Markus v Freeman Decorating Co.
2018 NY Slip Op 32309(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 160216/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LIORA MARKUS, Index No.: 160216/2014

Plaintiff,

-against-

FREEMAN DECORATING CO. d/b/a FREEMAN DECORATING SERVICES, INC., NEW YORK CONVENTION CENTER OPERATING CORP. and SPECIALTY FOODS ASSOCIATION, INC.,

Defendants.

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FREEMAN EXPOSITIONS, INC., f/k/a FREEMAN DECORATING SERVICES, INC. s/h/a FREEMAN DECORATING CO.,

Third-Party Plaintiff,

-against-

MANAMIM FOOD INDUSTRY, LTD. and ISRAEL EXPORT AND INTERNATIONAL COOPERATION INSTITUTE,

Third-Party Defendants.

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Edmead, J.:

Motion sequence numbers 005, 006, 007, 008 and 009 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained on June 28, 2014 by a booth operator, when she fell backwards over a roll of carpet while setting up at the Fancy Food Show being held at the Javits Center in New York City.

In motion sequence number 005, defendant/third-party plaintiff Freeman Expositions,

Inc., f/k/a Freeman Decorating Services, Inc. s/h/a Freeman Decorating Co. (Freeman) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.[1]

In motion sequence number 006, defendant Specialty Foods Association, Inc. (Specialty) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 007, Freeman moves, pursuant to CPLR 3212, for summary judgment dismissing the cross claims of defendants New York Convention Center Operating Corporation (NYCCOC) and Specialty.

In motion sequence number 008, NYCCOC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

Plaintiff Liora Markus cross-moves to strike NYCCOC's answer on the ground of spoliation for its alleged failure to preserve and destroy surveillance footage of the accident.

In motion sequence number 009, third-party defendant Manamim Food Industry, LTD (Manamim) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it.

BACKGROUND

NYCCOC is a public entity established by the New York Legislature to develop and own the Javits Center. Therefore, on the day of the accident, NYCCOC owned the Javits Center for the State of New York. In order to utilize the Javits Center for the 2014 Fancy Food Show (the Show), Specialty entered into a licensee agreement with NYCCOC, whereby Specialty obtained a

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[1]Freeman was incorrectly sued as Freeman Decorating Co. d/b/a Freeman Decorating Services, Inc.

non-exclusive right to use portions of the Javits Center for the Show (the Licensee Agreement). The Licensee Agreement set forth that, in regard to the various events held by Specialty at the Javits Center, NYCCOC would be the exclusive and sole provider of electricity, plumbing, housekeeping, carpentry and teamster labor. The Licensee Agreement also specified which activities the exhibitors were permitted to perform in regard to the set-up of their individual booths.

Pursuant to a contract, Specialty hired Freeman to perform the move-in, set-up and dismantling of the Show. Plaintiff was the manager and part-owner of Manamim, a wafer manufacturer. Manamim participated in the Show pursuant to a display package order (the Package Order) that it entered into with non-party Israel Export and International Cooperation Institute (IEI). IEI's members participated in the Show pursuant to a contract it had with Specialty.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was the manager and part-owner of Manamim, a company that manufactures wafers in Israel. On that day, Manamim was participating in the Show, which was being held at the Javits Center. The booth Manamim rented for the show (the Booth) was located in the Israel Pavilion section of the event. Plaintiff described the Booth as "a part of a bigger booth because we are like a whole booth for the Israeli Export Institute" (plaintiff's tr at 42). She testified that Freeman was in charge of setting up the booths for the Show, and that she had no dealings with Freeman.

Plaintiff testified that when she arrived at the Booth to set up Manimim's display, the Booth was already fully set up and carpeted. At that time, it contained a table, two chairs and a

pyramid shelf. Plaintiff observed that the aisles outside the Booth were not yet carpeted. She also observed "wooden boxes, carton boxes and . . . there were maybe carpets too" in the aisle (*id.* at 48).

Plaintiff explained that she was preparing to put some of her products on the shelves in the Booth when the accident occurred. As she was standing inside the Booth and facing its back wall, she suddenly felt something on her leg. Plaintiff testified, in pertinent part, as follows:

> "So, I was really just standing there, and in the time of the fall I was doing nothing. I mean, I was just standing there. Maybe two minutes before I was talking to my husband, but as this happened I was just standing there, and then I felt something down on my leg . . . and the minute I wanted to move I just fell back, like making steps back and . . . you put your hand back, you know, not to fall"

(*id.* at 91). Plaintiff testified that she fell "[t]he minute" she felt the carpet against her leg (*id.* at 95). With the exception of her husband, plaintiff was not aware of anyone else in her vicinity at the time of her accident, and she did not see any workers in the immediate area "touching this carpet before [she] fell" (*id.* at 96).

