

Diaz v 2 Broadway Ground Lease Trust

2023 NY Slip Op 34317(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 162756/2014

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X

DIAZ, CARLOS

Plaintiff

- v -

2 BROADWAY GROUND LEASE TRUST, 2 BROADWAY
LLC, METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY, TRIBOROUGH
BRIDGE AND TUNNEL AUTHORITY

Defendants

-----X

2 BROADWAY GROUND LEASE TRUST, 2 BROADWAY LLC,
METROPOLITAN TRANSPORTATION AUTHORITY, NEW
YORK CITY TRANSIT AUTHORITY, TRIBOROUGH BRIDGE
AND TUNNEL AUTHORITY

Plaintiffs

-against-

ABM JANITORIAL SERVICES - NORTHEAST, INC., SLADE
INDUSTRIES, INC., SLADE ELEVATOR

Defendants

-----X

ABM JANITORIAL SERVICES - NORTHEAST, INC.

Plaintiff

-against-

GILBERT INTERNATIONAL INC

Defendant

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116,
117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 133, 136, 138, 139, 140, 141, 142, 186, 188,
205- were read on this motion

INDEX NO. 162756/2014
MOTION DATE _____
MOTION SEQ. NO. 003

**AMENDED DECISION AND
ORDER ON MOTION**

Third-Party
Index No. 595043/2016

Second Third-Party
Index No. 595049/2017

JUDGMENT- SUMMARY

For the reasons that follow, the motion for summary judgment by ABM JANITORIAL SERVICES - NORTHEAST, INC is denied.

Background

In this personal injury matter, Plaintiff, Carlos Diaz alleges that he was injured by a malfunctioning elevator. Plaintiff specifically alleges that on January 3, 2014, at his place of employment as an elevator operator, the infrared/sensor beams, and the manual mode of a freight elevator malfunctioned and closed on the right side of his body.

Main Action-162756/2014

On December 29, 2014, Plaintiff commenced a negligence action against the lease holder/owners/managers of the premises, Defendants, 2 Broadway Ground Lease Trust, 2 Broadway LLC, Metropolitan Transportation Authority (MTA), New York City Transit Authority, and Triborough Bridge and Tunnel Authority (collectively 2 BROADWAY)

On June 13, 2016, and April 13, 2017, Plaintiff amended the complaint to include subcontracting managing companies, Defendant, ABM Janitorial Services – Northeast (ABM) a corporation hired by the MTA to perform custodial and engineering services and Defendant, Slade Industries, Inc. (SLADE), a corporation hired by the MTA to maintain the elevators.

Third Party Action- 595043/2016

On or about January 14, 2016, Defendants 2 BROADWAY, filed a Third-Party action impleading managing companies, ABM and SLADE. 2 BROADWAY brings causes of action for indemnification and alleges that SLADE and ABM, under their contractual obligation were responsible for maintaining the elevator in a safe condition, and if Plaintiff's injuries were not caused by his own negligence, then SLADE and ABM are liable.

Second Third Party Action- 595049/2017

On January 16, 2017, ABM filed a summons and complaint, Plaintiff's employer, Gilbert International Cleaner (GILBERT). In this second third-party action, ABM alleges subcontracting janitorial services to GILBERT and sues for contractual indemnification.

Now, post-note of issue, Defendant, Third-Party Defendant and Second-Third Party Plaintiff, ABM, moves only as Defendant for summary judgment pursuant to CPLR 3212 against Plaintiff. Plaintiff opposes the motion.

The Court notes that while this motion was filed late, it accepts ABM's good cause argument for lateness.¹ ABM contends entitlement to judgment as a matter of law on the grounds that it (1) does not owe Plaintiff a duty of care nor assume such a duty; and adopts SLADE's argument in Motion Seq. 2 that it did not create, nor have notice of the alleged defective condition.

Discussion

A party moving for summary judgment pursuant CPLR 3212, has the high burden of establishing entitlement to judgment as a matter of law with admissible evidence that dispels any material questions of fact requiring a trial (see CPLR §3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Upon meeting this burden, opposing papers are then considered (*Alvarez*).

Regarding tort actions, it is well established that in order to find a defendant negligent, the defendant must have owed and breached a duty of care to the injured party (see *Epinal v Melville Snow Contractors Inc.*, 92 NY2d 36 [2002]). Thus, based on this principal of law, a

¹ In this action, the preliminary conference order allowed for filing summary judgment motions within 120 days from the date Plaintiff filed the Note of Issue. But the controlling and subsequent orders by a different court nonetheless allowed for 60 days. While ABM filed this motion over 60 days from the date the Note of Issue was filed, it was nonetheless filed within 120 days (on the 111 day after the Note of Issue was filed) and as good cause ABM requests that this Court consider the deadline given in the preliminary order and also ABM's counsel attest that he and his family were ill and effected by the global pandemic of Covid-19 during part or all of the 60 day- deadline and that he is the sole attorney working on this action at his firm.

defendant with only a contractual obligation, generally does **not** owe a duty of care to an injured third party (*id.*). Allowing otherwise would floodgate our courts and could render the contracting party liable to “an indefinite number of potential beneficiaries” (*Espinal*, 92 NY2d 36 quoting former Chief Judge Cardozo).

Yet there are a few circumstances where a defendant rendering contractual services may be found to have assumed a duty of care to outside persons or parties (*id.*). For example (1) where the contracting defendant, failed to exercise reasonable care in performing its contractual duties and thus is considered to have “launche[d] a force or instrument of harm” creating or exacerbating a dangerous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting defendant's duties; and (3) where the contracting defendant has entirely displaced the other party's duty to maintain the premises safely (*id.*; see *Medinas v MILT Holdings LLC.*, 131 AD3d 121 [1st Dept 2015]).

Further, where the summary judgment movant alleges not creating or having actual or constructive notice of the defective condition, it is their burden to establish lack of notice as a matter of law (*Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403[1st Dept 2001]; *Rogers v Dorchester Assoc.*, 32 NY2d 553 [1973]; see e.g. *O'Neill v Mildac Props.*, 162 AD2d 441 [2d Dept 1990]; *Liebman v Otis El. Co.*, 127 AD2d 745, 746 [2d Dept 1987]; *Sanchez v City of New York*, 211 AD3d 1065[2nd Dept 2022]; *Dyer-Crewe v Schindler Elevator Corp.*, 205 AD3d 474 [1st Dept 2022]).

Here, ABM contends that it does not owe Plaintiff, a non-party to the contract between ABM and the MTA, a duty of care and that it did not assume a duty of reasonable care independent of its contractual obligations to the MTA. Additionally, ABM contends that it did not entirely displace 2 BROADWAY's duty to maintain the premises safely, especially when it came to

elevator maintenance, since 2 BROADWAY had contracted with SLADE for the maintenance and mechanical care of the elevator. ABM further argues it was contracted to only perform certain janitorial functions, and those functions are not the type of comprehensive and exclusive property-maintenance obligation required to assume any duty of reasonable care.

In support ABM relies on and submits a contractual agreement, the transcript of Plaintiff's examination before trial (EBT), the transcript of a SLADE's witness EBT, the transcript of a 2 BROADWAY's witness' EBT, and an affidavit from an ABM employee (Roth Affidavit), who attests that as a branch manager he has verified that there are no written notices given to ABM of any alleged defective conditions.

Upon review, material questions of fact exist. While it is undisputed that ABM had a contractual obligation with Defendant MTA and not with Plaintiff, ABM has not established its summary judgment burden. First the contractual obligation between ABM and MTA is not clear. According to the contract ABM was to perform custodial and engineering services for the MTA. Yet the body of the contract does not outline any engineering services. In addition, ABM's counsel's affirmation states that ABM provided janitorial and maintains work. For purposes of this case, it matters whether ABM services were solely cleaning or also included engineering. Based on Plaintiff's deposition testimony on the day of his accident there were engineers who earlier in the day had problems with the same elevator. Yet ABM has not established whether such engineers were its employees who would have had notice of the problem. Furthermore, there is testimony that the elevator sensors malfunction due to debris or snow and AMB's papers do not establish as a matter of law that on the day of the accident or reasonable before the accident it had properly cleaned the subject elevator. Accordingly, ABM has not established as a matter of law that it reasonably performed its contractual duties in relation to this subject elevator and that did

not give rise to a dangerous condition for the use of others (*see Epinal*, 92 NY2d 36; *Medinas*, 131 AD3d 121). Nor has AMB established as a matter of law that it was Defendant, SLATE's duty to maintain the elevators free of debris (*id*). Furthermore, there is a question of fact as to whether ABM had notice of problems with this elevator (*see e.g. Giuffrida*, 279 AD2d 403; *Dyer*, 205 AD3d 474; *see also Sanchez v City of New York*, 211 AD3d 1065).

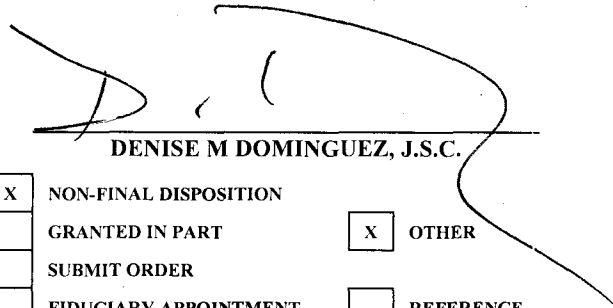
Thus, it is hereby

ORDERED that motion for summary judgment is denied; and it is further

ORDERED that said Defendants serve and file a notice of entry of this Order within 20 days from today.

12/08/2023

DATE



DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: