMMUNITY HOUSE HOUSING DEVELOPMENT FUND COMPANY, INC., COMMUNITY HOUSE PROSPECT PARK YMCA AND DNB PROPERTY MANAGEMENT, INC. d/b/a METRO MAINTENANCE,

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	120-143, 145-151,
Opposing Affidavits (Affirmations).....	153-154, 169-170, 175-176,
Reply Affidavits (Affirmations)	163-168, 181, 182-183,
Memorandum of Law.....	119, 144, 152, 155, 171, 177

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After a review of the papers and oral argument the Court finds as follows:

The instant action concerns an alleged slip and fall incident that occurred on June 20, 2017.

On that day the Plaintiff, Robert Potts (hereinafter “the Plaintiff”) allegedly injured himself when he slipped on an indoor running track located at 357 9th Street, Brooklyn, New York (hereinafter “the Premises”).

Defendant YMCA of Greater New York (d/b/a Prospect Park YMCA, Young Men's Christian Association of Greater New York and Community House Housing Development Fund Company, Inc.) (hereinafter referred to collectively as the "YMCA") now moves (motion sequence #6) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint as against it. The YMCA argues that the instant matter should be dismissed as against it because it did not create the slippery condition that purportedly caused the Plaintiff's accident and it did not have actual or constructive notice of the alleged dangerous condition. Specifically, the YMCA contends that any wet condition on the track was transitory and likely caused by an employee of the independent contractor that was hired to clean the Premises. YMCA also seeks summary judgment on its cross-claims for indemnification and contribution.

Defendant Perfects Synergy, Inc. (d/b/a Metro Maintenance, (s/h/a DNB Property, d/b/a Metro Maintenance) (hereinafter referred to as "Metro") also moves (motion sequence #7) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint as against it. Metro argues that it did not owe a duty to the Plaintiff in its role as a third-party contractor. Defendant Metro further argues that it did not cause the alleged condition and contends that the condition was caused by leaks from a rainy night before the day of the accident. They argue that the leak/water condition was, therefore, YMCA's responsibility to address.

The Plaintiff opposes both motions. In opposition to the motion by the YMCA, the Plaintiff argues that YMCA has failed to meet its *prima facie* burden as there is evidence that the alleged dangerous condition at issue was caused by chronic water leaks from the ceiling above the indoor track. The Plaintiff further argues that there are issues of fact as to whether the alleged wet condition came directly from the ceiling or whether it was caused by water spilling from buckets used to collect the water from the leaks. In opposition to the motion (motion sequence #7) by

Defendant Metro, the Plaintiff argues that there are issues of fact as to whether Metro was responsible for the alleged condition. The Plaintiff maintains that there remains a question of whether one of Metro's employees had mopped the track prior to the accident or Metro otherwise caused water from a bucket to spill on the track.

Metro Maintenance also opposes the motion by the YMCA and argues that Defendant YMCA has failed to meet its *prima facie* burden as there is evidence that there was a history of water leaks from the ceiling in the area of the accident. Additionally, Defendant Metro contends that its employees did not mop or otherwise clean the subject area prior to the Plaintiff's accident and the condition was created by the leaks coming from the ceiling.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’ ” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing

papers. *See Demshick v. Cmty. Rous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

Generally, in a slip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005]. The movant can meet this burden by submitting testimony concerning when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.*, 75 AD3d 629, 630, 906 N.Y.S.2d 299 [2d Dept 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2d Dept 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2d Dept 2008].

