

Dupree-Harper v City of New York
2025 NY Slip Op 35623(U)
March 4, 2025
Supreme Court, Queens County
Docket Number: Index No. 713647/2019
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Denise Dupree-Harper,

Index
Number: 713647/19

Plaintiff,

- against -

Motion
Date: 2/24/25

City of New York, Gertz Plaza Acquisition
2, LLC, Jamaica Center Business Improvement
District, Inc., Unique Thrift LLC, Savers, Motion Seq. No.: 11
Inc., TVI Inc., Apogee NY LLC and Jamaica
Center Improvement Association,

Defendants.

-----X
Jamaica Center Improvement Association, Inc.
D/b/a Jamaica Center Business Improvement
District i/s/h/a Jamaica Center Business
Improvement District, Inc.,

Third-Party Plaintiff,

- against -

Atlantic Maintenance Corp. d/b/a Streetplus,

Third-Party Defendant.

-----X
Apogee NY LLC,

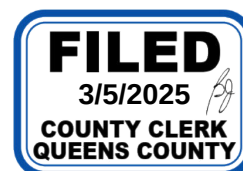
Second Third-Party Plaintiff,

- against -

Consolidated Edison Company of New York, Inc.,

Second Third-Party Defendant.

-----X
The following papers numbered E355-E381 read on this motion
by third-party Defendant, Atlantic Maintenance Corp. d/b/a
Streetplus, for summary judgment.



Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... E355-381

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by third-party Defendant, Atlantic Maintenance Corp. d/b/a Streetplus ("Atlantic"), for summary judgment is granted, there appearing no opposition.

Plaintiff allegedly sustained injuries when she tripped and fell on the sidewalk abutting 162-10 Jamaica Avenue in Queens County on June 8, 2018. It is undisputed that Gertz Plaza Acquisition 2, LLC owns the subject property.

Plaintiff testified that she was walking on the sidewalk of Jamaica Avenue near Union Hall Street. The sidewalk there is comprised of cobblestones. However, the area where she fell was comprised of cement. Plaintiff's foot got caught in a crack, causing her to fall near a manhole cover. Marked photographs from the Plaintiff's deposition depict a cobblestone sidewalk. On the sidewalk is a manhole cover whose square-like perimeter is comprised of broken and uneven cement.

David Goldberg testified on behalf of Atlantic. Goldberg is the Co-Chief Executive Officer of Streetplus Company, LLC. Atlantic Maintenance was no longer a "d/b/a" at the time of Golberg's deposition. The name was changed in 2012 from Atlantic Maintenance to Streetplus Company. For the purposes of this motion, the Court continues to reference the Movant as "Atlantic." Atlantic is in the maintenance, cleaning, safety, and security business. Atlantic had a maintenance agreement with the Jamaica Center Business Improvement District ("Jamaica BID") The contract involved cleaning sidewalks, curb lines, emptying trash receptacles, relining receptacles, graffiti removal, and some snow removal. The contract did not require Atlantic to perform any sidewalk inspections or repairs under the relevant contract.

As a general rule, a contractual obligation, standing alone, imposes a duty only in favor of the promisee and specific third-party beneficiaries, establishes only a cause of action for breach of contract, and does not give rise to tort liability in favor of a third party where the alleged harm results from mere inaction

(see Eaves Brooks Costume Co. V. Y.B.H. Realty Corp., 76 N.Y.2d 220 [1990]; Torres v. City of New York, 298 A.D.2d 318 [1st Dept. 2002])). A contractual obligation may give rise to tort liability on behalf of a third party only under three exceptions: 1) where the contracting party "launches a force or instrument of harm"; 2) where plaintiff detrimentally relies upon the contracting party's continued performance of its duties or 3) where the contracting party has "entirely displaced the other party's duty to maintain the premises safely" (Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 140 [2002]; see Church v. Callanan Industries, Inc., 99 N.Y.2d 104 [2002])). Atlantic has met its prima facie burden in establishing that none of the Espinal factors apply herein. Moreover, Plaintiff nor the remaining Defendants have appeared on this record to oppose the instant relief.

Atlantic has also established its entitlement to dismissal of the claims for common law and contractual indemnification. Common-law indemnification is a "restitution concept" whereby it is permissible to shift loss because failing to do so would result in unjust enrichment (see McCarthy v. Turner Const., Inc., 17 N.Y.3d 369 [2011])). Generally, common-law indemnification is available "in favor of one who is held responsible solely by the operation of law because of his relation to the actual wrongdoer" (see id.). Prima facie entitlement to common-law indemnification requires a party to prove that it was not negligent, and that the proposed indemnitor's actual negligence contributed to the accident (see Meadowbrook Pointe Dev. Corp. V. F&G Concrete & Brick Indus., Inc., 214 A.D.3d 964 [2d Dept. 2023]; Cando v. Ajay Gen. Contr. Co. Inc., 200 A.D.3d 750 [2d Dept. 2021])). Atlantic has made a prima facie showing, and none of the parties have appeared on this record to refute, that it did not contribute to the happening of the Plaintiff's accident. Accordingly, dismissal of the claims for common-law indemnification is warranted.

The right to contractual indemnification "depends upon the specific language of the contract" (see Mogrovejo v. HG Hous. Dev. Fund. Co., Inc., 207 A.D.3d 461 [2d Dept. 2022])). A review of the agreement between Jamaica BID and Atlantic did not impose any duty upon Atlantic to inspect or repair the subject sidewalks nor is there any evidence that Plaintiff's accident arose out of any of the covered activities in the agreement. Thus, the indemnification clause contained in the agreement was not triggered and Atlantic is entitled to dismissal of the claim for contractual indemnification.

Accordingly, the motion is granted and the complaint and any

and all cross-claims are hereby dismissed as against third-party Defendant, Atlantic Maintenance Corp. d/b/a Streetplus. As a result, the first third-party action is hereby dismissed in its entirety.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: March 4, 2025



KEVIN J. KERRIGAN, J.S.C.

