[* 1]

6-2-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAMES G. SOLOMON PART 55

Index Number : 107771/2007
KAPLAN, BRADLEY
VS.
PORT AUTHORITY
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 12/14/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

See attached memorandum Decision & Order.

FILED
JUN 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/28/10

JAMES G. SOLOMON J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------x

BRADLEY KAPLAN,

Plaintiff,

-against-

Index No.: 107771/2007
DECISION and ORDER

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, BOMBARDIER TRANSPORTATION USA, INC., CAPITAL CLEANING CONTRACTORS, INC., KEN-CAR CONTRACTORS, INC., and CAPITAL CONTRACTORS, INC.,

Defendants.

----------x

JANE S. SOLOMON, J.:

Plaintiff Bradley Kaplan (Kaplan) sues defendants for injuries suffered in a slip and fall at the Air-Train terminal at John F. Kennedy Airport (JFK). Defendants Bombardier Transportation USA, Inc. (Bombardier) and Capital Contractors, Inc. f/k/a/ Capital Cleaning Contractors, Inc. (Capital), pursuant to CPLR 3212, jointly move for summary judgment dismissing the complaint and all cross-claims against them on the grounds that they did not owe Kaplan a duty and that they had no notice of any defective or dangerous condition. Defendant Port Authority of New York and New Jersey (Port Authority) cross-moves for summary judgment dismissing the complaint and all cross-claims against it.

FACTS

Kaplan and his girlfriend, now wife, Julee Kaplan (Julee) were passengers on a commuter flight that landed at JFK

after midnight on August 7, 2006. Kaplan alleges that while exiting an elevator on the third floor of the Air-Train Terminal, he slipped and fell on a "wet and soapy swirl" left by a member of a cleaning crew who was using an Auto Scrubber floor cleaning machine. There were no caution signs in the area, although a janitorial worker was present. The unidentified janitor (described as a male Hispanic with a ponytail) saw Kaplan fall, spoke briefly with him, radioed a supervisor, and walked away. Shortly thereafter, Port Authority Officer Andrew Iadevaio (Iadevaio) arrived. In his accident report, he stated: "Condition of Area: Wet" and "What Did Injured Allege Caused The Accident: A cleaner had just finished washing the floor (by Machine) and it was still wet." (Accident Report, attached to Affidavit in Opposition, Ex. G).

The Port Authority operates the airport. It contracted with Bombardier to maintain the structural and mechanical components, including the Air Train Terminal. Bombardier sub-contracted its cleaning duties to Capital, who in turn sub-contracted with a company called CRB, also known as Ken-Car Contractors, Inc. (Ken-Car), a defendant in default. The unidentified janitor is alleged to have been an employee of Ken-Car, although he wore a Bombardier housekeeping uniform, that is, a t-shirt and windbreaker emblazoned with the Bombardier logo (EBT of Joseph Brett, Regional Operations Manager for Capital

[hereinafter Brett EBT], attached to Bombardier's motion, Ex. J, 110) and wore a Capital Cleaners identification badge (Brett EBT, 60).

DISCUSSION

A. Duty of Care

Bombardier and Capital argue that because Capital hired Ken-Car as an independent service contractor, and the janitor was a Ken-Car employee, they owe no duty to Kaplan for any action arising out of Ken-Car's performance. Kaplan counters that the condition was created by Ken-Car in fulfillment of Bombardier and Capital's contractual duties, and so they are responsible to him.

Generally, an independent contractor does not owe a duty to a non-contracting third-party arising out of its contractual obligations or the performance thereof (*Church v. Callanan Industries, Inc.*, 99 NY2d 104, 111 [2002]). However, there are three exceptions to this rule (*Jackson v. Board of Educ. of City of New York*, 30 A.D.3d 57, 65 [1st Dept, 2006]). The first is when the independent contractor, "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (id., see also *Moch Co. V. Rensselaer Water Co.*, 247 NY 160 [1927] [describing this creation of risk as "launching a force or instrument of harm"]). The second exception is "where the plaintiff has suffered injury as a result of reasonable reliance

upon the defendant's continuing performance of a contractual obligation" (*id.*). The third exception allows liability "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.*).

The facts presented here do not sustain the second or third exceptions. However, the first exception is fulfilled. The "launched force" or "instrument of harm" in this instance was a wet floor created by a Ken-Car employee doing Capital's work. Accordingly, Capital can be liable to Kaplan for the event.

B. Notice:

Capital argues that even if it had a duty of care it did not cause, nor did it have actual or constructive notice of the alleged dangerous condition. It contends that there is no evidence establishing the length of time prior to the accident to permit it to discover and remedy the condition. In support, it notes that Kaplan was unable to testify as to how long the condition existed, or even as to who definitively created it. Kaplan counters that the janitor was a de facto employee of Capital and notice was not required.

In a slip and fall action, a plaintiff must prove the existence of a dangerous condition and that the defendant had either caused or had actual or constructive notice of that condition (*Gordon v. American Museum of Natural History*, 67 AD2d 836 [1986]). "Where a showing is made that a defendant caused

the dangerous condition, further notice of such condition need not be shown" (*Panagakos v. Greek Archdiocese of North and South America*, 213 AD2d 336 [1st Dept, 1995]).

