

**Duncan v 4 World Trade Ctr., LLC**

2023 NY Slip Op 34055(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 155402/2018

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

-----X

INDEX NO. 155402/2018

COZETTA DUNCAN and JAMES FOOTE,  
Plaintiffs,

MOTION SEQ. NO. 005

- v -

4 WORLD TRADE CENTER, LLC, SILVERSTEIN  
PROPERTIES, INC., ABM INDUSTRY GROUPS, LLC AS  
SUCCESSOR IN INTEREST TO ABM JANITORIAL  
SERVICES - NORTHEAST INC. and ABM JANITORIAL  
SERVICES - NORTHEAST, INC.,  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

ABM INDUSTRY GROUPS, LLC AS SUCCESSOR IN INTEREST  
TO ABM JANITORIAL SERVICES - NORTHEAST INC. and ABM  
JANITORIAL SERVICES - NORTHEAST, INC.,  
Third-Party Plaintiffs,

Third-Party  
Index No. 595800/2021

-against-

UNIVERSAL PROTECTION SERVICE LLC,  
Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 148, 151, 161, 162, 163, 164, 165, 166, 175

were read on this motion to/for

**SUMMARY JUDGMENT**

The facts of this case are set forth in detail in the decision and order dated November 10, 2023, which, among other things, denied the motion of defendants Silverstein Properties, Inc. (“SPI”) and 4 World Trade Center (“4WTC”) seeking summary judgment, pursuant to CPLR 3212 (Mot. Seq. 004). Therefore, the facts of this case shall not be repeated here.

Plaintiff now moves, pursuant to CPLR 3212, seeking summary judgment on the issue of liability against the defendants, ABM Industry Groups, LLC, as successor in interest to ABM Janitorial Services – Northeast Inc. and ABM Janitorial Services – Northeast, Inc. (collectively, “ABM”). Plaintiff asserts that, based on the deposition testimony of both Rivera and Gall (*Exhibit G; Exhibit H*), ABM launched a force or instrument of harm by its improper placement of the mats because it failed to ensure that the mats were not overlapping, which violated the contract and its duty of care to plaintiff as she was within the zone and contemplation of the intended services. According to plaintiff, AMB created the defective condition at issue and had

constructive and actual notice of same. Additionally, plaintiff asserts that ABM were the proximate cause of her injuries insofar as she maintains that the video clearly shows that her foot went under the edge of the overlapping mat causing her to be propelled into the revolving door. Moreover, plaintiff argues that there is a lack of proof that plaintiff's own conduct was a superseding cause of the accident. (NYSCEF Doc. No. 119, *memorandum of law*).

Alex Rivera ("Rivera"), an SPI employee, testified at his deposition that, as vice president of World Trade Center operations, he had no recollection as to any prior instance where anyone tripped over overlapping mats (NYSCEF Doc. No. 109, *Rivera's Dep.* at 32, lines 4-12). Rivera admitted that he never kept any written documents of any inspections made in the lobby of the subject building. (Rivera Dep. at 19-20). He testified that, according to SPI's policy, the mats were to be placed "flat" on the floor to ensure "that no edges were posing a tripping hazard," and both the location and manner were provided to ABM on site. (Rivera Dep. at 28, lines 12-24). Rivera further explains that for the mats to be considered flat, "the edging of the mats should touch each other, but not overlap." (Rivera Dep. at 28, lines 9-10). Upon review of the surveillance video, however, Rivera testified to noticing "that the rubber edging [of the mats were] on top of each other." (Rivera Dep. at 44, lines 1-3). Further, Rivera admits that he did not know the last time the mats were inspected prior to plaintiff's accident. (Rivera Dep. at 41-42).

Matthew Gall ("Gall"), Project Manager at ABM Industries Incorporated, testified at his deposition that, while he and Rivera conducted inspections together, he had no recollection of inspecting the mats on the day of the incident. (Gall Dep. at 49). Gall agreed that any overlapping of the mats constituted a safety hazard, and if that placement had been seen, he would have closed the area off and reported it to the building. (Gall Dep. at 51, lines 14-19; 53). He concedes that ABM placed down the mats that plaintiff tripped on. (Gall Dep. at 26, lines 8-16). Further, when asked if the surveillance video shows the mats overlapping, Gall testified that he did not believe so. (Gall Dep. at 44-45).

