Barrett v Aero Snow Removal Corp.
2017 NY Slip Op 31418(U)
May 11, 2017
Supreme Court, Bronx County
Docket Number: 24799/13E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ELIZABETH A. BARRETT AND RICHARD BARRETT,

Plaintiff(s),

- against -

AERO SNOW REMOVAL CORP., CRSITI CLEANING SERVICES, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ABM BUILDING SOLUTIONS, LLC, ABM PARKING SERVICES, INC., AND AMPCO SYSTEM PARKING,,

Defendant(s).
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DECISION AND ORDER

Index No: 24799/13E

In this action for premises liability, defendant PORT AUTHORITY OF NEW YORK AND NEW JERSEY (PANYNJ) moves seeking an order granting it summary judgment thereby dismissing plaintiffs' amended complaint and all cross-claims on grounds that with respect to the icy condition alleged to have caused plaintiff ELIZABETH A. BARRETT's (Barrett) accident, PANYNJ neither created the condition nor had prior notice of its existence. Alternatively, PANYJ seeks an order granting it summary judgment on its cross-claims against defendants CRISTI CLEANING SERVICES (Cristi) and ABM PARKING SERVICES, INC (ABM) for contractual indemnification and breach of contract. PANYNJ saliently contends that because it was not negligent in connection with Barrett's accident and given the indemnification provisions in the relevant agreements, PANYNJ is entitled to summary judgment. Plaintiffs oppose the instant motion

asserting, *inter akia*, that because PANYNJ fails to establish that the condition alleged was not present when the situs of the accident was last inspected, it fails to establish prima facie entitlement to summary judgment. Cristi opposes PANYNJ's motion, solely to the extent that summary judgment is sought with respect to the cross-claims asserted against Cristi, asserting that questions of fact with respect to whether Cristi was negligent precludes summary judgment on PANYNJ's contractual indemnification claim. ABM opposes PANYNJ's motion solely to the extent that summary judgment is sought with respect to the cross-claims asserted against ABM, asserting that summary judgment is unwarranted, where as here, indemnification turns on ABM's negligence, which on this record, doesn't exist.

For the reasons that follow hereinafter, PANYNJ's motion is granted, in part.

The instant action is for alleged personal injuries allegedly sustained as a result of the negligent maintenance of a premises. The amended complaint alleges that on February 20, 2013, Barrett slipped and fell while traversing the employee parking lot at LaGuardia Airport, located in Queens, NY. It is alleged that Barrett slipped on a dangerous condition existing thereat, that PANYNJ owned and maintained the foregoing premises, that pursuant to contract, ABM, Cristi and defendant AERO SNOW REMOVAL CORP. (Aero) also operated and maintained the premises, and that

defendants were negligent in the maintenance of the premises. It is alleged that the foegoing negligence caused Barrett's accident and the injuries resulting therefrom. Plaintiff RICHARD BARRETT, Barrett's husband, interposes a derivative loss of services claim.

PANYNJ's motion for summary judgment and dismissal of the complaint and all cross-claims is granted insofar as the uncontroverted evidence establishes that it neither caused nor created the condition alleged to have caused Barrett's accident and that it did not have prior notice of said condition.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Under the common law, a landowner is duty bound to maintain his or her property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233, 242 [1976]). Thus, the owner of a premises is required to exercise reasonable care in the maintenance of his property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk (*id.*). Accordingly, liability for a dangerous condition within a premises requires proof that either the owner created the dangerous condition or, that he had actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317, 318 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]).

A defendant is charged with having constructive notice of a

defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a transitory condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575, 575 [2000]). To be sure, "where the hazardous condition is transitory, a defendant may establish its entitlement to summary judgment by demonstrating that the condition could have arisen shortly before the accident" (*Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404, 405 [1st Dept 2016]; *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 [2005]; *Brooks-Torrence v Twin Parks Southwest*, 133 AD3d 536, 536 [1st Dept 2015]). In *Brooks-Torrence*, where plaintiff alleges to have tripped and fallen on a plastic bag located on steps, the court granted defendant

summary judgment finding, in part, no constructive notice because "plaintiff testified that she did not see the plastic bag or any other debris on the staircase when she arrived at defendant's building, only seeing the bag after she fell" (*id.* at 536).

