

**Joachimczyk v Best Work Holdings (N.Y.) LLC**

2024 NY Slip Op 34965(U)

November 13, 2024

Supreme Court, Bronx County

Docket Number: Index No. 33165/2019E

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 6

James Joachimczyk,

-against-

Best Work Holdings (New York) LLC,  
et al

Index No.

33165/2019E

Hon.

LAURA G. DOUGLAS  
Justice Supreme Court

Justice Supreme Court

The following papers numbered 1 to (3) were read on this motion ( Seq. No. 4 )  
for Summary Judgment noticed on June 21, 2024  
submitted

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>(1)</u>
Answering Affidavit and Exhibits	No(s). <u>(2)</u>
Replying Affidavit and Exhibits	No(s). <u>(3)</u>

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant Best Work Holdings (New York) LLC for summary judgment is decided in accordance with the attached memorandum Decision / Order.

Dated:

Dated: 11-13-24

Hon.

*LD*

LAURA G. DOUGLAS  
Justice Supreme Court

, J.S.C.

- HECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- HECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No. 33165/2019E

JAMES JOACHIMCZYK,

Plaintiff,

-against-

BEST WORK HOLDINGS (NEW YORK) LLC,  
72 WALL STREET CONDOMINIUM, by its BOARD OF  
MANAGERS, ALLSTATE CONSTRUCTION &  
RESTORATION, INC., SSP CONSTRUCTION CORP.,  
CBRE, INC., and CBRE GROUP, INC.,

Defendants.

**DECISION/ORDER**

**Present:**  
**Hon. Laura G. Douglas**  
**J. S. C.**

**Part 6**

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 4):

**Papers**

**Numbered**

**Notice of Motion by Defendant Best Work Holdings (New York) LLC, Statement of Facts by Michael Zettl, Esq. dated April 24, 2024, Memorandum of Law by Michael Zettl, Esq. dated April 24, 2024 in Support of Motion, Affirmation of Michael Zettl, Esq. dated April 24, 2024 in Support of Motion, and Exhibits (“A” through “H”)..... 1**

**Affirmation of James M. McGowan, Esq. dated June 14, 2024 in Opposition to Motion and Opposition to Defendant’s Statement of Material Facts by James M. McGowan, Esq. dated June 14, 2024..... 2**

**Reply Affirmation of Michael Zettl, Esq. dated June 21, 2024..... 3**

*Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:*

Defendant Best Work Holdings (New York) LLC (“Best Work”) seeks summary judgment pursuant to CPLR 3212 dismissing the plaintiff’s complaint and all cross-claims asserted against it in their entireties. The motion is granted.

The plaintiff (“Joachimczyk”) seeks monetary damages for personal injuries purportedly sustained on July 22, 2019 at approximately 9:00 p.m. when he allegedly slipped and fell on a sidewalk

located adjacent to 72 Wall Street in Manhattan. The defendants were owners, managers, and/or contractors at the premises. Best Work contends that it is entitled to judgment as a matter of law because Joachimczyk cannot identify the cause of his fall. In addition, Best Work argues that Joachimczyk cannot demonstrate that Best Work created any hazardous condition or had notice of same.

In support of its motion, Best Work relies on Joachimczyk's own deposition testimony. In pertinent part, Joachimczyk testified that he was walking under certain scaffolding and slipped and fell on a "slippery solution" near the end of the scaffolding. He did not see the solution before he fell, did not see other persons slip on the solution before him, and made no complaints about the presence of the solution prior to his fall. When asked to describe the solution, Joachimczyk stated that it felt very slippery to the touch. However, he could not describe the solution's physical characteristics, such as its color or viscosity. He did not know how long the solution had been present prior to the time of his accident or where the solution had come from. Joachimczyk did state that it was raining at the time of his accident.