Turning to the merits of the instant motion, the YMCA (motion sequence #6) has failed to sufficiently show by testimony or other evidence that it “neither created the allegedly dangerous condition” ... nor “...had actual or constructive notice of it.” *Hudlin v. Epicurean Deli*, 46 AD3d 752, 847 N.Y.S.2d 479 [2d Dept 2007]. The YMCA argues that it did not have actual or constructive notice of the alleged unsafe water condition on the indoor track because it was not a recurrent condition and was likely the result of inappropriate mopping by an employee of independent contractor Defendant Metro. In support of its motion, Defendant YMCA relies primarily on the deposition of the Plaintiff, the deposition and affidavit of Shakila Monk, the deposition of Tiffany Dunbar, the deposition of Cesar Escobar-Cuevas, the deposition of Joel Claude, and emails, documents, photographs and a video.¹

¹ It should be noted that the video does not reflect anything material to this motion.

When asked how the accident occurred, the Plaintiff stated that “I took three or four steps to the edge of the track, stepped onto the track and immediately fell and broke my ankle.” (See YMCA’s Motion, Exhibit “E”, Page 31) When asked if a bucket was present in the room when the accident occurred, the Plaintiff stated that “[t]he bucket was there, yes, it was, I did not notice it until after the accident.” (See YMCA’s Motion, Exhibit “E”, Page 33). When asked to describe the subject area, the Plaintiff stated that “[t]he track is a banked track, and so you walk to the edge of the floor and then the track banks down and you step onto the track.” (See YMCA’s Motion, Exhibit “E”, Page 35) When asked what occurred when he stepped onto the track, the Plaintiff again stated, “I took the step onto the track and I immediately slipped and fell, and there was a crack like a rifle shot when my bone broke, my bones broke.” (See YMCA’s Motion, Exhibit “E”, Page 37).

When asked what her position was while she was employed by YMCA at the Premises, Tiffany Dunbar stated “[a]ssociate executive director.” (See YMCA’s Motion, Exhibit “G”, Page 9). When asked what her job duties were at that time, Ms. Dunbar stated “[m]y job duties were I over saw the directors of the healthy lifestyles department, — membership, aquatics, new Americans, and I'm missing one, youth and family, sorry, membership, aquatics, healthy lifestyles, new Americans...” (See YMCA’s Motion, Exhibit “G”, Page 11). When asked if there was a separate management company for the Premises during the time of her employ at the Premises, Ms. Dunbar stated, “[n]ot to my knowledge.” (See YMCA’s Motion, Exhibit “G”, Page 14). When asked what her hours were, Ms. Dunbar stated, “[o]n a typical week, I would work Monday through Fridays; on average, start 9:30 to 10:00, and end the day minimum 6:00, sometimes later.” (See YMCA’s Motion, Exhibit “G”, Page 16). When asked if there were instructions given to the maintenance workers on how to perform their job duties, Ms. Dunbar stated “[t]hat’s not my department, so I don't know.” (See YMCA’s Motion, Exhibit “G”, Page 19).

When asked what her position at the YMCA was in relation to the Premises, Shakila Monk stated “[p]roperty director.” When asked how long she has been in that position she stated, “[s]ixteen years.” (See YMCA’s Motion, Exhibit “H”, Page 10). When asked what her responsibilities had been in this position, Ms. Monk stated “[s]afety, security, job compliance, code compliance, cleanliness, mechanical infrastructures, anything to do with safety and security of the facility.” (See YMCA’s Motion, Exhibit “H”, Page 10). When asked what locations she covered, she stated “[t]he Prospect Park YMCA and the Prospect Park Armory.” (See YMCA’s Motion, Exhibit “H”, Page 12). When asked how often she would visit each location, she stated “[d]aily.” (See YMCA’s Motion, Exhibit “H”, Page 13). When asked who she supervised, Ms. Monk stated “[b]uilding engineer, security, maintenance mechanic and porters.” (See YMCA’s Motion, Exhibit “H”, Page 20). When asked if she had ever noticed a water leak on the indoor track prior to the Plaintiff’s accident, Ms. Monk stated “[n]o.” (See YMCA’s Motion, Exhibit “H”, Page 56) However, when asked if there ever had been a water leak on the second floor of the Premises prior to the Plaintiff’s accident, Ms. Monk stated “[y]es.” (See YMCA’s Motion, Exhibit “H”, Page 57) She stated that the leak started “[w]hen we installed the HVAC units.” (See YMCA’s Motion, Exhibit “H”, Page 57). Ms. Monk stated that the water from the HVAC system would go on the floor of the track area, at “[t]he carpet portion.” (See YMCA’s Motion, Exhibit “H”, Page 59). However, when asked if that location was near to where the Plaintiff slipped or somewhere else, Ms. Monk stated, “next to the window that would be facing the 8th Street sidewalk.” (See YMCA’s Motion, Exhibit “H”, Page 60). When asked whether buckets were placed in that area to retain water in response to the water leak, she stated “[y]eah.” (See YMCA’s Motion, Exhibit “H”, Page 61). Ms. Monk stated that there were no other leaks other than the one she discussed. (See YMCA’s Motion, Exhibit “H”, Page 66). In relation to what responsibility the