Generally, on a motion for summary judgment a defendant establishes *prima facie* entitlement to summary judgment when the evidence establishes the absence of notice, actual or constructive (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803, 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790, 790 [3d Dept 1998]). Notably, addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Green v Albemarle, LLC*, 966, 966 [2d Dept 2013]). If defendant meets his burden it is then incumbent upon plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]).

It is well settled that generally there can be no liability for dangerous conditions resulting from the accumulation of snow

and ice absent evidence that a defendant, in electing to remove snow, created a hazardous condition or exacerbated a natural one (*Gwinn v Christina's Polish Restaurant, Inc.*, 117 AD3d 789, 789 [2d Dept 2014]; *Xie v Ye Jiang Yong*, 111 AD3d 617, 618 [2d Dept 2013]; *Cotter v Brookhaven Memorial Hosp. Medical Center, Inc.*, 97 AD3d 524, 524 [2d Dept 2014]), had notice - actual or constructive - of the dangerous condition alleged, and evidence that a reasonable period of time elapsed between the accident and last episode of precipitation (*Laster v Port Authority of New York and New Jersey*, 251 AD2d 204, 205 [1st Dept 1998]; *Soboleva v Gojcaj*, 238 AD2d 170, 170 [1st Dept 1997]; *Urena v New York City Transit Authority*, 248 AD2d 377, 378 [2d Dept 1998]; *Robles v City of New York*, 255 AD2d 305, 306 [2d Dept 1998]; *Bertman v Board of Managers of Omni Court Condominium I*, 233 AD2d 283, 283-284 [2d Dept 1996]).

For purposes of constructive notice, evidence that it had snowed prior to a plaintiff's accident is, by itself, insufficient to establish constructive notice of a dangerous ice condition's existence (*Simmons v Metropolitan Life Insurance Company*, 84 NY2d 972, 973-974 [1994] ["The testimony that it had snowed a week prior to the accident was insufficient to establish notice because no evidence was introduced that the ice upon which plaintiff allegedly fell was a result of that particular snow accumulation."]; *Grillo v New York City Transit Authority*, 214 AD2d 648, 649 [2d Dept 1995 [same]). Instead, a plaintiff seeking to establish constructive

notice of an ice condition with proof that it had snowed prior to the accident must establish that the condition alleged was actually caused by the prior storm (*Simmons* at 973-974; *Grillo* at 649; *Lenti v Initial Cleaning Services, Inc.*, 52 AD3d 288, 289 [1st Dept 2008]; *Steo v New York University*, 285 AD2d 420, 421 [1st Dept 2001]). Stated differently, a plaintiff seeking to establish constructive notice of an icy condition by asserting that its origins were the result of weather conditions preceding the accident, must establish the origins of such condition (*Baum v Knoll Farm*, 259 AD2d 456, 456 [2d Dept 1999]; *Fuks v New York City Transit Authority*, 243 AD2d 678, 678-679 [2d Dept 1997]; *DeCurtis v T.H. Associates*, 241 AD2d 536, 537 [2d Dept 1997]; *Denton v L.M. Klein Middle School*, 234 AD2d 257, 258 [2d Dept 1996]). This is because, by definition, constructive notice requires a finding that the condition alleged existed for a sufficient period of time to enable a defendant to discover and remedy the same (*Baum* at 456). Thus, generally to prove constructive notice of an icy condition based on a prior storm, a plaintiff must establish that the icy condition could have formed as a result of the precipitation and the weather that followed thereafter (*Bernstein* at 1022 ["The evidence indicated nothing more than the possible existence of an unmeasurable trace of snow or ice prior to the January 13 snowstorm. Plaintiff produced no evidence that an ice patch of such dimension could have been formed from such precipitation and could

have lasted until January 15. Quite simply, plaintiff has failed to show facts and conditions from which the negligence of defendant could have been reasonably inferred."]).