In opposition to the motion, defendants argue that they had no notice of the alleged defect and did not create a hazardous condition, relying on the affidavit of Gall that there were no complaints or prior written notice concerning the weather mats, rugs, or runners in the area at the location where plaintiff fell. ABM maintains that, as to plaintiff's testimony that the defect could have existed for more than a few minutes, three to five minutes is not enough time to discover and correct the allegedly hazardous condition. ABM also adopt as its own the legal arguments, references and citations filed by co-defendants 4WTC and SPI in opposition to plaintiff's cross-motion for summary judgment on the issue of liability under Mot. Seq. 004 (NYSCEF Doc. No. 148, *affirmation in opposition*).

In reply, plaintiff reiterates the arguments previously advanced and incorporates the arguments raised in opposition with respect to Mot. Seq. 004. (NYSCEF Doc. No. 165, *memorandum of law in reply*).

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, and a failure to make such *prima facie* showing requires denial of the motion. (See *S.G. v Harlem Vil. Academy Charter Sch.*, 213 AD3d 616, 618 [1st Dept 2023]; *Fuller v KFG L & I, LLC*, 189 AD3d 666, 669 [1st Dept 2020].) “Only if the movant meets the *prima facie* burden does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact.” (*Lewis v Safety Disposal Sys. of Pennsylvania, Inc.*, 12 AD3d 324 [1st Dept 2004]; see *Fair v Fuchs*, 219 AD2d 454, 455 [1st Dept 1995].)

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must show that the defendant either created the condition which caused the accident, or that it had actual or constructive notice of the condition (see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994].) Generally, “[c]onstructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition” (*Gomez v Samaritan Daytop Vil., Inc.*, 216 AD3d 456, 457 [1st Dept 2023]; see *Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 937 [1st Dept 2019].) To meet its *prima facie* burden on the issue of lack of constructive notice, the defendant must offer some evidence “of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell.” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dep 2011]).

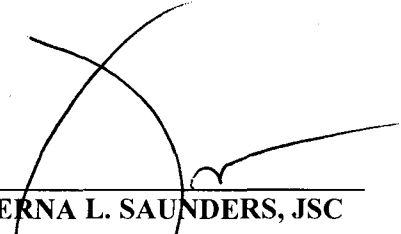
In the case at bar, the court finds that plaintiff has failed to establish her *prima facie* burden for summary judgment. From the video annexed to the moving papers, this court finds that there is an issue of fact as to whether the mats were overlapping. Additionally, there is conflicting deposition testimony as to whether the mats were overlapping, precluding summary judgment on her negligence claim. (see *McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 576 [1st Dept 2023]; *Fundus v Scarola*, 214 AD3d 479, 479 [1st Dept 2023]; *Evans v Acosta*, 169 AD3d 438, 439 [1st Dept 2019]). Moreover, plaintiff fails to establish that defendants had notice of said condition—either actual or constructive. (See *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]; *Johnson v City of New York*, 18 AD3d 272, 272 [1st Dep 2005]). Plaintiff does not address defendants’ argument in opposition that based on her testimony, the accident occurred three to five minutes after the mats were placed. Thus, there is an issue of fact as to whether the allegedly defective condition existed for a sufficient length of time for defendants to both discover and remedy it. (See *Sweeney v Riverbay Corp.*, 76 AD3d 847, 847 [1st Dept 2010]; *Haseley v Abels*, 84 AD3d 480, 483 [1st Dep 2011]). All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that plaintiff's motion, pursuant to CPLR 3212, seeking summary judgment on the issue of liability against defendants, ABM Industry Groups, LLC, as successor in interest to ABM Janitorial Services – Northeast Inc. and ABM Janitorial Services – Northeast, Inc. is hereby denied; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants, ABM Industry Groups, LLC, as successor in interest to ABM Janitorial Services – Northeast Inc. and ABM Janitorial Services – Northeast, Inc. shall serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

November 13, 2023

  
\_\_\_\_\_  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER		