| **Lopez v NYU Langone Med. Ctr.** |
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| 2023 NY Slip Op 35221(U) |
| April 19, 2023 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 300750/2017E |
| Judge: Andrew Cohen |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF BRONX: PART 4**

**FRANCISCO M. LOPEZ,**

**Plaintiff,**

**-against-**

**NYU LANGONE MEDICAL CENTER**

**Defendant.**

**NYU LANGONE MEDICAL CENTER,**

**Third-Party Plaintiff,**

**-against-**

**COLLINS BUILDING SERVICES, INC.,**

**Third-Party Defendant.**

**DECISION AND ORDER**

**Index No. 300750/2017E**

**The following papers, on motion sequence numbers 5, 6 & 7, were considered on these motions for summary judgment:**

| PAPERS | NUMBERED |
|---|---|
| **Motion Seq. No. 5** | |
| Notice of Motion and annexed Exhibits and Affidavits and Memorandum of Law | 1, 2 |
| Answering Affidavits and Exhibits | 3 |
| Reply Affirmation | 4 |
| **Motion Seq. No. 6** | |
| Notice of Motion and annexed Exhibits and Affidavits and Memorandum of Law | 1, 2 |
| Answering Affidavits and Exhibits | 3 |
| Reply Affirmation | 4 |
| **Motion Seq. No. 7** | |
| Notice of Motion and annexed Exhibits and Affidavits and Memorandum of Law | 1, 2 |
| Answering Affidavits and Exhibits | 3 |
| Reply Affirmation | 4 |

**Upon the foregoing papers, it is ordered that motion sequence numbers 5, 6, & 7 are consolidated for the purposes of disposition:**

1) **The motion for partial summary judgment on liability pursuant to CPLR 3212 by plaintiff (Motion Sequence Number 5) is denied.**
2) **The motion by third-party defendant Collins Building Services, Inc. for summary judgment pursuant to CPLR 3212 to dismiss the third-party complaint (Motion Sequence Number 6) is granted only to the extent that the causes of action for common-law indemnification and contribution are dismissed.**
3) **The branch of the motion by defendant NYU Langone Medical Center's motion for summary judgment pursuant to CPLR 3212 to dismiss the complaint is denied and the branch of the motion for summary judgment pursuant to CPLR 3212 on its third-party complaint (Motion Sequence Number 7) is granted only on its cause of action for breach of contract for failure to procure insurance and is otherwise denied.**

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on January 27, 2017, when he tripped and fell in the storage cage located in the sub-basement ("storage cage") of 550 First Avenue, New York, New York ("premises"). Defendant NYU Langone Medical Center ("NYU") is the owner of the premises. Third-party defendant Collins Building Services, Inc. ("Collins") provides cleaning and maintenance services at the premises. At the time of the accident, plaintiff was employed by Collins as a porter and had been working at the premises for three months. His duties and responsibilities included retrieving supplies from the storage cage and restocking supply closets at the premises. Plaintiff claims that prior to his accident, he had already made one trip that day to the storage cage to retrieve supplies without incident. He testified that upon his second trip to the storage cage, while holding a box of supplies, he fell when he tripped in a crack in the cement slab floor. According to plaintiff, there were boxes of supplies in the storage cage that were stacked so high that they covered some of the lighting and that due to dim lighting, he ended up tripping in the crack in the concrete slab floor.

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment on liability on his complaint (Motion Sequence 5). NYU moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for summary judgment on its third-party complaint (Motion Sequence 7). Collins moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint (Motion Sequence 6). The third-party complaint sets forth causes of action for common-law indemnification, contribution, contractual indemnification, and breach of contract for failure to procure insurance.

**NYU's liability**

Plaintiff contends that NYU breached its duty to plaintiff by failing to maintain the premises in a reasonably safe condition and that it either created and/or had actual or constructive notice of the defective condition. Specifically, plaintiff posits that NYU failed to provide adequate lighting inside the storage room and that it failed to repair a crack in the concrete floor.

NYU asserts that the complaint should be dismissed because the alleged defective condition to wit: the crack, is trivial and not actionable, and that NYU neither created nor had actual or constructive notice of the defective condition.

A defendant seeking dismissal based on a trivial defect must demonstrate that "the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). Generally, whether a dangerous condition or defective condition exists depends on the particular circumstances of each case and is an issue of fact for the jury to determine (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]). The court should consider whether other conditions exist, such as weather, location, or adverse lighting, that make would make an apparently trivial defect, nonetheless a tripping hazard (*Menendez v Dobra*, 301 AD2d 453, 453 [1st Dept 2003]). The court must also look at the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997] [internal citation omitted]).

Here, NYU failed to meet its initial burden of making a prima facie showing that the defective condition was trivial as a matter of law. NYU does not submit evidence to show that the defect was trivial and not actionable, such as expert testimony or a report from an expert examining the alleged defect, nor does NYU proffer evidence of the dimensions of the crack. The photographs taken by plaintiff approximately five days after plaintiff's accident reflect a crack running the length of the wooden pallet with jagged edges. Additionally, plaintiff testified that the lighting was dim and was blocked by some of the boxes of supplies. NYU's reliance on the photographs and the deposition testimony fail to support a finding of triviality as a matter of law (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 83).

A defendant who moves for summary judgment in a trip and fall action has the initial burden of establishing that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 143 [1st Dept 2000] [internal citation and quotation marks omitted]). "A defendant demonstrates lack of constructive notice by producing 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 Dept 2011] [internal citation omitted]).

NYU also failed to satisfy its prima facie burden with regards to constructive notice (*see Sada v August Wilson Theater*, 140 AD3d 574 [1st Dept 2016]). Notably, NYU produced no evidence of its inspection activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected before plaintiff fell (*Quitana v TCR, Tennis Club of Riverdale, Inc.*, 118 AD3d 455 [1st Dept 2014]). NYU's building manager testified that his duties and responsibilities included inspecting the sub-basement at least once a week (McCann Tr. at 16), however, there is no evidence of what the inspection routine was, if any, and whether such routine was followed on the day of the accident. The mere assertion of routine inspection of the sub-basement is insufficient to satisfy its burden of demonstrating a lack of constructive notice of the hazardous condition (*see Williams v New York City Housing Authority*, 99 AD3d 613 [1st Dept 2012]). NYU's building manager also testified that if something was unsafe in the storage cage, Collins was supposed to notify NYU and "[NYU] would make the corrections" (McCann Tr. at 37). Even assuming *arguendo*, that NYU had satisfied its *prima facie* burden, given the condition of the defect, there exist issues of fact as to the length of time that the crack existed prior to plaintiff's accident. Accordingly, the branch of NYU's motion for summary judgment dismissing plaintiff's complaint is denied.

Plaintiff's motion for partial summary judgment on liability against NYU is likewise denied for failure to satisfy the initial burden of establishing entitlement to summary judgment on liability as a matter of law. Plaintiff submitted no evidence that NYU either created the defective condition or had actual notice of the defect. He testified that he had never made any complaints about the crack or heard of anyone else complaining about the crack before his accident (Plaintiff Tr. at 58-59). Plaintiff testified that he had made daily visits to the storage cage for three months before the accident and had never noticed the crack (Plaintiff Tr. at 87). He indicated that the crack was not there a month before the accident (Plaintiff Tr. at 88). While plaintiff asserts that the dim lighting contributed to his accident, none of plaintiff's pleadings include allegations of inadequate lighting and therefore cannot be considered to establish whether NYU created the defective condition as that would be a new theory of liability (see *Achee v Merrick Village, Inc.*, 208 AD3d 542 [2d Dept 2022]; see also *Knickerbocker v Ulster Performing Arts Ctr.*, 74 AD 3d 1526 [3d Dept 2010]). Indeed, plaintiff testified that he had never complained about the lighting being dim nor did the lighting ever interfere with his duties and responsibilities (Plaintiff Tr. at 53). Moreover, NYU's building manager testified that the storage area was well lit (McCann Tr.at 34). Thus, plaintiff's own proof failed to establish that the lighting was inadequate and that NYU had actual or constructive notice of the defect. Consequently, plaintiff's motion is denied.

**Third-party complaint**

NYU also moves for summary judgment on its third-party complaint. NYU maintains that under the service agreement between Collins and NYU ("Contract"), Collins is obligated to indemnify NYU since plaintiff's accident arose in connection with the work Collins was contracted to provide. Collins opposes, asserting that NYU retained control over the storage cage and that NYU failed to eliminate all material issues of fact as to whether it lacked constructive notice of the dangerous condition. Collins also asserts that since NYU failed to establish that it was free of negligence, it is not entitled to contribution or common-law or contractual indemnification.

In moving to dismiss the third-party complaint, Collins claims that the Contract required that Collins provide janitorial and maintenance services and that Collins could only perform work outside the scope of the janitorial services upon NYU's written request to Collins. Under the Contract, NYU was to provide Collins with a "suitable office, locker room, storage, shop and washroom space . . . to be determined by [NYU] for the use by [Collins'] employees . . ." (Contract at 5). Collins claims that there was no requirement that it inspect or maintain the storage cage under the Contract and thus, the Contract did not operate to entirely absorb NYU's duty to maintain the premises safely. In opposition NYU argues that there are material issues of fact regarding Collins' duty to the plaintiff and whether Collins breached its duty to report any dangerous condition to NYU.

Common-Law Indemnification and Contribution

In order to recover on a claim for common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (*Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). A party seeking summary judgment on a claim for contribution must show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiff and that a breach of that duty contributed to the alleged injuries (*Guerra v St. Catherine of Sienna*, 79 AD3d 808 [2d Dept 2010]).

Here, NYU has failed to carry its burden in establishing that Collins had exclusive control of the storage cage and thus, rendering it responsible for its maintenance and inspection. According to NYU's building manager, none of the contractors who used the storage cages in the sub-basement, including Collins, were permitted to install their own lighting systems (McCann Tr. at 34). He further testified that if there was an issue in a storage cage, he would go and inspect it and NYU would address the problem (McCann Tr. at 37). He stated that "[e]verything has to be cleared by NYU" (McCann Tr. at 34). Thus, NYU failed to eliminate all material issues of fact as to whether NYU retained control of the storage cage and whether it was responsible to inspect and maintain the storage cage. Therefore, this branch of NYU's motion for summary judgment is denied, regardless of the sufficiency of the opposing papers.

Collins has, however, established its entitlement to judgment as a matter of law dismissing the contribution and common-law indemnification causes of action in the third-party complaint by demonstrating that the accident was not due solely to its negligent performance or nonperformance of an act solely in its province (*Del Vecchio v Danielle Associates, LLC*, 108 AD3d 583, 586 [2d Dept 2013]). Under the Contract, Collins was only required to provide janitorial and maintenance services; there is nothing in the Contract that obligated Collins to inspect and maintain the storage cage.

Additionally, NYU's claims for common-law indemnification and contribution are barred by Workers' Compensation Law § 11, which precludes any third-party claim for common-law indemnity and contribution against the injured worker's employer in the absence of a "grave injury." Here, it is clear that plaintiff's accident occurred within the course of his employment with Collins and that the injuries to his right leg and foot, including a torn meniscus to his knee and a facture to his ankle, do not constitute a grave injury under Section 11 of the Workers Compensation Law (*Tavarez v LIC Development Owner, L.P.*, 205 AD3d 565 [1st Dept 2022]). Grave injury is defined as "death, permanent and total loss blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (*see* Workers Compensation Law § 11). In opposition, NYU failed to raise a triable issue of fact as to whether plaintiff's injuries qualified as a grave injury. Accordingly, the third-party claims for common-law indemnification and contribution against Collins are dismissed.

Breach of Contract for Failure to Procure Insurance

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011] [internal quotation marks and citations omitted]).

Here, NYU satisfied its prima facie burden of demonstrating its entitlement to summary judgment. It is undisputed that, under the Contract, Collins was required to procure comprehensive general liability insurance, with a combined limit of at least $25,000,000.00 for each occurrence, to include NYU as an additional insured. In opposition, Collins failed to refute that it was obligated to procure insurance naming the NYU as an additional insured or that it failed to do so. Accordingly, this branch of NYU's motion on its third-party claim for breach of contract is granted and the branch of Collins' motion for summary judgment dismissing this cause of action is denied.

Contractual Indemnification

A party is entitled to contractual indemnification where the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances (*Blank Rom, LLP v Parrish*, 92 AD3d 444 [1st Dept 2012] [internal quotation marks and citations omitted]). The party seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability (*Correia v. Professional Data Management, Inc.*, 259 AD2d 60 [1st Dept 1999]). Here, the indemnification clause in the Contract is written in broad terms. It provides for indemnification when a claim is "caused by, resulting from, arising out of or occurring in connection with the [s]ervices . . . whether such claim is based upon the Services Provider's alleged sole active or passive negligence or willful misconduct . . .(unless the claim is based exclusively upon the Owner's alleged sole negligence or willful misconduct)" (Contract at 11).

However, since NYU failed to tender any evidence as to when they last inspected the storage cage prior to plaintiff's accident, there exists an issue of fact as to whether plaintiff's accident was due to NYU's negligence, if any. It is premature to grant summary judgment on a contractual indemnification claim where there is a possible finding that plaintiff's injuries can be attributed to the party seeking indemnification (*Picaso v 345 East 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2011]). Thus, summary judgment is not proper on a claim of contractual indemnification when the extent of each potentially liable party's negligence has yet to be determined (*Hughey v RHM-88,* LLC, 77 AD3d 520 [1st Dept 2010]; *Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]).

The branch of Collins' motion for summary judgment dismissing this cause of action is similarly denied. Contrary to Collins' assertions, General Obligations Law § 5-322.1 is inapplicable to this case, since the Contract is an agreement to provide cleaning services and is unrelated to "the construction, alteration, repair or maintenance of a building" (*id.; Skerrett v LIC Site B2 Owners, LLC*, 199 AD3d 956 [2d Dept 2021]). The term "maintenance was intended to mean services related to maintain the integrity of the building and the functioning of its appliances (*see Quevedo v City of New York*, 56 NY2d 150 [1982]) and not routine maintenance and cleaning (*see Skettett v LIC Site B2 Owner, LLC*, 199 Ad3d 956 [2d Dept 2009])

Although Collins avers that the provision providing for indemnification is void and unenforceable because it purports to indemnify NYU for its own acts of negligence, this assertion is without merit. As a general matter, a contract that obligates a contractor to indemnify an owner for the owner's own negligence is against public policy and unenforceable (*see, e.g.*, General Obligations Law § 5-321). However, in the context of a commercial contract that is negotiated between sophisticated parties, where parties "freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity" (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). Moreover, as the indemnification clause contains the saving clause language, "to the fullest extent of the law," it only purports to indemnify NYU to the extent it was not itself negligent.

Inasmuch as NYU cannot be indemnified for its own negligence, Collins fails to eliminate all material issues of fact as to whether plaintiff's accident was a result of NYU's *sole* negligence. Here, there exist triable issues of fact as to whether Collins was negligent in failing to notify NYU of the crack in the storage cage. Plaintiff's supervisor, Victor Pacheco, testified that if there was a "dangerous situation" with the storage cage, he would notify his supervisor, who would then notify NYU so that NYU could make the appropriate repairs since the storage cage belonged to NYU (Pacheco Tr. at 53). He also testified that although the Collins employees are responsible for cleaning the storage cage and keeping the boxes organized and the cage tidy (Pacheco Tr. at 45), he did not recall whether there was any regular inspection of the cage by Collins (Pacheco Tr. at 49). Further, NYU's building manager testified that Collins was supposed to let NYU know if there was an unsafe condition in the storage cage (McCann tr. at 18). Consequently, this branch of Collins' motion for summary judgment is denied.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on liability (Motion Sequence Number 5) is denied; and it is further

ORDERED, that the portion of NYU's motion for summary judgment dismissing plaintiff's complaint (Motion Sequence Number 7) is denied; and it is further

ORDERED, that the portion of NYU's motion for summary judgment on its third-party complaint (Motion Sequence Number 7) is granted only as to its claims for breach of contract for failure to procure insurance and the motion is otherwise denied; and it is further

ORDERED, that the motion by Collins for summary judgment dismissing the third-party complaint against it (Motion Sequence Number 6) is granted insofar as the claims for common-law indemnification and contribution are dismissed and the motion is otherwise denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this court.

**Dated:** April 19**, 2023**

**Andrew Cohen, J.S.C**