Metro Defendants had, she stated “[d]aily, they were supposed to go up, visually inspect it for water bottles, leftover towels, spills from possible sports activity drinks, look at the handrails and see if they were dirty, and as needed, mop and wipe down.” (See YMCA’s Motion, Exhibit “H”, Page 67). When asked if she would agree with the statement that the Plaintiff’s incident occurred on a Tuesday, but that mopping purportedly only occurred on Sundays and Wednesdays, Ms. Monk stated “[n]o.” (See YMCA’s Motion, Exhibit “H”, Page 68). When asked if she had seen Metro maintenance workers mop the track, Ms. Monk stated “[y]es.” (See YMCA’s Motion, Exhibit “H”, Page 69). When asked if caution signs should be placed where the mopping occurs, she stated. “[w]et floor signs they are supposed to place.” (See YMCA’s Motion, Exhibit “H”, Page 69).

When asked who his employ was, Cesar Escobar-Cuevas stated “OnPoint System. & Management.” (See YMCA’s Motion, Exhibit “I”, Page 6). When asked what his position was, Mr. Escobar-Cuevas stated “[g]eneral manager.” (See YMCA’s Motion, Exhibit “I”, Page 6). When asked how long he had that position, he stated “I would say about 6 years now.” (See YMCA’s Motion, Exhibit “I”, Page 6). When asked if he was employed with OnPoint [Metro] in June of 2017, Mr. Escobar-Cuevas stated “[y]es.” (See YMCA’s Motion, Exhibit “I”, Page 7). When asked if he was familiar with a company called Metro Management, he stated “[y]es.” (See YMCA’s Motion, Exhibit “I”, Page 7). When asked to describe the relationship between OnPoint and Metro, he stated, “[u]m, Metro Maintenance changed its name to OnPoint System & Management.” (See YMCA’s Motion, Exhibit “I”, Page 8). When asked what his job duties were at the time of the alleged accident, Mr. Escobar Cuevas stated that “it was to hire, train, um, and also fire staff.” (See YMCA’s Motion, Exhibit “I”, Page 9). He also stated that he “I would also implement new protocols with the YMCA, um, and my company, um, conduct weekly and bi-

weekly walk-throughs, uh, conduct staff meetings.” (See YMCA’s Motion, Exhibit “I”, Page 9).

