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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

INDEX NO. 100020/08

MOTION DATE 12/20/11

MOTION SEQ. NO. 003

Index Number : 100020/2008

LIANG, JIAN MING

VS.

PORT AUTHORITY OF NY AND NJ

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

The following papers, numbered 1 to 14 were read on this motion and cross motions for summary judgment

Notice of Motion; Affirmation — Exhibits A-J	No(s). 1-2
Notice of Cross Motion—Affirmation — Exhibits A-O	No(s). 3-4
Notice of Cross Motion—Affirmation — Exhibits A-R	No(s). 5-6
Affirmation in Opposition—Exhibits A-F; Affirmation in Opposition—Exhibits A-B; Affirmation in Opposition— Exhibits A-F	No(s). 7; 8; 9
Affirmation in Partial Opposition—Exhibits A-C	No(s). 10
Reply Affirmation; Reply Affirmation; Reply Affirmation— Exhibits S [Affidavit],	No(s). 11; 12; 13-14

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 4/16/12
New York, New York

_____, J.S.C.

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

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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JIAN MING LIANG,

Plaintiff,

Index No. 100020/2008

- against -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, LARO MAINTENANCE CORP., LARO SERVICE SYSTEMS, INC., NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK & METROPOLITAN TRANSIT AUTHORITY,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action arising out of an alleged slip and fall accident in the Port Authority Bus Terminal, the Port Authority of New York and New Jersey (Port Authority) and its cleaning contractor seek, among things, summary judgment dismissing the complaint as against them. The New York City Transit Authority (NYCTA) and the Metropolitan Transportation Authority (MTA), sued herein as the Metropolitan "Transit" Authority, also seek summary judgment dismissing the complaint and cross claims.

BACKGROUND

Plaintiff alleges that, on January 16, 2007 at 12 P.M., he slipped on "refuse,

debris and garbage" at the Port Authority Bus Terminal at the walkway near the entrance to the subway station for the number 7 train (Griffin Affirm., Ex D [Verified Bill of Particulars] ¶¶ 2-5.) The debris allegedly consisted of "food peels and mashed food substance." (*Id.* ¶ 18.) The supplemental bill of particulars alleges "actual and constructive notice is claimed." (Kozak Affirm., Ex I.) According to a Port Authority "Patron Accident or Property Damage Report," the location of plaintiff's accident was "625 8th Ave NY NY 10018 N/W Subway Mezz." (Griffin Affirm., Ex G; Kozak Affirm., Ex P.)

Plaintiff testified at his deposition, "I did not saw [*sic*] anything before I fell. I was walking, I was walking towards the glass door and near the pillar suddenly my right feet [*sic*] stepped on something and I slid[ ] and fell on my left knee." (Griffin Affirm., Ex E [Liang EBT] at 24.) Plaintiff was asked, "The debris that you say you slipped on, can you tell me for how long it was there before your accident?" (*Id.* at 82.) He answered, "I did not – I did not notice it before I stepped on it. After I fell, I saw it. It was a piece of a fruit peel." (*Id.*) When asked to describe what the debris looked like, he answered,

> "A. It was jelly.
>
> * * *
>
> A. After I stepped on it, it rolled together like in round form.
> Q. Can you describe its approximate size after you stepped on it?

A. Not big. Just like this (indicating)."[1]

(*Id.* at 83.)

Nelson Pineiro, a General Maintenance Supervisor for the Port Authority, testified at his deposition that he was the individual responsible to oversee contract and maintenance services at the Port Authority Bus Terminal on the date of plaintiff's alleged accident. (Kozak Affirm., Ex M [Pineiro EBT], at 11, 13.) Pineiro was shown a photograph marked as Plaintiff's Exhibit 4 (Griffin Affirm., Exs H, I), which Pineiro identified as "the Subway Mezzanine, North Wing Subway Mezzanine." (Pineiro EBT, at 39.) Pineiro testified that the Port Authority's cleaning contractor was responsible for cleaning the mezzanine area, and that the cleaning contractor on January 16, 2007 was Laro Maintenance. (*Id.* at 39.)

