SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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INDEX NO. 158705/2020

TERENCE CAIN,

Plaintiff,

MOTION DATE 08/19/2025, 08/19/2025

- v -

MOTION SEQ. NO. 001 002

THE LONG ISLAND RAILROAD COMPANY, 1 PENN PLAZA, LLC., FEDCAP REHABILITATION SERVICES, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 84, 85

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 75, 81, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY.

INTRODUCTION

This personal injury action arises from plaintiff's slip and fall on October 16, 2019, at approximately 5:15 p.m., on tracked-in rainwater at the bottom of the stairway at the 7th Avenue entrance to Penn Station at West 34th Street in Manhattan. Defendant The Long Island Railroad Company ("LIRR") now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it and for a declaratory judgment in its favor on its crossclaim for contractual indemnity against defendant FEDCAP Rehabilitation Services, Inc. ("FEDCAP") (MOT SEQ 001). Plaintiff and FEDCAP oppose the motion, and FEDCAP separately moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and LIRR's crossclaim against it (MOT SEQ 002). The motions are each granted in part.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in*

the City of N.Y. v D'Agostino Supermarkets, Inc., 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

LIRR's Motion (MOT SEQ 001)

"A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created nor had actual or constructive notice of the unsafe condition" (*Rosario v Prana Nine Properties, LLC*, 143 AD3d 409, 410 [1st Dept. 2016]). Here, it is undisputed that it was raining at the time of the accident and that the slippery condition on which plaintiff fell was caused by tracked-in rainwater. However, contrary to LIRR's contention, the video surveillance footage it submits in support of its motion does not conclusively establish a lack of constructive notice by demonstrating that the wet and slippery condition was created just a few minutes before the accident. Specifically, while the video shows other commuters shaking water off their umbrellas after descending the subject stairs in the vicinity of where plaintiff would slip and fall just a few minutes later, it does not conclusively establish that a wet and slippery condition was not already present.

Nor does LIRR make a prima facie showing that it took reasonable precautions to remedy the wet condition of its concourse floor (*see Toner v Nat'l R.R. Passenger Corp.*, 71 AD3d 454, 455–56 [1st Dept. 2010]; *Pomahac v TrizecHahn 1065 Ave. of Americas, LLC*, 65 AD3d 462, 465-66 [1st Dept. 2009]). While the witness for FEDCAP, which held a subcontract to provide LIRR with janitorial services at Penn Station, testified regarding the precautions normally taken during rainy weather, including mopping the floor and the placement of mats and warning cones, his testimony did not establish that these precautions were in fact taken on the date of the accident. Indeed, the video surveillance does not show anyone mopping the area at the base of the stairs where plaintiff fell for at least thirty-six (36) minutes prior to the accident, nor does it show any mats, wet floor signs, or cones placed at the bottom of the subject stairs. Similarly, plaintiff testified that, while he observed mats placed near the bottom of the escalators adjacent to the stairway, no mats were placed at or near the foot of the subject stairs.

Therefore, LIRR's motion is denied to the extent it seeks dismissal of plaintiff's complaint, as it fails to demonstrate *prima facie* that LIRR lacked constructive notice or otherwise exercised reasonable care in maintaining the safe condition of its premises.

LIRR's motion is granted, however, to the extent it seeks summary judgment on its contractual indemnity crossclaim against FEDCAP. LIRR submits a copy of its contract with New York State Industries for the Disabled, Inc. ("NYSID"), of which FEDCAP is a member, and pursuant to which FEDCAP provided janitorial services at Penn Station. The contract contains a broad indemnification provision requiring FEDCAP to indemnify LIRR for any all claims of bodily injury "arising out of or in connection with [FEDCAP's] Work under this Contract . . . irrespective of whether it shall have been due in whole or in part to the negligence, fault, failure or omission of [FEDCAP.]" The contract further provides, however, that "[FEDCAP] shall not be responsible for indemnifying, or holding harmless [LIRR] for that portion of damages arising out of bodily injury . . . caused by or resulting from negligence of [LIRR]." It is undisputed that, pursuant to the contract, FEDCAP was the exclusive provider of janitorial services at Penn Station, and that its duties included mopping the floors and placing mats and warning cones during inclement weather in accordance with LIRR protocols. As such, LIRR demonstrates that the contract's broad "arising out of" indemnity provisions were triggered by plaintiff's commencement of this action, which seeks damages for injuries sustained due to an alleged failure to remedy the wet and slippery condition of Penn Station's floors (*see Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept. 2021]; *Paulino v Bradhurst Assocs., LLC*, 144 AD3d 430, 430–31 [1st Dept. 2016]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept. 2015]; *Fuger v Amsterdam House for Continuing Care Ret. Cmty., Inc.*, 117 AD3d 649, 650 [1st Dept. 2014]).