Notwithstanding the foregoing, constructive notice can, of course, be established by evidence that the condition existed for a prolonged period of time such as eyewitness accounts (*Ralat v New York City Housing Authority*, 265 AD2d 185 [1st Dept 1999] ["Furthermore, in their sworn affidavits submitted on renewal, plaintiff's witnesses both describe having observed plaintiff slip and fall on a large patch of ice. Significantly, they also stated that the icy problem on the sidewalk existed for at least a week prior to plaintiff's accident, and that they had observed other tenants from the Edenwald Housing Project slipping and falling on ice in the same area" (internal quotation marks omitted)]), or by the condition of the ice itself, evincing that it is longstanding and its proximity to defendant's property (*Gonzalez v American Oil Co.*, 42 AD3d 253, 256 [1st Dept 2007] ["From these facts—the large size of the ice patch, its consistency as well as its close proximity to the store's front door, and defendants' failure to perform any meaningful maintenance—one could reasonably conclude that defendants should have discovered this condition well before plaintiff's fall and remedied it."]).

Climatological reports[1] can be used to establish the weather conditions at the time of the accident alleged, including the existence of snow (*see e.g. Bernstein v City of New York*, 69 NY2d 1020, 1021 [1987] [defendant's evidence as to weather conditions, consisted, in part of meteorological data]; *Clarke v Pacie*, 50 AD3d 841, 842 [2d Dept 2008] [same]; *Ralat* at 187 [same]). However, whether such reports establish the origin, formation, and duration of a particular condition is a factual analysis and is wholly dependent on the facts of each case. For example, in *Rivas v New York City Housing Authority* (261 AD2d 148 [1st Dept 1999]), the court held that using climatological data, plaintiff established that defendant had constructive notice of the defect alleged, namely, a patch of ice (*id.* at 148). The court noted that the climatological reports established that it had snowed several days prior to plaintiff's accident, that some snow remained on the ground thereafter, and that the temperatures remained below freezing, which evidence was sufficient to establish that a defendant had constructive notice of the ice patch alleged and had

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[1] When climatological records are submitted, they must be submitted in admissible form. Generally, they must be "accompanied by a certificate signed by, or with a facsimile of the signature of, the clerk of a court having legal custody of the record" (CPLR § 4540) and if such certificate is submitted, then "[a]ny record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated" (CPLR § 4528; *Sfakianos v Big Six Towers, Inc.*, 46 AD3d 665, 665 [2d Dept 2007]["0The climatological records submitted by the defendant should have been authenticated."]).

sufficient to time to discover and remedy the same (*id.*). Conversely, the court in *Womble v NYU Hospitals Center* (123 AD3d 469, 469 [1st Dept 2014), held that climatological data submitted failed that a storm was in progress when it lacked a key explaining the data codes used therein.

In support of its motion, PANYNJ submits Barrett's deposition transcript wherein she testified, in pertinent part, as follows: On February 20, 2013, at approximately 4:30AM, she slipped and fell within the employee parking lot at LaGuardia Airport. On the forgoing date, Barrett was a flight attendant employed by American Airlines. Immediately prior to her accident, Barrett was headed to work and had just parked her car within the parking lot. Upon entering the lot in her vehicle, she parked in a spot adjacent to the crosswalk and near the "C" bus stop. As Barrett exited her vehicle, and upon stepping onto the crosswalk, Barrett slipped and fell. After falling, she noticed that the area upon which she slipped was covered in snow and ice. Barrett testified that because there had been lots of snow that month, there were piles of snow at various locations in the parking lot and once such pile near a pole not too far from the crosswalk. While she testified that the piles of snow had existed for several days prior to her fall, including the afternoon of the 19th, she testified that did not see the ice upon which she slipped until after she fell. She also testified that she did not recall where she had parked her

vehicle on the day prior to her accident and that she could not recall if the conditions of the parking lot on the 19th were the same as they were on the 20th. Prior to her accident, she had not made any complaints regarding the condition of the parking lot or the snow therein.