Best Work also submits the deposition testimony of Daniel A. Kobylinski, the owner and operator of Koby Security Solutions, Inc. ("KSS"), which provided security services at the subject premises. In pertinent part, Kobylinski testified that there was construction ongoing at the building in July 2019. He stated that no one had made any complaints to KSS regarding any hazardous condition on the sidewalk. He did not recall observing a slippery solution or any debris that required removal or cleaning on the sidewalk anytime in July 2019 or during the period of his engagement at the premises. Finally, Kobylinski testified that he never saw anyone leave trash bags or anything similar on the sidewalk and noted that the construction crews would use a side entrance away from the location of Joachimczyk's accident.

In opposition, Joachimczyk maintains that material questions of fact exist as to whether Best Work's negligence caused or contributed to his accident. Joachimczyk argues that Best Work, as the owner of the premises, had a nondelegable duty to keep the abutting sidewalk in a reasonably safe condition pursuant to New York City Administrative Code 7-210(a) and (b), notwithstanding any transfer of possession or maintenance agreement with a nonowner (*see He v. Troon Management, Inc.*, 34 NY3d 167 [Ct App 2019]). In addition, he maintains that there remain questions of fact as to whether Best Work created the slippery condition.

Joachimczyk notes that Kobylinski testified that he could not recall how often Best Work would

inspect the subject sidewalk (*see* Kobylinski deposition transcript, pp. 39-40) and could not state whether he was present at the premises on the date of Joachimczyk's accident (*see* Kobylinski deposition transcript, p. 25, ll. 3-12). Joachimczyk argues that summary judgment is not warranted, since Best Work has not submitted any admissible evidence demonstrating that it did not cause the slippery solution to be present on the sidewalk and revealing when it last inspected the sidewalk while adhering to an inspection schedule or protocol (*see Quintana v. TCR Tennis Club of Riverdale, Inc.*, 118 AD3d 455 [1<sup>st</sup> Dept 2014]).

To obtain summary judgment, Best Work must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1<sup>st</sup> Dept 2006]). To defeat such a showing, an adversary must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1<sup>st</sup> Dept 2006]). The goal of a motion for summary judgment is issue finding, rather than issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [Ct App 1957]).

In a slip and fall action, the defendant bears the initial burden of establishing that it did not create the allegedly hazardous condition and lacked actual or constructive notice of its existence (*see Rodriguez v. 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [1<sup>st</sup> Dept 2010]). A lack of actual notice can be demonstrated by testimony that no complaints about the location were received before the accident, and that there were no prior incidents in that area prior to the plaintiff's fall (*see Frederick v. New York City Hous. Auth.*, 172 AD3d 545 [1<sup>st</sup> Dept 2019]). Constructive notice usually exists when the allegedly hazardous condition is visible, apparent, and exists on defendant's premises for a period sufficient to give the defendant an opportunity to discover and remedy it (*see Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419 [1<sup>st</sup> Dept 2011]). Constructive notice can also be established by evidence that a recurring dangerous condition existed in the area of the accident that the defendant routinely left unaddressed (*see Uhlich v. Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [1<sup>st</sup> Dept 2003]). A defendant can satisfy its burden of showing that it lacked constructive notice by submitting evidence of its maintenance activities on the accident date and that the alleged condition did not exist when the area was last inspected or cleaned prior to the plaintiff's accident (*see Velocci v. Stop & Shop*,

188 AD3d 436 [1<sup>st</sup> Dept 2020]). When a defendant fails to meet its initial burden to show that it did not cause, create, or have actual or constructive notice of the alleged condition, the burden does not shift to the plaintiff to raise a triable issue of fact (*see Hill v. Manhattan N. Mgt.*, 164 AD3d 1187 [1<sup>st</sup> Dept 2018]). In a case where the plaintiff attributes her injuries to a fall, a defendant can also sustain its initial burden of proof by demonstrating that a jury would have to engage in impermissible speculation to determine the cause of the accident (*see Smith v. City of New York*, 91 AD3d 456 [1<sup>st</sup> Dept 2012], *Pena v. Women's Outreach Network, Inc.*, 35 AD3d 104 [1<sup>st</sup> Dept 2006], and *De Rosa v. Anna & Rose Realty Company, LLC*, 219 AD3d 700 [2<sup>nd</sup> Dept 2023]).

Here, Best Work has satisfied its initial burden of proof by demonstrating that Joachimczyk can only speculate that any alleged negligence by Best Work was a proximate cause of his injuries. While Best Work acknowledges that it owned the premises abutting the subject sidewalk and that it arranged to have the scaffolding erected (*see Zettl Reply Aff.*, ¶ 3), there is no evidence that it created, exacerbated, knew of, or should have been aware of the hazardous condition allegedly existing on the sidewalk. The mere existence of a slippery foreign substance on the ground does not give rise to a negligence action; while a plaintiff does not have the burden to identify the substance that caused him to fall, speculation regarding causation cannot sustain the action (*see Segretti v. Shorestein Company, East, L.P.*, 256 AD2d 234 [1<sup>st</sup> Dept 1998] and *Alvarez v. Staten Island Rapid Transit Operating Authority*, 225 AD3d 830 [2<sup>nd</sup> Dept 2024]). Here, it is equally possible that Joachimczyk slipped and fell because it was raining or slipped on a solution accumulated only moments prior to his accident. He cannot state the substance's color, composition, or any other characteristic that distinguishes it from rainfall and cannot state how long the slippery solution existed on the sidewalk. He can only surmise that the slippery solution somehow originated with Best Work.

Joachimczyk's argument that Best Work must establish when the subject location was last inspected and show that it followed a maintenance and inspection schedule is unavailing, since there is no basis for his version of the accident that is not simply conjecture (*see Garcia v. 1265 Morrison LLC*, 122 Ad3d 512 [1<sup>st</sup> Dept 2014] (presence of mop and bucket under stairwell provided nonspeculative basis for attribution of wet spot to property owner)).

Under these circumstances, Joachimczyk's claim is wholly speculative and insufficient to defeat summary judgment (*see Dombrower v. Maharia Realty Corp.*, 296 AD2d 353 [1<sup>st</sup> Dept 2002]). A jury would have to base any finding of proximate cause upon conjecture (*see Goodman v. 78 West 47<sup>th</sup> Street*

*Corp.*, 253 AD2d 384 [1<sup>st</sup> Dept 1998] (plaintiff's complaint dismissed where he could not identify the source of the oily substance that cause the sidewalk to be hazardous) and *Alvarez v. Staten Island Rapid Transit Operating Authority*, 225 AD3d 830 [2<sup>nd</sup> Dept 2024] (plaintiff's deposition testimony that she fell as a result of a slippery substance that she could not identify was insufficient to raise a triable issue of fact)), especially since Joachimczyk himself admits that there was another potential source of water on the sidewalk in the form of rain, for which Best Work would not be liable (*see Georgiou v. 32-42 Broadway LLC*, 82 AD3d 606 [1<sup>st</sup> Dept 2011] and *McGuire v. 3901 Independence Owners, Inc.*, 74 AD3d 434 [1<sup>st</sup> Dept 2010]).

The cross-claims against Best Work are dismissed as abandoned, since none of its co-defendants opposed its motion seeking dismissal of the cross-claims (*see Hernandez v. NY Prepaid Wireless LLC*, 206 AD3d 409 [1<sup>st</sup> Dept 2022]).


Accordingly, it is hereby

ORDERED that defendant Best Work Holdings (New York) LLC have summary judgment dismissing the plaintiff's complaint and all cross-claims asserted against it in this action; and it is further

ORDERED that the Clerk of the Court make all entries necessary to effectuate the terms of this Order, including entry of judgment(s) of dismissal.

The foregoing constitutes the Decision/Order of this Court.

DATED: November 13, 2024  
Bronx, New York

  
\_\_\_\_\_  
HON. LAURA G. DOUGLAS  
J.S.C.