

Calderon v S&M 52nd Fee LLC

2025 NY Slip Op 34579(U)

March 17, 2025

Supreme Court, Bronx County

Docket Number: Index No. 31744/2019E

Judge: Matthew Parker-Raso

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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 21

-----X
JORGE ROA CALDERON,
Plaintiff,

Index No. 31744/2019E

ORDER

Hon. MATTHEW PARKER-RASO

Justice Supreme Court

-against-

S&M 52ND FEE LLC, SAN-DAR ASSOCIATES, 400
CONCRETE CORP., PERLBINDER REALTY, and
CENTRAL PARKING SYSTEM OF NEW YORK,
INC., CENTRAL PARKING SYSTEM INC., and SP
PLUS CORPORATION,

Defendants.

-----X
S&M 52ND FEE LLC, SAN-DAR ASSOCIATES and
PERLBINDER REALTY,

Third-Party Plaintiffs,

-against-

AQUA BLUE PLUMBING SERVICES and EMERSON
ELECTRIC CO.,

Third-Party Defendants.

-----X
S&M 52ND FEE LLC, SAN-DAR ASSOCIATES and
PERLBINDER REALTY,

Second Third-Party Plaintiffs,

-against-

CENTRAL PARKING SYSTEM OF NEW YORK,
INC., CENTRAL PARKING SYSTEM INC., and SP
PLUS CORPORATION,

Second Third-Party Defendants.

-----X
Recitation as Required by CPLR §2219(a): The following papers were read on defendants'/third-party defendants'
motion for Summary Judgment (Motion Seq. 002) and defendants/third-party plaintiffs' motion for Summary
Judgment Motion Seq. 003):

Notice of Motion, Affirmation in Support, Memo of Law, Statement of Material Facts and Exhibits	No(s). NYSCEF Doc. 123-132
Defendant's Affirmation in Opposition and Response to Statement of Material Facts	No(s). NYSCEF Doc. 162-163
Plaintiff's Affirmation in Opposition, Memo of Law, Response to Statement of Material Facts, and Exhibits	No(s). NYSCEF Doc. 171-178
Affirmations in Reply and Exhibits	No(s). NYSCEF Doc. 181-183
Notice of Motion, Affirmation in Support, Memo of Law, Statement of Material Facts and Exhibits	No(s). NYSCEF Doc. 133-157

Plaintiff's Affirmation in Opposition, Memo of Law, Response to Statement of Material Facts, and Exhibits	No(s). NYSCEF Doc. 164-179
Affirmation in Reply	No(s). NYSCEF Doc. 180

Motion sequence (002) and motion sequence (003) in this matter are decided in accordance with the annexed decision and order.

Dated: 3/17/25

Hon. 
MATTHEW PARKER-RASO J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 21

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Hon. MATTHEW PARKER-RASO

Justice Supreme Court

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Affirmation in Reply	No(s). NYSCEF Doc. 180

Upon the foregoing cited papers, the decision and order of this court is as follows:

Defendants/ Second Third-Party defendants, Central Parking System of New York, Inc., Central Parking System, Inc. and SP Plus Corp., (hereinafter, all parties collectively referred to as the "parking defendants") move for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint and the second third-party complaint in their entirety as against all parking defendants. Defendants/third-party plaintiffs, S&M 52nd Fee LLC, San-Dar Associates, and Perlbinder Realty Corporation i/s/h/a Perlbinder Realty (hereinafter, all parties collectively referred to as the "building defendants") oppose the motion. The building also moves for an order pursuant to CPLR §3212 dismissing the complaint in its entirety as to the building. Plaintiff opposes both motions. For purposes of judicial economy both motions will be decided in this single decision and order.

Plaintiff commenced this action by filing a summons and complaint on or about October 7, 2019. The complaint sets forth, *inter alia*, violations of the Labor Law. Plaintiff alleges that on May 29, 2019, he was injured while working at a premises located at 429 East 52nd Street in Manhattan (the "premises"). The premises in question consists of a residential building tower with a commercial parking garage. Plaintiff alleges that at the time of his accident he and a coworker were in the process of grooving a 5 inch steel pipe using a motorized grooving machine on top of a tripod. As he was bending down to check the groove depth, plaintiff alleges he was caused to slip on oil on the floor, towards the machine, resulting in his hand being pulled into the machine and his right index finger being amputated. Plaintiff testified that he first noticed the oil after his accident, but had seen oil spots on the floor at the premises on prior occasions.