FEDCAP fails to raise a triable issue of fact in opposition. FEDCAP is correct that, pursuant to the contract terms, no indemnity is owed for any portion of damages caused by or resulting from LIRR's negligence. It does not follow, however, that summary judgment on LIRR's contractual indemnity crossclaim is premature. The evidence submitted on the present motions suffices to demonstrate that LIRR's negligence, if any, is not the *sole* proximate cause of plaintiff's accident (*cf. Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept. 2020]). To be sure, the contract reserved for LIRR significant authority to control and supervise

FEDCAP's work. However, the deposition testimony of the LIRR and FEDCAP witnesses makes clear that FEDCAP was solely responsible for all janitorial services; LIRR had no staff of its own onsite performing such services; and that, while LIRR station managers were generally responsible for supervising FEDCAP's work, direct supervision of the janitorial staff was provided by FEDCAP employees who had discretion to determine when to mop and place mats, wet floor signs, and warning cones. As such, logic dictates that, if plaintiff is able to demonstrate at trial that a dangerous, slippery condition existed for a sufficient length of time to establish constructive notice (*see Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept. 2011]), or that LIRR otherwise failed to take reasonable precautions to remedy the wet condition of its concourse floor (*see Toner*, 71 AD3d at 455–56; *Pomahac*, 65 AD3d at 465-66), liability will be based, at least in part, on FEDCAP's negligence in the performance of its contractual duties.

Therefore, summary judgment on LIRR's contractual indemnification crossclaim is granted conditionally, subject to a determination at trial as to LIRR's negligence, if any (*Sanchez v 404 Park Partners, LP*, 168 AD3d 491, 493 [1st Dept. 2019]; *Aramburu*, 126 AD3d at 500-01; *Fuger*, 117 AD3d at 650-51).

FEDCAP's Motion (MOT SEQ 002)

An essential element for a claim of negligence is a breach of duty (*Anderson v Commack Fire Dist.*, 39 NY3d 495, 502 [2023]). Absent a duty running from the defendant to the plaintiff, there can be no breach and thus no liability (*DiBrino v Rockefeller Ctr. N., Inc.*, 230 AD3d 127, 132 [1st Dept. 2024]). As such, a non-party to a contract cannot generally impose tort liability on a contracting party for a breach of the contract (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept .2013]; *see Megaro v Pfizer, Inc.*, 116 AD3d 427, 427 [1st Dept. 2014] ["A contractual obligation does not generally 'give rise to tort liability in favor of a third party'"], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). A contractor is potentially liable in tort to third persons, however, where it '"launches a force or instrument of harm,' where the plaintiff suffers injury as a result of reasonable reliance on the [contractor's] continued performance of a contractual obligation, or 'where the contract[or] has entirely displaced the other [contracting] party's duty to maintain the premises safely'" (*Megaro*, 116 AD3d at 427, quoting *Espinal*, 98 NY2d at 140; *see also DiBrino*, 230 AD3d at 133).

FEDCAP submits its contract with LIRR, via NYSID, which establishes, *prima facie*, that it was contracted by LIRR to provide janitorial services at Penn Station, and therefore did not owe a duty to noncontracting third parties such as plaintiff (*see Welliver v T-C The Colorado LLC*, 238 AD3d 579, 579-80 [1st Dept. 2025], citing *Espinal*, 98 NY2d at 140; *Giovacco v Graham*, 213 AD3d 523, 524 [1st Dept. 2023]).

Moreover, none of the *Espinal* exceptions apply here. As already discussed, it is undisputed that the slippery condition on which plaintiff fell was caused by tracked-in rainwater and was thus neither created nor exacerbated by FEDCAP (*see Church ex rel. Smith v Callanan Indus., Inc.*, 99 NY2d 104, 112 [2002]; *Lopez v Limpiex Cleaning Servs., Inc.*, 199 AD3d 418, 419 [1st Dept. 2021]). Plaintiff's deposition testimony demonstrates that plaintiff was unaware of either FEDCAP's contract to provide janitorial services or of its presence at Penn Station and thus could not have detrimentally relied on its continued performance of its contractual obligations (*see Lopez*, 199 AD3d at 419). And, contrary to plaintiff's contention, FEDCAP did not displace LIRR with respect to the duty to maintain the premises safely. Both the contract terms and the deposition testimony of the LIRR and FEDCAP witnesses demonstrate that LIRR retained significant authority to control and supervise FEDCAP's performance of its janitorial services. This included general oversight of the Penn Station cleaning operation, the establishment of protocols for the performance of janitorial tasks, and authority to require FEDCAP to immediately perform unscheduled cleanings, to screen and reject FEDCAP employees assigned to work at Penn Station, to conduct unscheduled inspections of FEDCAP's work, and to provide direction to FEDCAP employees (*see id.*).

Therefore, FEDCAP's motion is granted to the extent it seeks summary judgment dismissing plaintiff's complaint.

The motion is denied, however, to the extent it seeks dismissal of LIRR's contractual indemnity crossclaim, for the reasons already stated in connection with the court's conditional grant of summary judgment to LIRR on that claim.

CONCLUSION

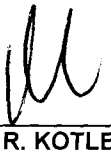
Accordingly, it is

ORDERED that defendant The Long Island Railroad Company's summary judgment motion (MOT SEQ 001) is conditionally granted to the extent that defendant FEDCAP Rehabilitation Services, Inc. shall indemnify The Long Island Railroad Company subject to a determination at trial as to the issue of The Long Island Railroad Company's alleged negligence, and the motion is otherwise denied; and it is further

ORDERED that defendant FEDCAP Rehabilitation Services, Inc.'s summary judgment motion (MOT SEQ 002) is granted to the extent it seeks summary judgment dismissing the complaint, the complaint is hereby dismissed in its entirety as against defendant FEDCAP Rehabilitation Services, Inc., and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



11/20/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE