

Duncan v 4 World Trade Ctr., LLC

2023 NY Slip Op 34056(U)

November 10, 2023

Supreme Court, New York County

Docket Number: Index No. 155402/2018

Judge: Verna L. Saunders

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

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 155402/2018

COZETTA DUNCAN and JAMES FOOTE,
Plaintiffs,

MOTION SEQ. NO. 004

- 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**

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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 Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 93, 94, 95, 96, 97, 98, 99, 145, 146, 147, 150, 152, 153, 154, 155, 156, 157, 159, 160, 167, 168, 173, 174

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff¹ Cozzetta Duncun commenced this action seeking to recover damages for injuries allegedly sustained during an accident at the building located at 150 Greenwich Street, New York, New York, also known as 4 World Trade Center (“building” or “premises”). Plaintiff claims that, on February 1, 2016, at approximately 1:30 P.M., she was walking across the lobby of the premises when she tripped and fell on floor mats near the revolving doors. In her verified bill of particulars, plaintiff describes the mats to be “loose, bumpy, raised, folded, layered, unsecured”, rising to the level of a dangerous condition at the premises. (NYSCEF Doc. Nos. 69, *summons and complaint*; 71, *bill of particulars*).

Defendants, 4 World Trade Center, LLC (“4WTC”) and Silverstein Properties, Inc. (“SPI”) (collectively “defendants” or “movants”) move the court, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint, arguing that plaintiff cannot establish a

¹ Although James Foote, the husband of Duncan, also asserts a claim for, *inter alia*, loss of consortium, all references to “plaintiff” refer to Duncun.

prima facie claim of negligence insofar as she cannot identify the cause of her fall or demonstrate that defendants had any notice of the alleged hazardous condition. Further, SPI and 4WTC move the court, pursuant to CPLR 3025(b), seeking to file an amended answer to assert cross-claims for breach of contract, common law and contractual indemnification, and for apportionment and contribution as against defendants, ABM INDUSTRY GROUPS LLC as successor in interest to ABM JANITORIAL SERVICES – NORTHEAST INC. and ABM JANITORIAL SERVICES – NORTHEAST, INC. (“ABM”). Movants also seek, pursuant to CPLR 3212, indemnification as against ABM (NYSCEF Doc. No. 65, *notice of motion*).

Plaintiffs oppose the motion and cross-move, pursuant to CPLR 3212, for an order granting them summary judgment on the issue of liability as against defendants. (NYSCEF Doc. No. 94, *notice of cross-motion*).

In their memorandum of law, defendants argue that they had no actual or constructive notice of an alleged defect. They received no complaints regarding the mats prior to the incident, nor was there any record of an accident with the same mats before plaintiff’s incident. They also contend that plaintiff has failed to establish that the premises were not reasonably safe. Defendants maintain that the alleged condition was a non-actionable trivial defect because proof available in this case, including the surveillance video, shows that the subject mat was flush to the floor, flat and without the ripples complained of. Additionally, they argue the subject mats were properly placed and did not present a hazardous or defective condition. Assuming it did, they contend that such condition was not the proximate cause of the accident but merely furnished the occasion for the subject accident, which they maintain “was caused by the unreasonable and improper manner in which [p]laintiff stepped, dragged her foot, so as to catch her foot on the edge of the mat.” Furthermore, they argue that plaintiff is not able to identify the specific defect that caused her trip and fall because, as evident by her deposition testimony, she never looked down at the mat to see what caused her foot to become caught on same. Since plaintiff is unable to maintain her claim, defendants argue that Foote’s derivative claim must also be dismissed. Moreover, they maintain that the ABM must indemnify defendants given the express language in its service agreement and that they should be granted leave to amend their answer since no prejudice exists. (NYSCEF Doc. No. 67, *memorandum of law*).

In support of their summary judgment motion, defendants submit surveillance video of the incident (NYSCEF Doc. No. 79, *surveillance video*). Plaintiff can be seen walking across the lobby, tripping on the mat, and falling into the revolving door at the entrance of the building. Defendants contend that the footage indisputably shows each mat lying flat on the floor, proving the mats to be “open and obvious.” Further, defendants argue that plaintiff fell when she failed to raise her foot a suitable distance to avoid catching the edge of the second mat. Defendants assert that no matter how the mats were placed, the accident would have occurred due to the way plaintiff stepped and dragged her foot. Therefore, it is their argument that they were not the proximate cause of the accident—but that plaintiff’s negligence caused her to trip, fall, and sustain injuries. (NYSCEF Doc. No. 66, *affirmation*).