PANYNJ also submits Thomas Hatton's (Hatton) deposition transcript wherein he testified, in pertinent part, as follows: in 2013, Hatton was PANYNJ's Contract Administrator at LaGuardia Airport. His duties included overseeing contracts between PANYNJ and other parties. LaGuardia Airport had one employee parking lot, designated as Lot 10E. The lot contained approximately 1,200 parking spaces. The lot was operated by ABM, who among other responsibilities, patrolled the lot looking for any unsafe conditions and reporting the same to PANYNJ. The lot was maintained by Cristi, who was responsible for the lot's cleanliness. Cristi was responsible to clean the lot and had personnel at LaGuarida Airport 24 hours per day. In addition to cleaning the lot and removing garbage and debris, Cristi was also responsible to remove snow and ice from the bus shelters and the crosswalks located therein. This was a general obligation, meaning Cristi had to ameliorate any ice conditions it encountered while cleaning an patrolling the lot. However, when PANYNJ issued a snow alert, meaning, an impending snow storm, Cristi was notified in advance and was tasked with removing all snow and ice deposited by

the storm in the shelters and crosswalks. PANYNJ also had a contract with Aero, who was tasked with removing snow from the roads and parking spaces within Lot 10E. In performing its snow removal activities, Cristi was required to treat any ice conditions with Calcium Chloride, a melting agent. In performing its snow removal activities, Aero was required to pile the snow in the rear of Lot 10E, over a drain located thereat. Thereafter, it was required to use a melting machine to melt the same. Aero's services were only required when activated by PANYNJ, usually as a result of a snow alert, and once Aero had satisfactorily removed snow from Lot 10E, they would discharged and had no further snow removal responsibilities. PANYNJ would inspect LaGuardia Airport daily to insure that contractors such as Cristi were performing their work. Such inspections were memorialized in a log. If PANYNJ personnel observed an icy condition in one of lots Cristi was tasked to maintain, they could note it in the log. Nevertheless under the foregoing circumstances PANYNJ would ensure that Cristi was notified so that it could ameliorate the same. The foregoing log indicates that all parking lots were checked by PANYNJ on February 19, 2013 at 3:55PM and that no issues requiring that Cristi be notified were noted. Further no conditions in Lot 10E, which required that Cristi be notified were noted in the log thereafter, through 6AM on February 20, 2013. Lastly, Hatton didn't have to notify Cristi regarding any conditions in Lot 10E

prior to February 20, 2013. PANYNJ did engage in snow and ice removal activities, but only with respect to ramps, taxiways, and runways.

PANYNJ submits Maurice Raymond's (Raymond) deposition transcript wherein he testified, in pertinent part, as follows: in 2013, Raymond was employed by ABM as its operations manager at LaGuardia Airport. ABM staffed the parking lots at LaGuardia, including Lot 10E, the employee parking lot. Raymond oversaw ABM's field and office operations. With regard to Lot 10E, ABM manned a booth located at the lot, and staffed it with two traffic agents 24 hours per day. The traffic agents were responsible for the operation of the lot, which included making sure that those coming inside were supposed to park therein. ABM's practice was to keep one agent in the booth at all times, while the other patrolled the parking lot. The lot was patrolled twice per 8 hour period and during those patrols, if the agent observed a dangerous condition, including one related to snow and ice, the agent notified the Supervisor in Charge (SIC), who sat at the office located at LaGuardia Ariport. The SIC would then notify the PANYNJ about the hazard and would also notify Raymond. The SIC would also note any dangerous conditions about which he had been apprised in his daily log. ABM also employed Field Supervisors, who would inspect the lots at LaGuardia and who would also report any hazardous conditions encountered by them. Any such conditions would be noted

in the daily reports generated by the Field Supervisors. A search of ABM's records for the week prior to and including February 20, 2013, indicated that ABM did not notice any ice conditions in Lot 10E.

PANYNJ submits Brian Brown's (Brown) deposition transcript wherein he testified, in pertinent part, as follows: in 2013, Brown was a manager employed by Cristi at LaGuardia Airport. His duties involved the management of Cristi's employees. Cristi was PANYNJ's contractor, responsible to clean the parking lots at LaGuardia Airport. Generally, Cristi was responsible to clean all areas of the parking lots, including Lot 10E. Cristi removed garbage and all debris, ensuring that the lots were safe for pedestrian travel. For this aspect of Cristi's job, they had employees within the lots 24 per day. Cristi employees would patrol the lots every 90 minutes cleaning and ensuring that the lots were clean. If upon the foregoing patrol a Cristi employee noticed a dangerous condition, they would report the same to a supervisor, who would then notify PANYNJ's contract services for amelioration. Cristi, was also responsible for snow removal within the parking lots at LaGuardia Airport provided the snow was in the bus shelters, crosswalks, and sidewalks. Generally, Cristi's snow removal efforts were triggered when PANYNJ issued a snow alert. At that point, Cristi would endeavor to remove snow within the parking lots from the crosswalks, sidewalks and bus shelters. Once all the snow