The premises is owned by S&M 52nd Fee LLC and assigned pursuant to a ground lease to San-Dar. At the time of the accident, plaintiff was employed by Aqua Blue Plumbing Services, who was hired by San-Dar to perform standpipe work at the premises. The building defendants joined issue with service of an answer on December 2, 2019 denying the allegations in the complaint, and setting forth several affirmative defenses.¹ On September 25, 2020, the building commenced a third-party action to implead Aqua Blue Plumbing Services and Emerson Electric Co. as third-party defendants.² The building moved for default judgment against third-party defendant Aqua Blue Plumbing Services after that defendant failed to appear and answer. Said relief was granted via order dated January 5, 2022 (Suarez, J.). On April 20, 2022 the building defendants commenced a second third-party action to implead the parking defendants.

A preliminary conference order dated April 29, 2022 was issued by the Court. On June 27, 2022 plaintiff filed an amended complaint adding the parking defendants as direct defendants. A compliance conference order was issued on December 20, 2022. The parties appeared for status conferences on September 13, 2023, February 15, 2024, and May 8, 2024. On June 7, 2024, plaintiff filed Note of Issue and Certificate of Readiness certifying that discovery is complete and this matter is ready to proceed to trial. The two instant motions for summary judgment followed.

The parking defendants contend that they are entitled to summary judgment dismissing both the complaint and the second third-party complaint against them. The parking defendants argue that plaintiff fails to set forth a prima facie case against them because they did not participate in hiring plaintiff's employer to perform work at the premises and had no control over the area where plaintiff conducted his work. The parking defendants further argue that plaintiff fails to establish that they had actual or constructive notice of any allegedly defective condition that caused the accident. As to the third-party complaint, the parking defendants argue that they are entitled to summary judgment against third-party plaintiffs on the basis of contractual and common law defense, indemnification and contribution pursuant to a management agreement for the parking garage.

The building defendants oppose the motion and argue that the parking defendants are not entitled to summary judgment because the parking defendants were responsible for cleaning the floor on which plaintiff fell and further, that they fail to demonstrate the last time the area was

¹ The matter was discontinued against 400 Concrete Corp. via stipulation dated April 14, 2023 (NYSCEF Doc. 102).

² The matter was discontinued against Emerson Electric Co. via stipulation dated May 12, 2022 (NYSCEF Doc.81)

inspected prior to the accident. The building defendants further argue that the parking defendants are not entitled to contractual indemnification because none of the building defendants are parties to, or referenced in, the management agreement. As such, the building defendants argue that the parking defendants fail to establish a basis for enforcing the same.

Plaintiff also opposes the motion. Plaintiff echoes the building defendants' argument that the parking defendants are not entitled to summary judgment on the negligence claims because they have failed to establish the last time the area was inspected. Plaintiff also highlights that while the parking defendants move to dismiss the entire complaint, they fail to specifically address plaintiff's Labor Law §241(6) claims. In further support of those claims, plaintiff submits the affirmation of licensed Professional Engineer, Nicholas Bellizzi, ("Bellizzi affirmation"). The Bellizzi affirmation sets forth in sum and substance that Industrial Code § 23-1.7(d) was violated in the failure to provide plaintiff with a safe non-slip floor free of oil to work on. Bellizzi further opines that in accordance with industry custom, the area should have been inspected prior to set up, and said inspection would have revealed the oil that caused the accident. On that same basis, Bellizzi opines that the safe workplace requirements of Labor Law § 200(1), which codifies a common law standard of care, were also violated.

The proponent of a motion for summary judgment must tender sufficient evidence in admissible form to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [NY 1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [NY 1985]). Once this showing has been made the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material facts which require a trial of the action (*Zuckerman v. City of New York*, 49 N.Y. 2d 557 [1980]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [NY 1957]).