Alex Rivera (“Rivera”), an SPI employee, testified at his deposition that as vice president of World Trade Center operations, he had no recollection of any prior instance where anyone had tripped over overlapping mats (NYSCEF Doc. No. 75, *Rivera Dep.* at 32, lines 4-12). Rivera

admitted that he never kept any written documents of any inspections made in the lobby of the building. (Rivera Dep. at 19-20). He also testified that the policy or procedure, with respect to ABM, was to place the mats “flat” and ensure “that no edges were posing a tripping hazard,” and both the location and manner of placement were provided to ABM on site. (Rivera Dep. at 28, lines 12-24). Rivera 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 someone inspected the mats 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. (NYSCEF Doc. No. 76, Gall Dep. at 49). Gall agreed that any overlapping of the mats constituted a safety hazard and that 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 conceded that ABM employees had placed the subject mats. (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 defendants’ motion, plaintiff argues that it is not her burden on defendants’ motion for summary judgment to show that the premises were reasonably safe. Rather, it is defendants’ burden to establish lack of notice as a matter of law, which they fail to establish. SPI has failed to present any evidence as to when the mats in the lobby were last inspected prior to the accident. Instead, plaintiff asserts that SPI created the hazardous condition, and, by improperly placing the mats in an overlapped condition, defendants failed in their duty to keep the premises in a “reasonably safe condition.” It is her argument that the surveillance video not only shows that the mats were overlapping, but that they were the sole and proximate cause of plaintiff’s trip and fall. Further, plaintiff argues that defendants had actual and constructive notice of the hazard because: (1) SPI, through its janitorial company ABM, placed the mats in an overlapping manner; and (2) SPI conceded, via Rivera’s deposition, that the overlapping mats constituted a tripping hazard. Plaintiff asserts that SPI failed to establish that the defect was trivial and not a violation of accepted standards; there was no measurement made of the overlapping mats. Plaintiff maintains that the hazardous condition was not open and obvious because the mats were the same color. Thus, she maintains that she is entitled to summary judgment. (NYSCEF Doc. 98, *Memorandum of Law in Opposition*).

In further support of her cross-motion, plaintiff submits an expert witness affidavit from Scott Silberman, P.E., a licensed and registered professional engineer in New York. He provides an analysis of the mechanics of walking and how the placement of the overlapping mats contributed to plaintiff’s accident. He opines, within a reasonable degree of engineering certainty that: (1) the overlapping mats constituted a tripping hazard; (2) defendants’ failure to provide safe maintenance was the proximate cause of plaintiff’s accident; and, (3) defendants failed to adhere to NYC Building standards. (NYSCEF Doc. No. 97, *Silberman’s affidavit*).

In reply and in opposition to plaintiff's cross-motion, defendants reiterate that the mats were not overlapping, but rather, were laid flat on the floor, and plaintiff failed to establish *prima facie* that such condition existed and was the proximate cause of the subject accident. They argue that plaintiff fails to establish that they had notice of a hazard or defect. Moreover, they insist that the proof elicited establishes that there was constant monitoring of the building's lobby and numerous personnel stationed there, whose tasks included monitoring and reporting any hazardous condition. They assert that multiple members of ABM's management team and SPI's own operations Manager conducted regular inspection and, even after the accident, they discovered no hazard or impropriety of the mats. Plaintiff's expert witness did not establish the existence of a hazardous condition, and his affidavit asserted only bare, conclusory allegations, unsupported by facts and investigation. Defendants further contend that they could not have created the hazardous condition, since it was ABM who laid the mats in the lobby (NYSCEF Doc. No. 145, *affirmation in opposition*).

Further, in support of their summary judgment motion for indemnification, defendants submit their Service Contract (NYSCEF Doc. No. 78, *ABM service contract*) with ABM, contending that they were aware of their claims for defense and indemnification, since it was stated in their contractual agreement. In their memorandum of law, defendants argue that ABM agreed to defend and indemnify the defendants, against all claims arising out of or incurred in connection with ABM's work under the contract (NYSCEF Doc. No. 67, *memorandum of law*). Moreover, defendants argue that ABM cannot argue that it is prejudiced or surprised by defendants' claims; thus, their motion to amend should also be granted.

ABM submits partial opposition to defendants' motion, arguing that, they will be prejudiced by amendment of the answer at this late stage in the litigation. ABM argues that, assuming the court grants the motion to amend, defendants are not entitled to contractual indemnification because they have failed to establish that they were free of negligence. According to ABM, issues of fact preclude summary judgment as to contractual indemnification because the record reflects that defendants purchased the weather mats and that they directed ABM how and where those mats would be placed down relative to the area where plaintiff fell. Thus, that branch of the motion seeking contractual indemnification must be denied (NYSCEF Doc. No. 147, *ABM's affirmation in opposition*). Defendants contend that ABM's assertions of prejudice are unsupported and that they are entitled to indemnification since ABM's allegation of negligence is flawed. They further argue that ABM was responsible for laying the mats and that any liability plaintiff can establish would arise out of ABM's active negligence and any negligence assessed to the defendants would be vicarious only (NYSCEF Doc. No. 168, *memorandum of law in reply to ABM's opposition*).

Although plaintiff files a reply to defendants' opposition (NYSCEF Doc. No. 155) and defendants also submit a reply to plaintiff's reply (NYSCEF Doc. No. 167). These submissions constitute impermissible sur-replies and, thus, they will not be considered.

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.” (See *Lewis v Safety Disposal Sys. of Pennsylvania, Inc.*, 12 AD3d 324 [1st Dept 2004]; *Fair v Fuchs*, 219 AD2d 454, 455 [1st Dept 1995].)