was cleared, Cristi would then resume its cleaning activities. If Cristi observed any ice conditions on any crosswalks within Lot 10E, it would have addressed the same. When removing snow from the crosswalks within Lot 10E, Cristi ensured that it was pushed away from the crosswalk and onto fence line.

Based on the foregoing, PANYNJ establishes prima facie entitlement to summary judgment insofar as the evidence tendered establishes that it could not have created the condition alleged nor did it have prior notice of the same. Liability for a dangerous condition within a premises requires proof that either the owner created the dangerous condition or, that he had actual or constructive notice of the same (*Piacquadio* at 969; *Bogart* at 937; *Armstrong* at 318; *Wasserstrom* at 37). Thus, on a motion for summary judgment a defendant establishes *prima facie* entitlement to summary judgment when the evidence establishes the absence of notice, actual or constructive (*Hughes* at 924; *Edwards* at 803; *Richardson-Dorn* at 790). A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon* at 837). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a

general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969).

Here, to the extent that Hatton testified that PANYNJ did not engage in any snow removal efforts within the lots at LaGuardia airport, it is clear that PANYNJ could not have caused the icy condition alleged. Significantly, while it is true that a defendant is liable for an ice or snow related condition, if in electing to remove snow, created a hazardous condition or exacerbated a natural one (*Gwinn* at 789; *Xie* at 618; *Cotter* at 524), where as here, Hatton testified that all snow removal efforts, and indeed maintenance of the instant lot was delegated to Cristi and Aero, PANYNJ cannot be said to have engaged in any conduct which could have created the condition alleged.

Moreover, PANYNJ also establishes the absence of any actual or constructive notice of the condition alleged. It is well settled that the absence of evidence demonstrating how long a transitory condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson* at 423; *McDuffie* at 575). Here, Barrett testified that she did not see the condition alleged to have caused her fall - a patch of ice - until after she fell, thereby establishing the absence of constructive notice (*Brooks-Torrence* at 536). Additionally, collectively, the testimony of the relevant

witnesses establishes that the condition alleged did not exist 90 minutes prior to plaintiff's fall such that defendants establish that it "could have arisen shortly before the accident" (*Betances* at 405; *Rivera* at 838; *Brooks-Torrence* at 536). Specifically, Brown testified that Cristi employees patrolled the instant parking lot every 90 minutes and if it had seen an icy condition on the crosswalk, it would have ameliorated the same.

Lastly, PANYNJ also establishes the absence of any acutal notice of the condition alleged. Hatton testified that PANYNJ would inspect LaGuardia Airport daily to ensure that contractors such as Cristi were performing their work, that such inspections were memorialized in a log, and that if PANYNJ personnel observed an icy condition in one of lots Cristi was tasked to maintain, it could note it in the log, and that PANYNJ would nevertheless ensure that Cristi was notified so that it could ameliorate the same. As per Hatton, a review of the foregoing logs indicates that all parking lots were checked by PANYNJ on February 19, 2013 at 3:55PM and that no issues requiring that Cristi be notified were noted. He further noted that no conditions in Lot 10E, which required that Cristi be notified were noted in the log thereafter, through 6AM on February 20, 2013. Lastly, Hatton testified that he didn't have to notify Cristi regarding any conditions in Lot 10E prior to February 20, 2013. Raymond, similarly testified that ABM's employees patrolled the instant lot twice per 8 hour period and during those

patrols, if the agent observed a dangerous condition, including one related to snow and ice, the agent notified the SIC The SIC would then notify PANYNJ about the hazard reported and would also notify Raymond. The SIC would also note any dangerous conditions about which he had been apprised in his daily log. Raymond also testified that ABM Field Supervisors would also inspect the lots at LaGuardia and would also report any hazardous conditions encountered by them. He further testified that any such conditions would be noted in the daily reports generated by the Field Supervisors. Significantly, a search of ABM's records for the week prior to and including February 20, 2013, indicated that ABM did not notice any ice conditions in Lot 10E.

Accordingly, it is clear that all avenues by which PANYNJ could have been apprised of the condition alleged to have caused Barrett's accident indicate the absence of any notice.

Nothing submitted by any of the parties raises an issue of fact sufficient to preclude summary judgment. Significantly, plaintiffs' salient opposition - that PANYNJ fails to establish the absence of constructive notice because it fails to establish that the condition alleged was not there when PANYNJ last inspected the same - is meritless. While it is true, that a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of

the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross* at 421; *Green* at 966), here, PANYNJ meets its burden. In this case, where PANYNJ delegated maintenance responsibility for the instant lot to several third parties, it is axiomatic that it can satisfy the foregoing burden if the contractors satisfied the foregoing burden. Here, as noted, above, ABM inspected the lot in question twice every 8 hours and had it found the condition alleged herein, would have reported the same to ABM's SIC who would have informed PANYNJ. As per Raymond, a review of ABM's records failed to indicate that any such condition was observed and relayed to the SIC at any time in the week prior to Barrett's accident. Thus, here, PANYNJ adequately negated the existence of constructive notice.

Having granted PANYNJ's motion for summary judgment with respect to the amended complaint, the portion of PANYNJ's motion seeking summary judgment with respect to its cross-claims is denied as moot.

Based on the foregoing, the Court shall also, upon a search of the record[2], grant summary judgment to all the remaining defendants

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[2] While not discussed, the Court also reviewed Ferdin Gonzalez' (Gonzalez) deposition transcript, submitted by plaintiffs and wherein he testified that Aero only engaged in snow removal activities in Lot 10E upon the request of PANYNJ after a snow alert was declared. Significantly, he testified that after a storm on February 8, 2013, where Aero removed snow from Lot 10E, on February 9, 2013, PANYNJ released Aero from

insofar as on this record it is clear that they did not create the condition alleged to have caused Barrett's accident.

When a court is deciding a motion for summary judgment, it can search the record and, even in the absence of a cross motion, may grant summary judgment to a non-moving party (CPLR 3212[b]; *Dunham v Hilco Constr. Co., Inc.*, 89 NY2d 425 [1996]). In fact, it is well settled that "a motion for summary judgment, irrespective of by whom it is made, empowers a court, even on appeal, to search the record and award judgment where appropriate" (*Grimaldi v Pagan*, 135 AD2d 496, 496 [2d Dept 1987]; *Schleich v Gruber*, 133 AD2d 224, 224 [2d Dept 1987]).

A contractor hired to perform work is generally not liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257 [2007]; *Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *H.R. Moch Co. v Rensselaer Water Co.*, 247 N.Y. 160, 164 [1928]; *Bugiada v Iko*, 274 AD2d 368, 369 [2d Dept 2000]). This is because, contractors are generally hired to perform work pursuant to contract and "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in

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further snow removal activities related to the storm and they performed no further snow removal activities in Lot 10E prior to February 20, 2013.

favor of a third party" (*Espinal* at 139). Thus, when there is a breach, such contractors are generally only liable to the person who hired them, the promisee, and are not liable to third parties for any injuries resulting from a breach of their contractual obligation. Consequently, if a contractor is to be held liable for injury to a third-party occasioned by their work, one of three scenarios must exist. First, a contractor is liable for injury to a third-party if

> the putative [contractor] has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good

(*id.* at 139, *quoting*, *H.R. Moch, Co.*, at 168). Stated differently, a contractor is liable to an injured third-party when said contractor causes or creates the condition alleged to have caused injury (*id.* at 140; *Church* at 111). Second, a contractor is responsible for a non contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury (*id.* at 11-112; *Espinal* at 140; *Eaves Brooks Costume Company, Inc. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 [1990]; *Bugiada* at 369). Lastly, when the contract is comprehensive and exclusive as to maintenance, so that due to its breath the contractor displaces, and in fact assumes the owner or possessor's duty to safely maintain the premises, said contractor

is liable to an injured third-party resulting from a breach of the services undertaken - such as the failure to maintain the premises in a safe condition (*Church* at 112; *Espinal* at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 589 [1994]; *Bugiada* at 369).