Here, Capital did not have actual knowledge. Similarly, Capital did not have constructive knowledge because there is no allegation that the defect existed for a sufficient length of time prior to the accident to permit Capital to discover and remedy it. In order for Capital to have caused the condition, one of its employees must have created it. Therefore, as a threshold matter, it must be determined whether the janitor, an employee of Kan-Car, was a de facto employee of Capital.

"The general rule is that the employer of an independent contractor is not liable for injury caused to a third party by an act or omission of the independent contractor or its employees . . . . However, if the employer assumes control of the details of the work or some part of it, then the general rule will not apply and the employer may himself be liable" *(Wright v. Esplanade Gardens*, 150 AD2d 197 [1st dept, 1989]).

Kaplan relies on *Anikushina v. Moodie*, 58 AD3d 501 (1st Dept, 2009) to support his claim. There, the court found that an independent contractor deliveryman working for a company named CD&L was a de facto employee because he used CD&L's forms; made deliveries at times specified by CD&L; had his whereabouts tracked by CD&L by means of a prepared schedule and regular

contact through a CD&L computer and CD&L dispatchers; was paid 57% of the gross billing receipts for work performed; was obligated to procure insurance in an amount dictated by the independent contractor's agreement; and always wore a shirt bearing CD&L's logo.

Here, the evidence shows that the Ken-Car employees were required to wear Bombardier uniforms and were issued Capital identification cards and security badges. Also, Brett testified that "we [Capital] have a contract with Bombardier of things that are necessary to be done on a daily, weekly, monthly and quarterly basis. In order to keep the contract active . . . my job is to make sure that all of the services are done up to the standards and expectations that are agreed upon in the contract" (Brett EBT, 27), and "when this was all set up initially, the badges, all the billings, go through my office at Capital Contractors, okay, so we're the ones that are overseeing, directly overseeing the contract" (*id.*, 104-5). Based on this, Capital maintained at least some managerial control over Ken-Car's employees and a question of fact remains regarding whether the janitor was a de facto employee of Capital. Accordingly, questions of fact remain regarding whether Capital may be held liable for Kaplan's injury, and Capital's and Bombardier's motion for summary judgment dismissing the complaint is denied.

C. Summary Judgment on Port Authority's Cross Claims

Bombardier and Capital seek summary judgment dismissing Port Authority's cross claims against them. However, no argument is made regarding this issue. Accordingly, the branch of Bombardier and Capital's motion for summary judgment dismissing the cross claims is denied.

D. Port Authority's Cross Motion:

Port Authority argues that it had no actual or constructive notice of the condition and cannot be held liable. Kaplan counters that Port Authority maintained daily supervision responsibilities over the Air Train terminal, including holding meetings regarding the cleanliness of the terminal and having individuals report the status of the terminal. Thus, he claims that it had sufficient notice of the condition that Kaplan slipped on.

Kaplan has not established that Port Authority had actual knowledge of the condition allegedly created by the Ken-Car employee, nor has he shown that the condition existed for a sufficient length of time prior to the accident to discover and repair it (*Gordon, supra*, 67 AD2d at 837). The factors Kaplan lists do not do not evince notice. Accordingly, summary judgment dismissing the complaint is granted as to Port Authority. Moreover, there being no articulated basis for Bombardier and Capital's cross-claims for indemnification against Port

Authority, summary judgment is granted as to all cross-claims against Port Authority.

CONCLUSION

In accordance with the foregoing it hereby is

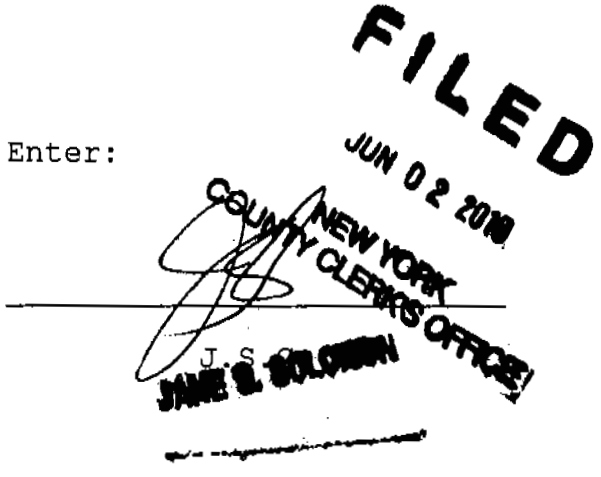
ORDERED that Bombardier's and Capital's motion for summary judgment is denied; and it further is

ORDERED that Port Authority's cross-motion for summary judgment is granted, and the complaint is dismissed as against Port Authority, and Bombardier's and Capital's cross claims against it are dismissed, and the clerk shall enter judgment accordingly with costs and disbursements as taxed; and it further is

ORDERED that counsel shall appear for a pre-trial conference on Kaplan's claim against Bombardier and Capital, and Port Authority's cross-claim against Bombardier and Capital, in Part 55, 60 Centre Street, Room 432, New York, N.Y., on June 21, 2010 at 2 PM.

Dated: May 28, 2010

Enter:



J.S.C.