Here, plaintiff alleges his accident was caused by a defective premises condition; to wit the oil that he slipped on, and further that defendants were negligent in permitting said condition to exist. A defendant establishes prima facie entitlement to summary judgment on a common-law negligence claim by proffering evidence that they neither created the accident-causing condition, nor had prior notice, actual or constructive, of it (*Lopez v. Dagan*, 98 A.D.3d 436, 438, 949 N.Y.S.2d 671, 673 (1st Dep't., 2012)). Contrary to parking defendants' argument, the testimony in this matter does not establish that they lacked the requisite notice to warrant dismissal, as discussed immediately below.

In support of their motion, parking defendants submit the deposition transcript of Angalade Saint Fort, manager of SP Plus (See Exhibit E to parking defendants' motion). Saint Fort's testimony confirms that the building and/or its employees occupied about half of the parking spaces on the floor where plaintiff's accident occurred and also stored equipment and tools there (*id.* at pg. 44). However, he also testified that there were no reserved spaces (*id.* at pg. 52) and people could technically park anywhere, though they tried to avoid that level if possible (*id.* at pg. 61). Notably, Saint Fort did not testify about the day of plaintiff's accident. Accordingly, the parking defendants fail to establish that they did not occupy the space, or that the building defendants had exclusive access to the area.

As to the condition that caused plaintiff's accident, Saint Fort admitted that the parking defendants are responsible for cleaning the floors of the garage. Despite having this responsibility, he also testified that there was no cleaning schedule in place (*id.* at pg. 45). Notwithstanding his testimony regarding the parking defendants' maintenance responsibilities, Saint Fort also testified that San Dar always took care of cleaning the floor where the accident occurred (*Id.* at pg. 39).

The parking defendants, while acknowledging the responsibility to clean the floor fail to present any evidence as to the last time the area is cleaned. While the parking defendants seemingly argue that San Dar's routine of cleaning the area abdicates them of the duty to do so, they cite to no case law to support that contention. In the absence of evidence as to the last time the area was cleaned or inspected before the accident, the parking defendants fail to demonstrate that they lacked constructive notice of the condition (*Ohadi v. Magnetic Constr. Grp. Corp.*, 182 A.D.3d 474, 476, 122 N.Y.S.3d 612, 616 [1st Dep't., 2020]). Moreover, as highlighted by plaintiff in opposition, the parking defendants fail to specifically address any of the Labor Law claims in its motion. Instead, the parking defendants' entire motion is premised on this notice argument, for

which they have not met their burden. Because issues of fact exist as to parking defendants' negligence in maintenance of the garage floor, they are not entitled to summary judgment on the common-law negligence claims and the branch of the parking defendants' motion seeking that relief is denied (*Maggio v. 24 W. 57 APF, LLC*, 134 A.D.3d 621, 627 [1st Dep't., 2015]).

Turning to the parking defendants' argument for dismissal of the second third-party complaint on the basis of indemnification. A party's right to indemnification may arise from a contract or may be implied based upon the law's notion of what is fair and proper as between the parties (*McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 375[2011]). Implied, or common-law, indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other (*McDermott v. City of New York*, 50 N.Y.2d 211, 216–217[1980]). A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part (*McCarthy v. Turner Const., Inc.*, 17 N.Y.3d at 377–78 [2011]).

The Court finds that parking defendants have failed to make a prima facie showing that they are entitled to indemnification based on the maintenance agreement submitted in support of the motion (Exhibit F). Initially, none of the building defendants are parties to the maintenance agreement with the parking defendants, nor has that agreement been properly authenticated. Both Saint Fort and Louis Calero, San Dar's resident manager, possessed no personal knowledge of the agreement and even admitted to seeing it for the first time at each of their respective depositions. While the parking defendants argue that the building and Rivercourt Garage Corporation (hereinafter, "Rivercourt"), the entity that is referenced as the owner in the agreement, are composed of the same individuals, they fail to establish that fact through any admissible evidence. For example, when asked who Rivercourt is, Mr. Calero replied that he "thinks" Mark and Steven Perl binder are (Exhibit D at pg. 56). This is hardly conclusive evidence, nor are those individuals parties in this case. Any further explanation regarding the makeup of any of the entities in this case has only been set forth via attorney affirmation, which is of no probative value (See *Lewis v. Safety Disposal Sys. of Pennsylvania, Inc.*, 12 A.D.3d 324, 325 [1st Dep't., 2004]).