A defendant moving for summary judgment in a trip and fall case must establish that its property had been maintained in a reasonably safe condition and that it did not create the alleged dangerous condition or have actual or constructive notice of it. (See *Rodriguez v New York City Tr. Auth.*, 118 AD3d 618, 618 [1st Dept 2014]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006].) 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” (see *Gomez v Samaritan Daytop Vil., Inc.*, 216 AD3d 456, 457 [1st Dept 2023]; *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.” (See *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dep 2011]).

Leave to amend pleadings under CPLR 3025(b) “should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay.” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]; see *Machado v Gulf Oil, L.P.*, 195 AD3d 26, 30 [1st Dept 2021].) However, “mere lateness is not a barrier to the amendment [as it] must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.” (*Detrinca v De Fillippo*, 165 AD2d 505, 508 [1st Dept 1994]; see *Abdelnabi v New York City Transit Auth.*, 273 AD2d 114, 115 [1st Dept 2000].) In the absence of prejudice or surprise to the opposing party, “leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.” (See *Herrera v Highgate Hotels, L.P.*, 213 AD3d 455, 456 [1st Dept 2023]; *Risk Control Assocs. Ins. Grp. v Lebowitz*, 151 AD3d 527, 527 [1st Dept 2017].) “Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered in the preparation of their case or has been prevented from taking some measure in support of their position.” (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]; see *Anoun v City of New York*, 85 AD3d 694, 694 [1st Dept 2011].) The party opposing the amendment has the burden of establishing prejudice. (See *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Lindo v Brett*, 149 AD3d 459, 463 [1st Dept 2017].)

A party is entitled to “full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.” (*Wai Cheung v 48 Tenants’ Corp.*, 192 AD3d 503, 504 [1st Dept 2021]; *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 483 [1st Dept 2010].) Generally, “the party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability.” (See *Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]; *Ramirez v Almah, LLC*, 169 AD3d 508, 509 [1st Dept 2019].) However, a defendant may establish its entitlement

to conditional summary judgment on its contractual indemnification claim pending a determination that the defendant was negligent. (See *Rubio v Ezra Cohen Corp.*, 205 AD3d 596, 597 [1st Dept 2022].)

Here, when applying the law to the facts in this case, the court determines that defendants have failed to satisfy their *prima facie* burden for summary judgment seeking dismissal of the complaint. In the video annexed to the moving papers, the entire incident can be seen, including the placement of the mats, how plaintiff was walking, and the trip and fall. Upon this court's review of the video, it appears that there is an issue of fact as to whether the mats overlapped. Consequently, Gall and Rivera offer conflicting deposition testimony as to whether the mats were overlapping at the time of the incident. Further, although defendants have demonstrated lack of actual notice of the mats — as evidenced by the testimony of Gall who explains that it was protocol to inform SPI of any hazardous conditions and there being a lack of proof of Gall or any ABM employee communicating the placement of the mats (Rivera Dep. at 32, lines 4-12) — there is no evidence as to when the subject area was last cleaned or inspected. Thus, lack of constructive notice has not been established. Moreover, given the video, the deposition testimony, and the arguments advanced in connection with this motion, the court finds defendants' argument that notwithstanding the placement of the mat, plaintiff would have inevitably tripped and fallen to be speculative and unpersuasive. Furthermore, the court rejects defendants' conclusory and unsubstantiated assertion that the defect was trivial.

Defendants' motion to amend the answer, pursuant to CPLR 3025(b), to assert cross-claims for breach of contract, common law, and contractual indemnification, and for apportionment and contribution as against ABM, is granted. Absent a showing of prejudice from AMB resulting from said amendment and given the well-settled principle that amendment should be freely given, the answer is hereby amended in the form annexed to the moving papers (NYSCEF Doc. No. 81, *proposed complaint*) (see *Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 490 [1st Dept 2018]; *Frangiadakis Est. of Bazas v 51 W. 81st St. Corp.*, 161 AD3d 478, 478 [1st Dept 2018]).

However, upon review of the service contract agreement, that branch of defendants' motion for summary judgment against ABM for contractual indemnification is granted to the extent that it is conditional upon a finding that ABM was negligent and that defendants were free from negligence, due to issues of material fact concerning the placement of the mats and defendants' control over same.

Based on the foregoing, plaintiff's cross-motion, pursuant to CPLR 3212, is also denied, insofar as issues of fact remain. Accordingly, it is hereby

ORDERED that the motion of defendants 4 World Trade Center, LLC and Silverstein Properties, Inc. for summary judgment, pursuant to CPLR 3212, is denied; and it is further

ORDERED the motion of 4 World Trade Center, LLC and Silverstein Properties, Inc. for leave to amend their answer, pursuant to CPLR 3025(b), in the form annexed to the moving papers (NYSCEF Doc. No. 81, *proposed answer*) is granted and is deemed served; and it is further

ORDERED that plaintiff's cross-motion for summary judgment, pursuant to CPLR 3212, is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel 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 10, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<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