Flores v Howard Hughes Corp.
2015 NY Slip Op 31214(U)
July 14, 2015
Supreme Court, New York County
Docket Number: 150083/2012
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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CIRILA FLORES,

Plaintiff,

-against-

THE HOWARD HUGHES CORPORATION, SEAPORT MARKETPLACE, LLC, ABM INDUSTRIES, INC., ABM JANITORIAL SERVICES, INC., NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, and SOUTH STREET SEAPORT LIMITED PARTNERSHIP,

Defendants.

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Index No: 150083/2012
Subm. Date: Jan. 28, 2015
Mot. Seqs.: 004 and 005

DECISION AND ORDER

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ELLEN M. COIN, J.:

In this action, plaintiff Cirila Flores sues for a trip and fall on a staircase at South Street Seaport in New York City. In motion sequence 004, New York City Economic Development Corporation (NYCEDC) moves pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims brought against it. In motion sequence 005, defendants ABM Janitorial Services-Northeast, Inc. i/s/h/a ABM Industries, Inc., and ABM Janitorial Services, Inc. (ABM) move pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims brought against them. Motion sequence numbers 004 and 005 are consolidated for disposition.

The Howard Hughes Corporation (HHC), Seaport Marketplace, LLC (Marketplace), and South Street Seaport Limited Partnership (SSSLP) (collectively HHC defendants) cross-move pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint as against them.

FACTUAL ALLEGATIONS

Plaintiff alleges that on April 16, 2011, she was injured near the entrance to Pier 17 at South Street Seaport. On the date of her accident, plaintiff was accompanied by Lena Flores (Lena) and Isaac Santiago (Santiago). While leaving the pier, the group proceeded to walk along a wooden boardwalk, leading to a staircase comprised of three metal steps (Exhibit L to the Affirmation of Jessica A. Clark, dated September 23, 2014). As plaintiff was about to walk down the stairs, she allegedly tripped on something near the top step (Clark Affirm., Ex. J,

25:17-21 [transcript of plaintiff's deposition]). She landed between the ground level and the first step, with her left arm and head hitting the ground (Clark Affirm., Ex. J, 31:14-15, 20). Plaintiff testified that she believed that it was raining when she fell, but that she did not notice any puddles or water on the stairs (Clark Affirm., Ex. J,. 32:12-23).

Plaintiff testified that she "tripped on something, and my foot entered something" (Clark Affirm., Ex. J, 26:9-10). At the time plaintiff tripped, Santiago had already descended the steps and Lena was descending the steps in front of her (Clark Affirm., Ex. J, 30: 17-20, 6-7). Plaintiff maintains that she did not see or know what she tripped on, but that immediately following the accident, Lena pointed to a piece of metal raised above the wood (Clark Affirm., Ex. J, 35:17-19). From the photographs which the parties submit of the subject area, it appears that the wooden boardwalk meets a diamond metal plate raised above the boardwalk by at least an inch (Clark Affirm., Ex. L at 2 and 4 [photographs]).

Plaintiff was taken by ambulance to Beekman Downtown Hospital. Plaintiff had a MRI of her head, as well as x-rays, which revealed that she had fractures on her shoulder and upper arm.

Michael Papraniku (Papraniku) testified on behalf of the ABM defendants. Papraniku serves as operations manager of ABM Industries. Papraniku testified that he was not familiar with HHC or NYCEDC. He maintains that ABM was responsible for cleaning both the interior and exterior structures at South Street Seaport (Clark Affirm., Ex. M, 14:7-19). Papraniku testified that ABM had a porter sweep the wooden decks and steps at Pier 17, that ABM would not perform any repairs or structural modifications, that his workers "never had any tools" and

that "[w]e were told not to use any tools ever . . . " (Clark Affirm., Ex. M, 15:4-5). He maintains that based upon the contract which ABM had for cleaning of the area, ABM conducted cleaning and not repairs. He maintains that based upon ABM's contract, it was not allowed to conduct repairs.

ABM was not responsible for inspecting any defects, such as tripping hazards and did not inspect the subject steps for any dangerous conditions (Clark Affirm., Ex. M, 35:9-25, 36:2-4). If there were a tripping hazard caused by debris, Papraniku would inspect it (Clark Affirm., Ex. M, 36:3-4). However, if there were a tripping hazard that was not associated with debris, and if it were deemed dangerous, ABM would report it to a building supervisor(Clark Affirm., Ex. M, 36:5-10). The supervisor would then inform the engineers of the building to take the necessary actions (*id.*).