Louis Vacca, Jr. testified on behalf of Laro Maintenance Corp. At his deposition, he stated that he was employed by "Laro Services,"[2] and he was the vice president of operations at Laro Services on the date of plaintiff's alleged accident. (Griffin Affirm., Ex F [Vacca EBT], at 7.) When asked if there was an agreement between Laro Services and the Port Authority with regard to Laro Services cleaning

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[1] Several counsel at the deposition stated on the record that plaintiff was indicating the size of a quarter or the size of a grape. (Liang EBT, at 83.)

[2] Laro Mainentance Corp. and Laro Service Systems, Inc. are both named as defendants in this action. Laro Service Systems, Inc. answered for both defendants, stating in its answer that it was "also sued herein as Laro Maintenance Corp." (Kozak Affirm., Ex F.)

and maintaining the Port Authority Bus Terminal, Vacca answered, "Yes." (*Id.* at 8.) Vacca was shown the photograph marked as Plaintiff's Exhibit 4 at Pineiro's EBT, and he was asked:

> "Q. As far as you know, under the agreement that was in effect between the Port Authority and Laro Services, the cleaning services, was it Laro Services'[s] responsibility to clean the area depicted in that picture?
> A. Up to the door entrances. Up to that line (indicating).
> Q. Point out door entrances into the subway?
> A. Yes. The inside Port Authority piece we maintained.
> * * *
> A. Just to clarify, that whole white terrazzo area up to the doorway entrance, that's our point of cut off, that's what we clean up to."

(*Id.* at 10-11.)

By decision and order dated October 2, 2009, Justice Beeler granted the City of New York's motion for summary judgment dismissing the complaint and all cross claims as against the City, reasoning,

> "According to the affidavit of James J. Whooley, principal title examiner in the New York City Law Department . . . all deeds to the bus terminal's property as of January 15, 2007, the day before the accident, were in the name of the Port Authority. City, therefore, had no interest in or responsibility for the accident site."

(Kozak Affirm., Ex J.)

Laro Maintenance Corp. now moves for summary judgment dismissing the complaint and all cross claims as against it, on the ground that it did not have either actual or constructive notice of the piece of "fruit peel" that allegedly caused

plaintiff's slip and fall. The Port Authority also cross-moves for summary judgment dismissing the complaint and all cross claims as against it, or in the alternative, for summary judgment in its favor against Laro Service Systems, Inc. and Laro Maintenance Corp. on its cross claims for contractual indemnification and breach of an agreement to procure insurance naming the Port Authority as an additional insured. Finally, NYCTA and MTA cross-move for summary judgment the complaint and all cross claims as against it, on the ground that they do not own or control the area where plaintiff allegedly fell. Plaintiff opposes the motion and cross motions.

DISCUSSION

The standards for summary judgment are well settled.

> "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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]).

Laro Maintenance Corp.'s motion for summary judgment & the Port Authority's cross

motion for summary judgment

Both Laro Maintenance Corp. and the Port Authority contend that they had no actual or constructive notice of the condition that caused plaintiff's alleged slip and fall.

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008].) "To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." (*Granillo v Toys R US, Inc.*, 72 AD3d 1024 [2d Dept 2010].)

As a threshold matter, the Court rejects plaintiff's argument that defendants were required to plead lack of notice as an affirmative defense. "[A]n affirmative defense is any matter 'which if not pleaded would be likely to take the adverse party by surprise' or 'would raise issues of fact not appearing on the face of a prior pleading.'" (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008].) Neither situation is present in this case, because plaintiff's supplemental bill of particulars, which amplified the pleadings, claimed actual and constructive notice. Indeed, notice

(whether actual or constructive) is an element of plaintiff's case, on which plaintiff would bear the burden of proof at trial; as such, it is not an affirmative defense by definition.

Turning to the issue of notice, Vacca testified at his deposition that, to the best of his knowledge, there were no reports of any hazardous spills or debris that were produced by Laro during the day of plaintiff's alleged accident. (Vacca EBT, at 47.) The Port Authority submits a copy of a "Laro Maintenance Corporation Daily Log Sheet" dated January 16, 2007, for "Tour 8 6:00 AM - 2:30 PM" and another page with the heading "Tuesday January 16, 2007." (Kozak Affirm., Ex O.) On the second page, "Tuesday January 16, 2007," are a list of entries which state, in pertinent part:

> "10:00 start n/w inspection
>
> 11:30 n/w inspection complete all floors and lobbies satisfactory check employee parking lot and start exterior inspection."

(*Id.*)

Plaintiff objects to this document as hearsay, because the document itself does not indicate that it is a document produced by Laro personnel in the ordinary course of business. Alternatively, plaintiff argues that the document does not state whether "n/w inspection" included the subway mezzanine concourse where plaintiff allegedly fell, and does not indicate the time when inspection of the subway mezzanine

concourse occurred.

However, in reply to plaintiff's opposition, the Port Authority submitted an affidavit from Vacca, who states

> "I have reviewed documents provided to me, specifically a Laro Maintenance Corp. Daily Log Sheet & Checklist dated January 16, 2007. These records are a fair and accurate representation of documents kept by Laro in the order course of business.
>
> The NW area referred to in the documents refers to the northwestern portion of the Port Authority Terminal including the concourse and the mezzanine."

(Kozak Reply Affirm., Ex S.)

Thus, the documents offered indicate that the inspection of northwest subway mezzanine occurred at some time between two hours to 30 minutes before plaintiff allegedly fell. The checklist states that the inspection started at 10:00 A.M. and ended at 11:30 A.M., whereas plaintiff allegedly slipped and fell at 12:00 P.M. The fact that the checklist dated January 16, 2007 does not indicate the specific time when the northwest subway mezzanine was inspected is not material. Assuming that the northwest subway mezzanine was inspected two hours before plaintiff allegedly fell, such an inspection would not be so remote in time as not to meet defendants' prima facie burden of lack of notice.

Plaintiff fails to raise a triable issue of fact as to whether Laro Maintenance

Corp. had notice of the condition that caused plaintiff's alleged slip and fall. Contrary to plaintiff's argument, Vacca did not testify that defendants had no records as to how often the area where plaintiff allegedly fell was actually checked on the date of the alleged accident. Vacca was asked at his deposition,

> "Q Do you maintain records with regard to how often the area or particular area in the Port Authority was scanned on a particular day?
> A. Do I maintain any?
> Q. Does Laro Services maintain?
> A. *Yes.*
> Q. Do you have those particular records with regard to January 16th of 2007, how often they were scanned?
> A. No.
> Q. The area.
> A. I don't, no.
> Q. Does Laro Service[s] have that type of documentation?
> A. *They did at the time.* I wouldn't know now."

(Vacca EBT, at 20-21 [emphasis supplied].) Later during the deposition, Vacca was asked,

> "Q. You previously testified there were people that patrolled the areas during shifts. How many people were during each shift? How many people were patrolling the are during each shift?
>
> * * *
>
> Q. Do you have any documentation as to the time that one of these patrols that Laro would have passed the area in question on January 16, 2007?
>
> A. No."

(*Id.* at 31-32.) Vacca's answer that he did not have any documentation as to when the areas were patrolled does not raise any triable issue as to whether the checklist dated

January 16, 2007 was a business record of Laro Maintenance Corp. Vacca had testified earlier in the deposition that such records existed; his answer that he himself did not have such documentation is not inconsistent with his testimony or with his affidavit.

As to the Port Authority, plaintiff points out that Pineiro testified at his deposition that Port Authority staff was "required to patrol the area looking for any sort of debris or anything of that nature." (Pineiro EBT, at 40.) According to Pineiro, at least three Contract Services Supervisors, who were Port Authority employees, would inspect or patrol the northwest subway mezzanine. (*Id.*, at 72-73.) Although the Port Authority does not submit any evidence as to when these employees last inspected the area where plaintiff allegedly fell, the Court rejects plaintiff's argument that Port Authority may not rely upon Laro Maintenance Corporation's Daily Maintenance Log and Checklist dated January 16, 2007 to meet its own prima facie burden on this motion of demonstrating lack of actual or constructive notice.

The Port Authority accepted the proposal of Laro Maintenance Corporation to perform general cleaning at the Port Authority Bus Terminal. (Griffin Affirm., Ex J; Kozak Affirm., Ex Q.) Because the Port Authority hired Laro Maintenance Corporation for the purpose of inspecting and cleaning areas of the Port Authority Bus Terminal, it may therefore rely upon the records of its cleaning contractor to meet

its prima facie burden of summary judgment.

Plaintiff fails to raise a triable issue of fact as to whether the Port Authority had notice of the condition that caused plaintiff's alleged slip and fall. The fact that the "Patron Accident or Property Damage Report" is blank in the sections "Area Last Cleaned by B.A." and "Area last Inspected by B.A." does not rebut defendants' prima facie showing that they lacked actual or constructive of the condition that caused plaintiff's alleged slip and fall.

Therefore, Laro Maintenance Corp.'s motion for summary judgment and the Port Authority's cross motion for summary judgment are granted, and the complaint and any cross claims by or against Laro Maintenance Corp., Laro Service Systems, Inc., and the Port Authority are dismissed. Plaintiff's argument that he may recover in tort against Laro Maintenance Corp. for the alleged breach of its contractual duty to inspect and clean the Port Authority Bus Terminal is unavailing. (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002].) Plaintiff does not argue that any of the three situations set forth in *Espinal*–where a potential liability in tort may exist–were present here.

NYCTA and MTA's Cross Motion for Summary Judgment

NYCTA and MTA's cross motion for summary judgment is granted. Plaintiff

testified at his deposition that he slipped and fell within the Port Authority Bus Terminal. As Justice Beeler found in his prior decision and order granting summary judgment dismissing the action as against the City of New York, "all deeds to the bus terminal's property as of January 15, 2007, the day before the accident, were in the name of the Port Authority." (Kozak Affirm., Ex J.) Moreover, Pineiro testified that the Port Authority's cleaning contractor was responsible for cleaning the mezzanine area.

Plaintiff fails to raise a triable issue of fact as to whether NYCTA and MTA own or control the area where plaintiff allegedly slipped and fell. Plaintiff argues that NYCTA and MTA have duties with regard to the area because plaintiff allegedly fell near a pillar above which hangs a large sign marked "SUBWAY." (Neuman Opp. Affirm., Ex A.) It is not reasonable to infer that NYCTA and the MTA (as opposed to the Port Authority) installed the "SUBWAY" sign or that, by installing the sign, NYCTA or the MTA would therefore have a legal duty to keep to inspect and clean the area below the sign. In any event, plaintiff submits no evidence as to who installed the "SUBWAY" sign.

Therefore, NYCTA and MTA's cross motion for summary judgment dismissing the complaint and any cross claims by or against them is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Laro Maintenance Corp. is granted; and it is further

ORDERED that the cross motion for summary judgment by defendant Port Authority of New York and New Jersey is granted; and it is further

ORDERED that the cross motion for summary judgment by defendants New York City Transit Authority and Metropolitan Transportation Authority (sued herein as Metropolitan Transit Authority) is granted; and it is further

ORDERED the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and all cross claims by and against defendants the Port Authority of New York and New Jersey, Laro Maintenance Corp., Laro Service Systems, Inc., New York City Transit Authority, and Metropolitan Transportation Authority (sued herein as Metropolitan Transit Authority) are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 16, 2012
New York, New York

ENTER:

J.S.C.