In *Espinal*, for example, the Court concluded that defendant, a contractor, was not liable to plaintiff for her alleged slip and fall on ice. Specifically, plaintiff slipped and fell on an icy condition, which defendant, as per a contract with the owner of the premises, was charged with abating (*id.* at 137-138, 142). Specifically, plaintiff alleged that the snow within the parking lot of the premises she was traversing had not been properly removed and that, thus, the contractor created the condition which caused her fall. (*id.*). In granting defendant's motion for summary judgment, the court reiterated the well settled rule that "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*id.* at 138). In discussing the exceptions to the foregoing rule, the court nevertheless held that by clearing snow as the contract required, the contractor had not created a dangerous condition, and as such was not liable under plaintiff's theory that the contractor created the condition alleged (*id.* at 142). Further, the court held that defendant was not liable under the exclusive control exception to the general rule, since as per

the contract between the contractor and the owner, the owner retained its duty to maintain and inspect the premises (*id.* at 141).

Similarly, in *Church*, the court granted a subcontractor's motion for summary judgment, after concluding that it was not liable to the plaintiff for any breaches of its contract with the State, the entity who hired the contractor. In that action, the subcontractor was hired to install guide rails along a portion of the state thruway by a contractor who was initially hired by the State (*id.* at 109, 114). In that case, plaintiff was an occupant of a vehicle whose driver fell asleep at the wheel, causing said vehicle to careen down an embankment accessible through an area which was slotted for guide rail installation, but upon which the subcontractor had yet to begin work (*id.*). The court held that the subcontractor was not liable to the plaintiff under any of the exceptions cited above (*id.* at 109-110). In holding for the subcontractor, the Court held that the subcontractor's failure to install guide rails at the location of the accident therein, did not cause or create a dangerous condition, since the subcontractor's failure to install guiderails thereat did not make the are therein any more dangerous than it was without the guide rails (*id.* at 112). Specifically, the court noted that had the subcontractor created the dangerous condition alleged, liability would have been extant but that in that case,

> the breach of contract consist[ed] merely in withholding a benefit where inaction is at most a refusal to become an instrument for good. [Specifically,] San Juan's [the subcontractor] failure to install the additional length of guiderail did nothing more than neglect to make the highway at Thruway milepost marker 132.7 safer--as opposed to less safe--than it was before the repaving and safety improvement project began

(*id.* at 112 [internal citations and quotation marks omitted]; *see H.R. Moch Co.* at 168 ["The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."]; *Bono v Halben's Tire City, Inc.*, 84 AD3d 1137, 1139 [2d Dept 2011] [Defendant automobile repair shop's failure to warn a party that his vehicle brakes could fail if he did not replace the master cylinder on his car did not constitute the launching of a force or instrument of harm.]; *Altinma v East 72nd Garage Corp.*, 54 AD3d 978, 980 [3d Dept 2008] [a defendant's alleged negligent failure to warn the decedent's employers regarding man-lift or elevator inspection requirements amounted to a finding that the defendant merely may have failed to become an instrument for good, which was insufficient to impose a duty of care."]).

Thus, because at best, in *Church* the omission alleged was nonfeasance as opposed to malfeasance, which failure merely failed to make the highway safer, the court concluded that such inaction

was not tantamount to causing and creating a dangerous condition (*id.* at 112). The court further concluded that there was no detrimental reliance by plaintiff upon the subcontractor's and that the contract between the subcontractor and the State was not one whereby the contractor assumed all safety related obligations with regard to the guiderail system so as displace the State's obligation to safely maintain the guiderails (*id.* at 113). More specifically, the court noted that the contract therein was not comprehensive and exclusive with respect to inspection and supervision vis a vis the installation of the guiderails, and as such, the contractor did not displace or assume the State's duty to safely maintain the guiderails (*id.*).

