

<b>Foster v CK-HP 1985 Marcus Ave. LLC</b>
2023 NY Slip Op 35059(U)
June 9, 2023
Supreme Court, Queens County
Docket Number: Index No. 717726/2018
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. ULYSSES B. LEVERETT  
Supreme Court Justice

-----X  
GREGORY FOSTER,

Plaintiff,

- against -

CK-HP 1985 MARCUS AVENUE LLC, FEIGA  
HOLLY HALL/1985 MARCUS AVENUE LLC, CLK  
MARCUS AVENUE PROPERTY OWNER LLC,  
C.L.K. MANAGEMENT CORP., JAMAICA ASH &  
RUBBISH REMOVAL CO., INC., WESTBURY  
PAPER STOCK CORP. and J.P. MORGAN CHASE  
BANK, NATIONAL ASSOCIATION,

Defendants.

-----X  
CK-HP 1985 MARCUS AVENUE LLC, FEIGA  
HOLLY HALL/1985 MARCUS AVENUE LLC, CLK  
MARCUS AVENUE PROPERTY OWNER, LLC, and  
C.L.K. MANAGEMENT CORP.,

Third-Party Plaintiffs,

-against-

J.P. MORGAN CHASE BANK, NATIONAL  
ASSOCIATION,

Third-Party Defendant.

-----X  
CK-HP 1985 MARCUS AVENUE LLC, FEIGA  
HOLLY HALL/1985 MARCUS AVENUE LLC, CLK  
MARCUS AVENUE PROPERTY OWNER LLC, and  
C.L.K. MANAGEMENT CORP.,

Second Third-Party Plaintiffs,

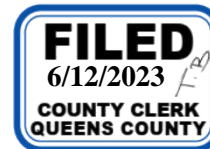
SPANIER BUILDING MAINTENANCE CO., INC.,

Second Third-Party Defendant.

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Index No. 717726/2018  
Motion Seq. Nos.: 02, 03, 04

**ORDER**



**The following papers have been read and considered on this motion:**

	Papers Numbered
Notice of Motion (Seq. No. 02), Statement of Material Facts, Affirmation in Support and Exhibits	<b>EF 108-125, 126</b>
Affirmation in Opposition of Motion (Seq. No. 02), Response to Statement of Facts, Counter Statement of Material Facts and Exhibits	<b>EF 173-180</b>
Affirmation in Reply (Seq. No. 2), and Exhibits	<b>EF 182-183</b>
Notice of Motion (Seq. No. 03), Statement of Material Facts, Affirmation in Support and Exhibits	<b>EF 127-144</b>
Notice of Motion (Seq. No. 04), Statement of Material Facts, Affirmation in Support, Exhibits and Memorandum of Law	<b>EF 146-168</b>
Affirmation in Opposition of Motion (Seq. No. 04), Response to Statement of Facts, Counter Statement of Material Facts and Exhibits	<b>EF 177-180</b>
Memorandum of Law in Reply (Seq. No. 04)	<b>EF 184</b>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants, JAMAICA ASH & RUBBISH REMOVAL CO., INC., and WESTBURY PAPER STOCK CORP. (hereinafter collectively referred to as "JAMAICA ASH") move (Seq. No. 02) pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, and any and all cross claims against it. Plaintiff opposes the motion.

Defendants, CK-HP 1985 MARCUS AVENUE LLC, FEIGA HOLLY HALL/1985 MARCUS AVENUE LLC, CLK MARCUS AVENUE PROPERTY OWNER LLC, C.L.K. MANAGEMENT CORP. (hereinafter collectively referred to as "CK-HP") move (Seq. No. 04) pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, and any and all cross claims against it. Plaintiff opposes the motion. CK-HP also moves unopposed, for an order granting summary judgment on the contractual indemnification claim against JAMAICA ASH.

Defendant, J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION, moves (Seq. No. 03) unopposed for summary judgment dismissing plaintiff's Verified Complaint as against it, the third party plaintiff's complaint against it and any and all cross claims against it. J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION's motion (Seq. No. 03) is hereby **GRANTED**.

The second third party action against SPANIER BUILDING MAINTENANCE CO., INC., has been previously discontinued against it by stipulation.

Plaintiff alleges that on February 25, 2018, he slipped on a trash compactor ramp that leads from the trash compactor to the loading dock of a commercial tenancy building located at 1985 Marcus Avenue, New Hyde Park, NY 11042, owned by CK-HP.

The trash compactor, owned by JAMAICA ASH, is comprised of a receptacle container, a walk-in chute that leads to a mechanical trash compactor that empties into the container and a

metal ramp that bridges the gap between the trash compactor's walk-in chute and the elevated portion of the loading dock.

At approximately 1:50 p.m., plaintiff, a security guard stationed at the loading dock of the premises, picked up two garbage bags from the elevated portion of the loading dock area and threw them into the trash compactor. The plaintiff stepped upon the metal ramp as he entered the walk-in chute, deposited the garbage, and turned around to exit the chute. While exiting the chute he stepped and slipped on the ramp with his right foot and fell face down upon the upper level of the loading dock. Unable to get up, plaintiff crawled to the edge of the dock and began to lower himself feet first to the lower level of the dock while lying face down on the dock. At a certain point plaintiff released himself from the elevated level of the dock so as to stand on the lower level of the dock, but fell to the ground.

During the course of treatment for the injuries he sustained from the accident plaintiff made statements that his accident occurred as a result of a slip on wet pavement, fall off a loading dock, or a greasy substance on the ramp. He also alleged in his bill of particulars that the ramp "was covered with water, oil, grease, food waste and other slippery substances causing the ramp to be slippery." Plaintiff also testified that at the time of the accident there was no moisture, grease, any type of liquid, or any slippery substance on the ramp that made him conclude that the ramp was slippery. Plaintiff further contends that he slipped and fell because the slope of the ramp was too steep and in violation of the NYS Building Code. Plaintiff also asserts that the surface of the ramp was smooth and should have been made of a diamond plated surface.

JAMACIA ASH and CP-HK move to dismiss plaintiff's complaint, in part, upon the following grounds: (1) plaintiff testified that he does not know what caused him to slip and fall; (2) plaintiff's claim is speculative and as such is not actionable since his inconsistent statements in the medical records and allegations as to how the accident occurred require a jury to speculate as to the ultimate cause of his accident; (3) the ramp is not defectively steep, smooth, and slippery, does not require a handrail and need not be made of a diamond or checkered metal plate; (4) the controlling principal of law holds the inherent smoothness of the surface the ramp is not actionable; and (5) the ramp is not in violation of the NYS Building Code and other statutes cited by plaintiff and his expert since the cited codes and statutes are not applicable to the subject ramp.

In this slip and fall case, the defendants may establish prima facie entitlement to judgement as a matter of law by submitting evidence that plaintiff is unable to identify the cause of his fall. Plaintiff's personal knowledge of the cause of the fall is not necessary to demonstrate negligence provided other admissible proof or provide. *See Izaquirre v. New York City Tr. Authority*, 106 A.D.3d 878 (2d Dep't 2013).

Here, plaintiff presented a report, affidavit and opinion of expert engineer Herman Silverberg P.E. Mr. Silverberg opined that the smooth metal was unreasonably dangerous because if its slope of 27% or 15 degrees and that the ramp violated the 1982 New York State Building Code section 1012.2 in that the slope exceeded the maximum allowable slope percentages of 8 percent for ramps used as a means of egress. Silverberg also opined that the smooth metal ramp violated section 1012.7.1 which provides that "the surface of ramps shall be of slip resistant materials securely attached", Mr. Silverberg also opined the applicability OSHA 1926.451(e)(5)(iii) which requires that the ramp have slip resistant material.

Defendant's expert engineer Peter Chen, P.E. in support of their motion for summary judgement, opined that some of the 1982 State Building Construction Code and industry standards cited by plaintiff were not applicable to the subject 1983 constructed building on the date of the accident. Mr. Chen also opined that the 1982 building construction codes section 108-3 regarding slope of ramps do not apply to the trash compactor, ramp and dock that which are not part of the means of egress/ingress of the building and are deemed incidental accessory structures attached to the main building. Mr. Chen also submitted measurements from a tribometer used to calculate the dynamic coefficient of friction in determining that the ramp was slip resistant.

Pursuant to CPLR §3212, a motion for summary judgement shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgement in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Expert testimony should be received when it would help clarify an issue calling for professional or technical knowledge possessed by the expert and beyond the ken of a typical juror. *See Shanika M. v. Stephaine G.*, 108 A.D.3d 717 (2d Dep't 2013).

Here, the parties experts, disputes the slip resistance of the sloped ramp, whether the loading dock is an essential part of the building or an accessory, whether the loading dock and trash compactor are covered by various portions of the building codes. Where there are conflicting expert reports or opinions as to compliance with building code violations, liability and proximate cause, the questions of facts may be determined by a jury. *See Ocasio v. Board of Education*, 55 A.D.825 (2d Dep't 2006) and .

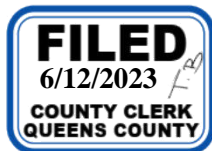
The Court accordingly finds that there exists triable issues of fact for trial.

The defendant Jamaica Ash's motion (Sequence #2) and defendant CK-HP's motion (Sequence #4) for summary judgement pursuant to CPLR §3212 dismissing the complaint and all cross-claims counterclaims and third party claims against it are denied.

Defendant CK-HP's motion (Sequence #2) for an order granting summary judgment on contractual indemnification against defendant Jamaica Ash for its negligence is granted without opposition.

This is the decision and order of this Court.

ENTER:



  
HON. ULYSSES B. LEVERETT, J.S.C

Hon. Ulysses B. Leverett

DATED: 6/9/2023