| **Joachimczyk v Best Work Holdings (N.Y.) LLC** |
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| 2024 NY Slip Op 34978(U) |
| September 19, 2024 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 33165/2019E |
| Judge: Laura G. Douglas |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

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James Joachimczyk,

Index No. 33165/2019E

-against-

Hon. LAURA G. DOUGLAS Justice Supreme Court

Justice Supreme Court

Best Work Holdings (New York) LLC, et al

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

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

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant Allstate Construction + Restoration, Inc. is decided in accordance with the attached memorandum Decision/Order.

Dated: 9-19-24

Hon. LAURA G. DOUGLAS Justice Supreme Court, J.S.C.

CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE

MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK 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. 3):

| **Papers** | **Numbered** |
|---|---|
| **Notice of Motion by Defendant Allstate Construction & Restoration, Inc., Statement of Facts by Constantine Pantazis, Esq. dated March 11, 2024, Affirmation of Constantine Pantazis, Esq. dated March 11, 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 Constantine Pantazis, Esq. dated June 19, 2024** | **3** |

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

Defendant Allstate Construction & Restoration, Inc. ("Allstate") 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. Allstate contends that it is entitled to judgment as a matter of law because Joachimczyk can only speculate as to the cause of his accident. In addition, Allstate maintains that it had stopped working at the subject location about one month prior to the date of Joachimczyk's accident and that it neither created nor had notice of the allegedly hazardous condition.

In support of its motion, Allstate 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.

Allstate 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. Included in the duties performed by KSS at this location were fire watch, visitor monitoring, and construction monitoring. Kobylinski testified that no one had made any complaints to KSS regarding any hazardous condition on the sidewalk. He did not recall observing a slippery solution on the sidewalk anytime in July 2019.

Finally, Allstate notes the deposition testimony of Mohammad Malik ("Malik"), Allstate's president. In pertinent part, Malik testified that Allstate is engaged in building façade and interior construction work. This included spot pointing and façade work at the subject building. Mostly in the rear of the building at the roof level. Allstate was not required to perform any inspections. Malik did not recall receiving any complaints about Allstate's work at this location. He testified that Allstate had completed all of its work at the subject premises sometime in early May 2019, and certainly by July 2019.

In opposition, Joachimczyk contends that material questions of fact exist as to whether Allstate created the condition that caused him to slip and fall. He notes that Allstate admits that it performed spot pointing and façade work at the subject location. Joachimczyk simply argues that Allstate has failed to submit any admissible evidence that it did not cause the slippery solution to be present on the

sidewalk and that it inspected the area where he fell (*see Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 AD3d 455 [1st Dept 2014]).

To obtain summary judgment, Allstate 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 [1st 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 [1st 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 [1st 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 [1st 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 [1st 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 [1st 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 [1st 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 [1st 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 [1st Dept 2012],

*Pena v. Women's Outreach Network, Inc.*, 35 AD3d 104 [1st Dept 2006], and *De Rosa v. Anna & Rose Realty Company, LLC*, 219 AD3d 700 [2nd Dept 2023]).

Here, Allstate has satisfied its initial burden of proof that it owed no duty to Joachimczyk since it did not own nor was responsible for the condition of the sidewalk. In addition, Allstate has shown that Joachimczyk cannot establish that any alleged negligence by Allstate was a proximate cause of his injuries. It is uncontested that Allstate was last on the premises some 22 to 83 days prior to the accident. There is no evidence that Allstate created, exacerbated, knew of, or should have been aware of the hazardous condition allegedly existing on the sidewalk (*see Perez v. Morse Diesel, Inc.*, 258 AD2d 428 [1st Dept 1999] (Defendant demonstrated that it did not perform work in the immediate vicinity of the plaintiff's accident, that it completed its work six months before the accident occurred, and that it had no obligations with respect to the maintenance of the patio where the plaintiff slipped)).

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. Shorenstein Company, East, L.P.*, 256 AD2d 234 [1st Dept 1998]). Here, Joachimczyk cannot identify the substance on which he slipped and has offered no testimony revealing how long the slippery solution existed on the sidewalk. He has not offered any evidentiary support for his claim that Allstate created the hazard and can only surmise that the slippery solution somehow originated with Allstate. There is no evidence that Allstate breached its contractual obligations or had a duty to return to the premises after completing its work to remedy any defects that might have developed *(see Fernandez v. 707, Inc.*, 85 AD3d 539 [1st Dept 2011]). Joachimczyk's argument that, in seeking summary judgment in a slip and fall case, Allstate must indicate when the subject location was last inspected and show that it followed a maintenance and inspection schedule is unavailing, since he has not established that Allstate had any duty to inspect the subject sidewalk.

Under these circumstances, Joachimczyk's claim is wholly speculative and insufficient to defeat summary judgment (*see Dombrower v. Maharia Realty Corp.*, 296 AD2d 353 [1st Dept 2002]). A jury would have to base any finding of proximate cause upon conjecture (*see Goodman v. 78 West 47th Street Corp.*, 253 AD2d 384 [1st 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 [2nd 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 Allstate would not be liable (*see Georgiou v. 32-42 Broadway LLC*, 82 AD3d 606 [1st Dept 2011]).

As to the cross-claims against Allstate, it is uncontested that there was no contract between Allstate and any of the answering co-defendants. Allstate correctly notes that common-law indemnification is not viable because it has demonstrated that it was not negligent and/or a proximate cause of Joachimczyk's injuries (*see McCarthy v. Turner Construction, Inc.*, 17 NY3d 369 [Ct App 2011]). The Court notes that there was no opposition to the branch of Allstate's motion seeking dismissal of the cross-claims.

Accordingly, it is hereby

ORDERED that defendant Allstate Construction & Restoration, Inc. 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: September 19, 2024
Bronx, New York

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