When asked if he had reviewed his prior records regarding the dates and times of his weekly and bi-weekly walk throughs of any of the YMCA locations, he stated “[n]o, I didn’t.” (See YMCA’s Motion, Exhibit “I”, Page 10). When asked if he ever created overnight schedules for the employees that he supervised, Mr. Escobar-Cuevas stated “[t]hat would be the -- um, the overnight supervisor would do that at times.” (See YMCA’s Motion, Exhibit “I”, Page 16). When asked who the overnight supervisor was in 2017, he stated “[u]h, Felix.” (See YMCA’s Motion, Exhibit “I”, Page 16). When asked if he had still been employed by Defendant Metro, he stated “[n]o.” (See YMCA’s Motion, Exhibit “I”, Page 16). When asked who he had reported to at the Premises, he stated “Shakila Monk.” (See YMCA’s Motion, Exhibit “I”, Page 18). When asked to describe his weekly or bi-weekly walk throughs, he stated that he “would walk the entire building, making sure that our safety protocols are being implemented, that – that we have enough supplies, um, conductor - our – our cleaning of the building, um, and also checking on our staff, making sure that they're present, that they're doing the job correctly, that they're in uniform.” (See YMCA’s Motion, Exhibit “I”, Page 19). He testified that he could not remember whether he ever sent emails concerning a recurring water condition on the track area of the gym. (See YMCA’s Motion, Exhibit “I”, Page 20). When asked if the track was regularly cleaned, he stated that “we would dust the track area.” (See YMCA’s Motion, Exhibit “I”, Page 52). As to what the protocol had been when an area had to be mopped, he stated that “[w]e would first put a wet floor sign up and then get the appropriate solution, mop, and mop bucket, put the mop inside the mop bucket, and, um, pull it back out of the mop bucket, put it in the wringer.” (See YMCA’s Motion, Exhibit “I”, Page 53). Mr. Escobar-Cuevas stated that he believed that it was appropriate to mop “[a]t least two hours before the- before the building opens.” (See YMCA’s Motion, Exhibit “I”, Page 54). When asked

whether there was a way to restrict the use of the track area if it was still wet and the gym was open, Mr. Escobar-Cuevas stated that “if it was still a little bit wet, like just a little damp, we would leave the sign there, and it would be visible to all customers.” (See YMCA’s Motion, Exhibit “I”, Page 55). When asked to describe how the track would be mopped, Mr. Escobar-Cuevas stated “[i]t’s not like we, uh, went in there and completely damp-mopped the entire track ‘cuz it’s -- that’s just a waste of time.” (See YMCA’s Motion, Exhibit “I”, Page 102). When asked to explain, he stated that “they would walk a track, and they would spot-mop areas.” (See YMCA’s Motion, Exhibit “I”, Page 104).

When asked when he began working for Defendant Metro, Joel Claude stated that he “would say probably around 2015, 2016.” (See YMCA’s Motion, Exhibit “J”, Page 11). When asked if he often worked at the Prospect Park YMCA, Mr. Claude stated, “[y]es.” (See YMCA’s Motion, Exhibit “J”, Page 12). Mr. Claude stated that “[a] man named Felix” was his supervisor (See YMCA’s Motion, Exhibit “J”, Page 15). When asked whether anyone else supervised him, Mr. Claude, stated that “I actually answer to Cesar, but if I’m working at Prospect, I answer to Shakila.” (See YMCA’s Motion, Exhibit “J”, Page 16). When asked what his responsibilities were, Mr. Claude stated “when I was just a worker, it was a daily thing that when you got to the job, you found out your assignment.” (See YMCA’s Motion, Exhibit “J”, Page 18). When asked about a cleaning schedules at the Premises, Mr. Claude stated, “Sundays and Wednesdays, we sweep and mop, only on Sundays and Wednesdays. Every other day is just sweeping.” (See YMCA’s Motion, Exhibit “J”, Page 22). When asked how the track was cleaned, Mr. Claude stated “[f]irst, they sweep the track onto the basketball court, and then someone would come after that and mop with a damp mop.” (See YMCA’s Motion, Exhibit “J”, Page 23). When asked if he thought the track had been mopped on the day of the accident (a Tuesday) or the night before, Mr. Claude stated

that “[i]t wouldn't have been mopped at all.” (See YMCA’s Motion, Exhibit “J”, Page 23). When asked if he ever saw leaks on or near the indoor track he stated “[e]very once in a while there was always leaks on the track and the basketball court.” (See YMCA’s Motion, Exhibit “J”, Page 27).