Even assuming arguendo, that the identity of the parties wasn't an issue preventing contractual indemnification, the parking defendants' argument would nevertheless fail under a common-law theory as well. As discussed above, there are issues of fact as to the parking defendants' negligence in the maintenance of the garage floor that preclude a finding of liability

at this juncture. Where there has been no finding of liability, a common-law indemnification claim must be denied (*See Ford v. Campus Realty LLC*, 226 A.D.3d 405, 208 N.Y.S.3d 157, 159 [1st Dep't., 2024]). Accordingly, the branch of parking defendants' motion seeking summary judgment on the basis of indemnification is also denied.

The building defendants separately move for an order pursuant to CPLR 3212 dismissing the complaint. The building defendants argue that the Labor Law claims should be dismissed in their entirety as to both San-Dar and Perlbinder Realty. The building defendants argue that neither of those entities are the owner of the premises nor a contractor, nor did those entities direct and control the work so as to deem them agents of the owners under a Labor Law analysis. Therefore, the building defendants argue neither can be held liable for Labor Law claims. S&M 52nd Fee, LLC admits ownership of the premises, but nevertheless argues that it is not liable as an out of possession landlord. It further contends that maintenance of the area where plaintiff's accident occurred was the sole responsibility of the parking defendants pursuant to the garage management agreement. Accordingly, the building defendants argue that none of them had any duty with respect to the alleged motor oil that plaintiff slipped on and that all common law negligence claims must also fail. Alternatively, the building defendants argue that the Labor Law 240(1) claim should be dismissed because plaintiff's accident did not involve a gravity related hazard of the type that the statute encompasses.

Plaintiff opposes the building defendants' motion on multiple grounds. Plaintiff first argues that nothing in the parking management agreement divested San-Dar of control or responsibility for the garage premises in accordance with the ground lease. Plaintiff argues that as the lessee of the property, defendant San-Dar is considered an "owner" under the Labor Law because it contracted for the injury producing work. Plaintiff further contends that the management agreements are not leases, but rather, are operating agreements in which the parking defendants operated the parking garage as a licensee while San-Dar remained the lessee in possession. Plaintiff additionally argues that Saint Ford's testimony that the building management regularly cleaned the entire level of the parking garage where the accident occurred, creates a question of fact as to who was responsible for cleaning the subject area or may have caused and/or created the condition. Plaintiff also argues that the building defendants fail to demonstrate lack of notice of the condition because they submit no evidence of when the area was last inspected. Finally, plaintiff argues that

the building defendants did not specifically address the plaintiff's Labor Law §241(6) claim and therefore, they are not entitled to dismissal of the entire complaint.

Initially, plaintiff has not opposed the branch of the building defendants' motion seeking dismissal of its Labor Law § 240(1) claim. Nor does plaintiff set forth any argument to sustain any cause of action against defendant Perl binder Realty. Where a claimant does not oppose dismissal of their claim on summary judgment, the claim is properly dismissed (*See Bonventre v. Soho Mews Condo.*, 173 A.D.3d 411, 412 [1st Dep't., 2019]). Accordingly, the branch of the building defendants' motion seeking summary judgment on plaintiff's Labor Law § 240(1) claim and the branch seeking dismissal of the complaint in its entirety as to defendant, Perl binder Realty, are granted without opposition.

Notwithstanding the above, S&M 52nd Fee LLC fails to make a prima facie showing that it is not liable as an out of possession landlord. It is undisputed that S&M 52nd Fee LLC is the owner of the premises and the same is reflected in a deed from 2002. The building defendants rely on the management agreement discussed above in support of its argument that it did not have possession of the premises at the time of the accident. Given the building defendants' position on the identity of parties to the agreement in its opposition above³, the Court finds this argument disingenuous at best. Although the building defendants' response to parking defendants' notice to admit verified the authenticity of the agreement, it is not clear to this Court if and/or how they had the authority to do so given their current position that they are not parties to the agreement. In other words, the building defendants cannot use their not being a party to the agreement argument as a shield and then use that very agreement as a sword.