Papraniku's testimony is supported by the terms of ABM's janitorial contract.[1] Subparagraph B of Exhibit C-1 of ABM's janitorial contract, describing general terms of ABM's scope of work, provides that "[c]ontractor shall use warning or caution signs to advise customers, tenants and invitees of all spills and/or hazardous conditions," which could arguably encompass a duty to warn of tripping, in addition to slipping, hazards (Clark Affirm., Ex. O at 38). However, Section B of Exhibit C-2, detailing the scope of floor maintenance, specifically provides only for cleaning floors and "displaying 'wet floor' signs for all spills" (Clark Affirm., Ex. O at 39).

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[1] ABM's janitorial contract was originally formed between ABM Janitorial Services North Central, Inc. and GGL Limited Partnership and General Growth Management, Inc. (referred to by the parties as General Growth Properties), but was later assigned by General Growth Properties to HHC and is therefore applicable to it (Clark Affirm., Ex. N, 56:10, 60:8, 61:4).

Jay Pearly (Pearly), HHC's associate general manager, testified. Pearly averred that HHC was a real estate ownership and management company, that HHC was a parent company to Marketplace, and that Marketplace was a general partner of SSSLP (Clark Affirm., Ex. N, 103:10-11, 98:17-20). The Rouse Company acquired a leasehold of South Street Seaport from the City of New York, and later assigned it to General Growth Properties and HHC (Clark Affirm., Ex. N, 18:2-13). Thus, Pearly conceded that as of the date of the accident, HHC was responsible for maintenance of the boardwalk and the subject steps, yet he was uncertain as to who owned the area where the steps were located, surmising that it was the City of New York (Clark Affirm., Ex. N, 22:13-23).

Pearly also stated that ABM performed janitorial services and took care of minor repairs (Clark Affirm., Ex. N, 34:14-15, 20-22, 62:11-21). It was the duty of HHC under the lease with the City of New York to make the subject stairs passable for the public, and HHC performed daily inspections to that end (Clark Affirm., Ex. N, 42:12-22). Pearly asserted that HHC relied on the janitorial contractor to inspect for defects, that they were qualified to identify tripping hazards, and that HHC had an operations department which handled maintenance and repairs (Clark Affirm., Ex. N, 44:8-25).

While Pearly testified that ABM was responsible for cleaning the subject steps, he did not know whether ABM made any repairs to the staircase (Clark Affirm., Ex. N, 64:3). He surmised that HHC "could have probably asked them [ABM] if they could fix" the raised metal diamond plate located on the stairs. (Clark Affirm., Ex. N, 64, 9-10). Pearly also theorized that if ABM saw the raised diamond plate, it would probably inform HHC about it, and HHC would

inspect the condition and determine how to remedy it (Clark Affirm., Ex. N, 66:5-6, 19, 67:5-7). Pearly admitted that ABM's performance of minor repairs was not expressly provided for in its janitorial agreement (Clark Affirm., Ex. N, 84:15-16).

Pearly also admitted that as of the time of the accident, HHC was the sole entity responsible for making repairs to the subject stairs unless HHC hired a third-party vendor. Pursuant to Article 12, section 21.01 of the lease between "South Street Corporation, Landlord" and "Seaport Marketplace, Tenant," HHC would have been considered to be the tenant, and it would be HHC's sole responsibility to repair the type of defect on the subject staircase (Clark Affirm., Ex. N, 100:14-20).

Dean Bodnar (Bodnar), the senior vice president of the asset management division at NYCEDC, also testified. Bodnar is the portfolio manager for 20 real property assets held by NYCEDC across the five boroughs, including South Street Seaport. He averred that the City of New York owned South Street Seaport and leased the property to different entities. Bodnar testified that NYCEDC provided oversight and managed the relationship between the tenant and the city. As of April 16, 2011, the date of the accident, Pier 17 of South Street Seaport was leased to HHC pursuant to a written lease with the City.

NYCEDC did not have any responsibility for maintenance at South Street Seaport, did not hire or approve maintenance contractors, and did not know prior to plaintiff's accident whether there was a janitorial contractor retained by HHC (Clark Affirm., Ex. P, 57, 58). Bodnar testified that NYCEDC and HHC shared the cost of maintenance at South Street Seaport (Clark Affirm., Ex. P, 57, 13-17). However, while the cost of maintenance was shared, as of the date of

plaintiff's accident, HHC was responsible for providing the actual maintenance of the subject steps (Clark Affirm., Ex. P, 38:4, 7-11).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . . " (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006] [citation omitted]).

Motion Sequence 004

NYCEDC argues that summary judgment must be granted dismissing plaintiff's complaint and all cross-claims, because it did not own, occupy, control, or use the premises where plaintiff tripped. The Court notes that plaintiff has indicated that it has discontinued its claims against NYCEDC. Accordingly, NYCEDC's cross-claims for common law contribution and indemnification will be dismissed as moot, as NYCDEC will not be liable for plaintiff's damages.