Turning to the merits of the YMCA’s motion (motion sequence #6), the Court finds that there is an issue of fact regarding whether Defendant YMCA had actual or constructive notice of the alleged dangerous condition. In the instant matter, the deposition testimony from Shakila Monk, the YMCA property director at the time the alleged incident occurred, did not specifically state when the subject area had been last cleaned or inspected. A motion will fail if it merely presents testimony regarding general cleaning and inspection procedures and fails to provide evidence regarding when the area in question was last cleaned or inspected relative to when the Plaintiff’s injury occurred. *See Piotrowski v. Texas Roadhouse, Inc.*, 192 AD3d 1147, 1148, 141 N.Y.S.3d 350 [2d Dept 2021]; *Johnson v. 101-105 S. Eighth St. Apartments Hous. Dev. Fund Corp.*, 185 AD3d 671, 124 N.Y.S.3d 852 [2d Dept 2020]; *Ansari v. MB Hamptons, LLC*, 137 AD3d 1174, 28 N.Y.S.3d 397 [2d Dept 2016]; *Williams v. New York City Hous. Auth.*, 119 AD3d 857, 990 N.Y.S.2d 549 [2d Dept 2014]; *Farrell v. Waldbaum's, Inc.*, 73 AD3d 846, 847, 900 N.Y.S.2d 453, 454 [2d Dept 2010].

Additionally, the testimony of Cesar Escobar-Cuevas, who had been a supervisor for Defendant Metro at the Premises during the period when the Plaintiff’s accident occurred, was not detailed or specific and related only to building wide policies and general practices. The testimony of Joel Claude, who was also employed by Defendant Metro during that period, directly contradicts the position taken by YMCA that the water condition on the track was directly related to an employee of Defendant Metro who had cleaned the track early that morning, immediately prior to

the location being opened to the public. Joel Claude stated that the location would not have been mopped on the morning of the accident and that he did in fact see leaks in the area on occasion.

As a consequence of this testimony, the Court cannot determine when the condition was created in relation to when the accident occurred. Therefore, the Court cannot determine the period of time the alleged condition existed. As such, Defendant YMCA has not established that it 1) lacked constructive notice of the condition, or 2) did not cause and/or create the condition by not addressing the acknowledged water leak. *See Babb v. Marshalls of MA, Inc.*, 78 AD3d 976, 911 N.Y.S.2d 640 [2d Dept 2010]; *Yearwood v. Cushman & Wakefield, Inc.*, 294 AD2d 568, 742 N.Y.S.2d 661 [2d Dept 2002].

YMCA also seeks summary judgment as it relates to its cross-claims for common law and contractual indemnification as against Metro. The Court denies YMCA's application for common law indemnification as against Defendant Metro. *See McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 376, 953 N.E.2d 794, 799 [2011]. In the instant proceeding, Defendant Metro has not been determined to have been negligent and the YMCA has not established that it was not negligent. Generally, "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 AD3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010].

The Court also denies YMCA's application for contractual indemnification as against Metro. Generally, "[a] party's right to contractual indemnification depends upon the specific language of the relevant contract." *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties

did not intend to be assumed.” *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. In the instant proceeding, YMCA has not shown that Metro had a duty to indemnify the YMCA under the terms of its contract with Metro.

The Court grants YMCA’s application for summary judgment on its breach of contract cross-claim. YMCA argues that the provision for insurance coverage, page 13 of the contract between Defendant Metro and YMCA (Exhibit K to YMCA’s motion), requires that Metro provide additional insured coverage for the YMCA for, *inter alia*, “General Liability Insurance Policy of at least \$3,000,000.00.” Instead, Defendant YMCA claims that Defendant Metro purchased an insurance policy that provided less than \$3,000,000.00 in coverage. In Reply, Defendant Metro does not adequately address this issue other than rely upon the deposition testimony of Mr. Kim, who stated that, “Metro already provided the relevant insurance documents.” Accordingly, the application by YMCA for breach of contract related to Defendant Metro’s failure to procure insurance as required by the underlying agreement is granted. *See Beharovic v. 18 E. 41st St. Partners, Inc.*, 123 AD3d 953, 956, 1 N.Y.S.3d 158, 161 [2d Dept 2014]; *Lima v. NAB Const. Corp.*, 59 A.D.3d 395, 397, 873 N.Y.S.2d 141, 143 [2d Dept 2009].

Turning to the merits of the motion by Metro Maintenance (motion sequence #7), the Court finds that there is a material issue of fact regarding whether the condition at issue was created by an employee of Defendant Metro Maintenance. Metro Maintenance argues that summary judgment in its favor should be granted as it owed no duty to the Plaintiff. Specifically, Metro Maintenance contends that it was an independent contractor and there is no indication that it caused or created the condition at issue. Generally, “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.” *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120, 773 N.E.2d 485 [2002]. However, there are three exceptions to this rule

“(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 N.Y.2d 136, 140, 773 N.E.2d 485, 488 [2002](internal citations omitted). A contractor can still be found liable if “while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk.” *Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 111, 782 N.E.2d 50, 53 [2002]. This exception has been understood as requiring that a contractor exercise reasonable care under the circumstances. *See Landon v. Kroll Lab. Specialists, Inc.*, 91 A.D.3d 79, 85, 934 N.Y.S.2d 183, 190 [2nd Dept, 2011].

Moreover, to succeed in a motion for summary judgment, a contractor must show that the work it conducted did not create or exacerbate the allegedly dangerous condition at issue. *See Schwint v. Bank St. Commons, LLC*, 74 A.D.3d 1312, 1313, 904 N.Y.S.2d 220, 222 [2nd Dept, 2010]; *Keese v. Imperial Gardens Assoc., LLC*, 36 A.D.3d 666, 668, 828 N.Y.S.2d 204 [2nd Dept, 2007]. However, a review of the deposition testimony of both Cesar Escobar-Cuevas and Shakila Monk raises a material issue of fact regarding whether Defendant Metro Maintenance caused or created the subject condition. As such the issue shall be determined at trial. *See Gorham v. Reliable Fence & Supply Co.*, 92 A.D.3d 834, 837, 939 N.Y.S.2d 490, 493 [2d Dept 2012]. Specifically, the deposition testimony of both Monk and Escobar Cuevas raised the issue of whether the condition was a product of cleaning conducted by Defendant Metro on the morning of the Plaintiff's accident. As a result, Defendant Metro failed to show that it did not create or exacerbate

the condition. *See Morales v. Sinmar Dev. Corp.*, 298 A.D.2d 236, 748 N.Y.S.2d 151 [2nd Dept, 2002].

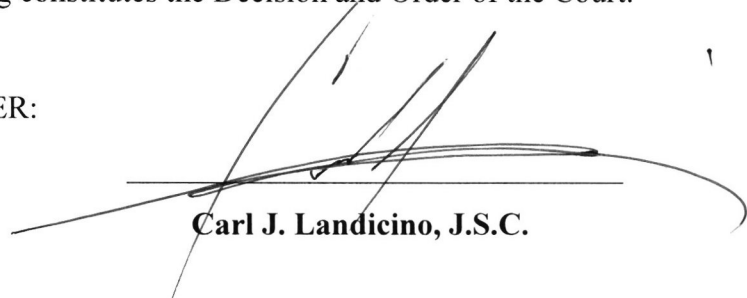
Based on the foregoing, it is hereby ORDERED as follows:

The motion by the YMCA (motion sequence #6) for summary judgment is denied.

The motion by Metro Maintenance (motion sequence #7) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

A handwritten signature in black ink, appearing to read 'Carl J. Landicino', is written over a horizontal line. The signature is stylized and somewhat messy.

Carl J. Landicino, J.S.C.

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