As referenced above, the management agreement lists Rivercourt "as owner" and it pre-dates S&M 52nd Fee LLC's ownership of the premises pursuant to deed. There is nothing in the record to establish what, if any, relationship Rivercourt had to the premises, or any of the parties herein on the date of plaintiff's accident. The building defendants' submissions in support of its contentions shed no further light on the matter. For example, the building defendants submit a 1977 agreement between Berkeley Associates and Rivercourt, in which Berkeley appoints Rivercourt as its renting and managing agent of the garage. Notably, Berkeley Associates was not the entity that S&M 52nd Fee LLC received the premises from, and there is no mention of a separate

³ As stated supra, the building defendants oppose the parking defendants' motion for indemnification based upon the fact that the building defendants are not parties to that agreement.

lease for the garage on the deed under which S&M 52nd Fee LLC obtained ownership. Moreover, according to Calero's testimony, Rivercourt stopped operating the garage about 20 years prior to his deposition (See Exhibit D pg. 55-56). Similarly, a review of the assignment and assumption of lease that purportedly assigns the property to San-Dar reveals that said agreement is between San-Dar and Berkeley Associates. Furthermore it is dated 1986, before S&M 52nd Fee LLC obtained ownership. Notably there is no affirmation, affidavit, or testimony from an individual with personal knowledge submitted to clarify these issues. Given the inconsistencies highlighted above, there are issues of fact as to what, if any, leases were in effect at the premises at the time of plaintiff's accident and S&M 52nd Fee LLC has failed to make a prima facie showing that it is an out of possession owner.

The Court is also not persuaded by the building defendants' argument for summary judgment based on San-Dar's ownership status. As discussed above, there is an issue of fact as to whether San-Dar was the lessee of the premises. Despite the building defendants' argument to the contrary, it is not only an owner or contractor that can be held liable to plaintiff for his Labor Law claims. A tenant who hires contractors to perform work on the leased premises is generally subject to liability under Labor Law as well (*Correa v. 100 W. 32nd St. Realty Corp.*, 290 A.D.2d 306, 307 [1st Dep't., 2002]). Additionally, Calero's testimony that he gave permission for the contractors to store their equipment in certain areas, that he regularly walks the garage and addresses maintenance issues if he sees them (pg. 198), and further confirming that San-Dar would have supervision responsibilities of the project of whoever is working in the garage (pg. 199-200) all create issues of fact as to whether Calero, as building manager, was the statutory agent of the owner. (See *Burgund v. Cushman & Wakefield, Inc.*, 167 A.D.3d 441, 87 N.Y.S.3d 473 [1st Dep't., 2018] *affirming the trial court's finding that defendant property manager was the statutory agent of the owner and contractor with respect to plaintiff's Labor Law claims because the manager testified that he oversaw general operations in the building and offered aid in relation to building issues and repairs*).

In accordance with the above, the building defendants fail to establish that they are not subject to liability on the basis of ownership or possessory interest and the motion also fails under a Labor Law analysis. Where, as here, the accident was caused by a defective premises condition, liability depends on whether there was notice of the hazardous condition (See *Bayo v. 626 Sutter Ave. Assoc., LLC*, 106 A.D.3d 648, 648, 966 N.Y.S.2d 390 [1st Dep't., 2013]). Like parking

defendants, the building defendants submit no evidence of when the area was last inspected or cleaned and therefore cannot establish that they did not have constructive notice of the condition.

In light of the foregoing, it is hereby:

ORDERED, that defendant/third-party defendants' motion (Motion Seq. 002) is denied in its entirety; and it is further,

ORDERED, that defendant/third-party plaintiffs' motion (Motion Seq. 003) is granted to the extent of dismissing the complaint in its entirety as against defendant Perlbinder Realty, and dismissing plaintiff's claim under Labor Law §240(1); and it is further,

ORDERED, that the clerk shall amend the caption to reflect the decision above, and it is further,

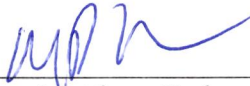
ORDERED, that the clerk shall enter a partial judgment accordingly; and it is further:

ORDERED, that the parties shall appear for a pre-trial conference in part 21, room 405 at 9:30 a.m. on March 31, 2025, and it is further:

ORDERED, that defendant Perlbinder Realty shall serve a copy of this order with notice of entry, upon all parties, within 30 days of the entry date hereof.

This constitutes the decision and order of the Court.

Dated: 3/17/25
Bronx, New York



Hon. Matthew Parker-Raso
A.J.S.C.