NYCEDC also cross-claims for contractual indemnity and breach of contract as against HHC, Marketplace, and ABM. NYCEDC asserts that it had a contract with HHC, Marketplace, and ABM, requiring defendants to purchase insurance, which they failed to do. However, in its moving papers, NYCEDC omits any mention of these cross-claims and neither references the alleged contract to indemnify and procure insurance nor submits a copy of it. Therefore, the

Court deems NYCEDC's claims for contractual indemnification and breach of contract to procure insurance abandoned (*see 87 Chambers, LLC v 77 Reade, LLC,* 122 AD3d 540, 542 [1st Dept 2014]).

With regard to the HHC defendants' cross-claim as against NYCEDC, NYCEDC maintains that based upon the testimony, it was not negligent as it did not have actual or constructive notice of the subject defect and did not occupy, own or control the premises. NYCEDC contends that at the time of plaintiff's accident, the premises were owned by the City of New York, and leased and managed by HHC. The HHC defendants have offered no evidence to refute NYCEDC's contentions that the only relationship it had to the subject premises was in its capacity as administrator of the lease agreement and that it did not have any ownership interest in South Street Seaport and resultingly did not owe a duty of care to either plaintiff or the HHC defendants. Therefore, HHC defendants' cross-claim against NYCEDC must be dismissed.

Similarly, the HHC defendants' cross-claim for breach of contract for failing to procure insurance as against NYCEDC must be dismissed. NYCEDC argues that there is no contract between any of the parties that requires NYCEDC to provide indemnification or procure insurance for the benefit of any of the other named defendants. The HHC defendants fail to demonstrate that a contract existed between these parties, or otherwise to present any opposition to NYCEDC's argument.

Motion Sequence 005

The HHC defendants cross-claim against ABM for common law and contractual contribution and indemnification and failure to procure insurance. Since plaintiff has

discontinued its action as against ABM, and as there has been shown no factual basis to hold ABM liable for plaintiff's injuries, the cross-claim for common law contribution and indemnification falls of its own weight. Concerning contractual indemnification, Section 9 of ABM's service contract provides as follows:

> 9. **Indemnification.** Contractor [ABM] agrees that it shall defend, indemnify, and hold harmless the Owners and the property management company (if any) for each Property, and for all the foregoing parties, their respective direct and indirect parents and subsidiaries, any of their affiliated entities, successors and assigns and any current or future officer, director, employee, partner, member or agent of any of them . . . from and against any (i) claim, liability, loss, damage, action, cause of action, or suit (each a "Claim") that may be sustained by or recovered against them by reason of *any negligent, intentional or willful act or omission* of the Contractor or its agents . . . and (ii) any Claim arising in connection with Contractor's *breach* of this Contract in any way. Contractor shall also indemnify the Indemnitees from Contractor's failure to purchase and maintain all insurance required by this Contract (emphasis added).

(Clark Affirm., Ex. O at 8). There is no evidence that plaintiff's accident arose out of ABM's activities or performance of the janitorial contract. Exhibit C-2 to ABM's contract establishes that ABM was responsible to address slipping, not tripping, hazards. Pearly's testimony that on occasion ABM performed minor repairs of railings, and provided additional janitorial work at extra charge during special events at South Street Seaport does not raise a factual issue, as admittedly there was no request from HHC and agreement by ABM to monitor and repair tripping hazards and no extra payments made for this service. Therefore, there is no basis to hold ABM liable to the HHC defendants for contractual contribution or indemnification.

With respect to ABM's contractual duty to procure insurance, ABM submits a copy of its ACE Insurance Company policy, which was in effect on the date of plaintiff's accident, with limits of $2 million per occurrence and $2 million in the aggregate and an automatic additional

insured endorsement. The HHC defendants do not offer any evidence to dispute the accuracy or the genuineness of ABM's policy. Therefore, HHC defendants' cross-claim as against ABM for breach of contract to procure insurance is dismissed.

ABM's first and second cross-claims for common law contribution and indemnification are rendered moot by plaintiff's discontinuance of the complaint as against it (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 248 [1st Dept 2013]).

ABM's third cross-claim is for contractual indemnification based on an alleged agreement between ABM, HHC, Marketplace, and NYCEDC to indemnify ABM for loss or damage sustained by any party, including plaintiff, arising out of the scope of the work. ABM's fourth cross-claim as against HHC, Marketplace and NYCEDC, is for breach of contract to obtain liability insurance covering ABM as an additional insured.

ABM, however, fails to identify the contractual provision in its janitorial contract providing for indemnification or procurement of liability insurance by the HHC defendants. Therefore, the Court declines to grant summary judgment as to ABM's third and fourth cross-claims, and upon searching the record pursuant to CPLR 3212 (b), dismisses same.

HHC Defendants' Cross-Motion

HHC defendants argue that plaintiff's complaint must be dismissed because plaintiff speculates as to the cause of her accident. They maintain that because plaintiff is not able to identify the cause of her fall, she has failed to establish that the alleged defect on the stairwell was the proximate cause of her injury. This argument, however, lacks bases in either fact or law.

The one circumstance common to all tripping accidents is that the unnoticed or overlooked defect causes a pedestrian to trip, and the injured person observes the defect *post factum.* Although plaintiff herself did not observe the alleged defect in the moment prior to tripping, Lena spotted the defect following the accident. Plaintiff testified that she tripped on something and that her "foot entered something." Plaintiff also submits photographs of the subject steps which show that the metal covering the top step was raised above the wooden boardwalk. This circumstantial evidence raises an issue of material fact as to whether the observed defect was the cause of plaintiff's accident (*see Schneider v Kings Hwy. Hosp. Ctr., Inc.*, 67 NY2d 743, 744-45 [1986]; *see also Nakasato v 331 W. 51st Corp.*, 124 AD3d 522, 523-24 [1st Dept 2015]; *Slowinski v Port Auth. of N.Y and N.J.*, 2013 NY Slip Op 30030(U), *6-7 [Sup Ct, New York County 2013]).

Furthermore, in order to be entitled to summary judgment, a property owner is required to establish that it maintained its premises "in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]). In their cross-motion, the HHC defendants fail to discuss whether the subject stairs were kept in a safe manner. They also do not address Pearly's testimony regarding HCC's maintenance obligations under its lease with the City of New York. Pearly testified that in 2011 HHC was the sole entity responsible for making repairs to the subject stairs unless HHC hired a third-party vendor. Pearly also testified that pursuant to Article 12, section 21.01 of the lease between South Street Corporation and Seaport Marketplace, HHC was responsible to repair the

alleged defect at the time of plaintiff's accident. Therefore, the cross-motion for summary judgment dismissing plaintiff's complaint must be denied.

CONCLUSION and ORDER

In accordance with the foregoing, it is hereby

ORDERED that so much of New York City Economic Development Corporation's motion for summary judgment (sequence 004) as seeks to dismiss plaintiff Cirila Flores' complaint is denied as moot, as plaintiff has discontinued her claims against New York City Economic Development Corporation; and it is further

ORDERED that so much of New York City Economic Development Corporation's motion for summary judgment as seeks to dismiss the cross-claims as against it is granted; and it is further

ORDERED that the cross-claims of New York City Economic Development Corporation for contractual indemnification and breach of contract against the Howard Hughes Corporation, Seaport Marketplace, LLC, ABM Janitorial Services-Northeast, Inc. i/s/h/a ABM Industries, Inc., and ABM Janitorial Services, Inc. are dismissed as abandoned; and it is further

ORDERED so much of ABM Janitorial Services-Northeast, Inc. i/s/h/a ABM Industries, Inc., and ABM Janitorial Services, Inc.'s motion for summary judgment (sequence 005) as seeks to dismiss plaintiff's claims is denied as moot, as plaintiff has discontinued its claims against ABM Janitorial Services-Northeast, Inc. i/s/h/a ABM Industries, Inc., and ABM Janitorial Services, Inc.; and it is further

ORDERED that so much of ABM Janitorial Services-Northeast, Inc. i/s/h/a ABM Industries, Inc., and ABM Janitorial Services, Inc.'s motion as seeks summary judgment dismissing the cross-claims as against them is granted; and it is further

ORDERED that upon searching the record pursuant to CPLR 3212(b), the first through fourth cross-claims of defendants ABM Janitorial Services-Northeast, Inc. i/s/h/a ABM Industries, Inc., and ABM Janitorial Services, Inc. are dismissed; and it is further

ORDERED that the Howard Hughes Corporation, Seaport Marketplace, LLC, and South Street Seaport Limited Partnership's cross-motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the Clerk of Court shall sever and dismiss the complaint, together with all cross-claims, as against defendants New York City Economic Development Corporation, ABM Janitorial Services-Northeast, Inc., i/s/h/a ABM Industries, Inc., ABM Janitorial Services, Inc. and South Street Seaport Limited Partnership, and the remainder of the action shall continue. The Clerk of Court is directed to amend the caption accordingly.

This constitutes the Decision and Order of the Court.

Dated: July 14, 2015

ENTER:

Ellen M Coin, A.J.S.C.