In addition to the foregoing, it has also been held that a contractor may be liable to a third party when in performing the work he was hired to perform, said contractor follows plans which are "so apparently defective, that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury" (*Ryan v the Feeney and Sheehan Building Company*, 239 NY 43, 46 [1929]; *Diaz v Vasques*, 17 AD3d 134, 135 [1st Dept 2005] ["plaintiffs failed to show that DOTs plans for the project were so apparently defective that Yonkers was put on notice of the inherent danger"]; *Gee v City of New York*, 304 AD2d 615, 616 [2d Dept 2003]; *Pioli v Town of Kirkwood*, 117 AD2d 954, 955 [3d Dept 1986]). Such exception imposes liability only if the defects

were so glaring and out of the ordinary that they put the contractor on notice that the work performed by following the plans would cause injury (*Ryan* at 46) The inquiry is one which focuses upon notice at the time the work was done and as such, that an expert examined the plans post construction and concluded that the plans were faulty is insufficient to impose liability upon the contractor (*Ryan* at 47 ["The fact that after the accident experts on examining the plans found the supports improper and insufficient was not enough to hold the defendant liable. The defects if any should have been so glaring and out of the ordinary as to bring home to the contractor that it was doing something which would be likely to cause injury."]). Evidence that the person who hired the contractor, accepted the work, and performed inspections in connection therewith, precludes any third-party liability upon the contractor (*Gee* at 616 ["Slattery demonstrated that the plans and specifications it followed were prepared by engineers of the New York State Department of Transportation (hereinafter the DOT). The DOT's signed daily inspection reports, along with its final acceptance letter of the project demonstrated that it approved Slattery's work. Slattery thereby established its entitlement to judgment as a matter of law."]).

Here, upon a review of the deposition testimony provided by Raymond, Brown, and Gonzalez, it is clear that the only avenue of liability as against the remaining defendants is if is shown that

they caused and created the condition alleged. To be sure, as noted above, and to the extent relevant here, a contractor hired to perform work is generally not liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party (*Stiver* at 257; *Church* at 111; *Espinal* at 138; *H.R. Moch Co.* at 164; *Bugiada* at 369). However, such contractor will liable to a third-party when it causes or creates the condition alleged to have caused injury (*Espinal* at 140; *Church* at 111), or when the contract is comprehensive and exclusive as to maintenance, so that the contractor displaces, and in fact assumes the owner or possessor's duty to safely maintain the premises (*Church* at 112; *Espinal* at 140; *Palka* at 589; *Bugiada* at 369). With regard to the first exception, nonfeasance as opposed to malfeasance, is not tantamount to causing and creating a dangerous condition (*Church* at 112).

On this record, where maintenance of the lot was contracted to three different parties, it is clear that no one contractors' responsibility constituted the wholesale assumption to maintain Lot 10E. Thus, here PANYNJ's maintenance responsibility was not totally displaced by any one of the remaining defendants. To be sure, Cristi, was only contracted to clean the lot, Aero to remove snow from portions therein, and ABM to perform security related functions at the lot. Moreover, on this record, it is clear that none of the defendants created the condition alleged to have caused

Barrett's accident, the only other possible basis for Cristi, ABM, Aero, and defendant AMPCO SYSTEM PARKING's (Ampco) liability. Significantly, Raymond testified that ABM did not engage in any snow removal activities and that ABM and Ampco were one in the same. Brown testified that, while Cristi was tasked with the removal and remediation of the condition alleged by plaintiffs, Cristi was never aware of said condition prior to the instant accident and woould have addressed it had it become aware of it. Lastly, Gonzalez testified that while Aero did remove snow from lot 10E prior to Barrett's accident, it did no such work on the crosswalk alleged and more importantly, had last done work therein 11 days prior to her accident.

To the extent that plaintiffs contend that the condition herein was created by one or more of these defendants in that snow was improperly piled and allowed to melt and re-freeze, such assertion is speculation at best and is not supported by any climatological data (*Rivas* at 148) or expert testimony establishing the same. It is hereby

ORDERED that plaintiffs' complaint and all cross-claims be dismissed, with prejudice. It is further

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ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : May 11 2017
Bronx, New York

Ben Barbato, JSC