At plaintiff's deposition, when she was asked if the carpet was pushed up against her before she fell, plaintiff replied, "I don't know, but it wasn't there when I was standing before. So, somehow it came there" (*id.* at 93). She further testified, "Somebody - - I don't know if a person pushed it. I don't know how you call those that take all kind of boxes was passing by and pushed it. All I know is it wasn't there, and I was standing there and suddenly I fell over it" (*id*).

In addition, when plaintiff was asked if she had noticed a carpet in the aisle "before she fell," plaintiff said, "I don't remember" (*id.* at 95). She further maintained that "[t]here were a lot of things in the aisle. It's possible it was there too. I think it was there, but I can't really

recall . . . [i]f something is not inside my booth . . . its not my concern" (*id.* at 83). Plaintiff further noted, "I think, if I have to recall, that [the carpet] was outside. I mean it was not inside. It's possible it was outside. I think it was outside" (*id.*). She also asserted that even though she "didn't care about the carpet because it was not inside [her] booth . . . after [she] fell [she] saw that it [was inside her booth]" (*id.* at 84).

The Javit Center's Injury Report

In the Javit Center's injury report (the Injury Report), the responding Javits Center safety officer documented plaintiff's version of the accident. In doing so, he wrote that "[plaintiff] stated that while setting up her booth (#1923) she tripped while stepping backwards over a roll of carpet" (Freeman's notice of motion, exhibit M, the Injury Report).

Deposition Testimony of Joshua Marks (Plaintiff's Husband)

Joshua Marks testified that he and plaintiff were setting up the Booth when the accident occurred. At this time, the Booth "was ready . . . the shelves were in place, and the table was in place" (Markus tr at 12). He also observed "big boxes . . . [a]nd the [rolled] carpet" in the aisle (*id.* at 13). When Markus was specifically asked if the roll of carpet was in the aisle when they arrived, Markus replied, "Yeah, it was there. I think it was there" (*id.*). Markus stressed that the carpet was not inside the Booth, but, rather, it was "parallel [and next] to the booth," among some wooden boxes (*id.* at 15).

Markus further testified that he was not aware of anyone working in the subject aisle during the time that he was in the Booth. In addition, he never saw anyone touch or move the carpet at any time between the time they arrived and the time of the accident. Markus maintained that he did not witness his wife's fall, and that he did not know what caused her to fall.

However, she told him that "the carpet was the reason for her to fall" (*id.* at 30).

Deposition Testimony of Michael McGuire (Freeman's Director of Operations)

Michael McGuire testified that he was Freeman's director of operations on the day of the accident. He explained that in 2014, most exhibitors for the various events held at the Javits Center placed their booth carpet orders with Freeman, and then Freeman supplied the carpets and installed them. That said, exhibitors could also order booth carpet from other vendors. In addition, exhibitors had "a choice between a Freeman laborer to install the carpet . . . [or] an independent contractor utilizing labor within the Javits Center to install the carpet" (McGuire tr at 13). All carpets for the events, even non-Freeman carpets, were delivered to the Javits Center and placed in the staging areas by Freeman, even if an independent laborer was slated to install it.

McGuire testified that aisle carpets were installed at the direction of Freeman supervisors, with the help of the facility foreman. The Freeman supervisors decided when and where the carpets would be delivered to the floor areas, as well as when and where they would be installed. As the carpet installations took place, Freeman supervisors patrolled the aisles to make sure that they were being installed correctly. McGuire maintained that it was Freeman's general practice to make sure that, when dropping off the rolls of carpet, the aisles stayed clear. For safety reasons, the carpets were dropped as close as possible to the areas where they were eventually going to be installed.

When McGuire was shown a photograph of the roll of carpet that plaintiff allegedly tripped over, he could not state definitively whether or not it belonged to Freeman, although he testified that the "carpet looks to be similar to the carpet that Freeman utilizes as well as others" (*id.* at 49).

Deposition Testimony of Elvys Lopez (Javits Center's Safety Supervisor)

Elvys Lopez testified that he was the safety supervisor for the Javits Center on the day of the accident, and, as such, he patrolled the show floors to make sure that its safety rules were being followed. He explained that Freeman served as the general contractor for the Show, which meant that Freeman was in control of all aspects of the set-up process, essentially building all of the booths and installing the booth and aisle carpets. He explained that even if an exhibitor used their own contractor to build its booth, the labor to do so was still supplied by the Javits Center and supervised by Freeman.

Lopez described the aisles on move-in day as being filled with crates, carpets and other items. While he was not familiar with Freeman's routine in regard to storing the carpets prior to their installation, he had observed carpets being stored wherever the men "could find space" for them (Lopez tr at 30). Freeman never asked Lopez's advice or permission as to where the carpet rolls could be stored.

Deposition Testimony of Roger Grant (Specialty's Operations Specialist)

Roger Grant testified that he was Specialty's operations specialist on the day of the accident. His duties included overseeing the exhibit space and working with Freeman, the Javits Center and the various floor managers to make sure everything was ready for move-in day. He asserted that Freeman handled the delivery of all of the furniture and carpeting for the Show.

Grant explained that the aisle carpets were delivered to the Javits Center in rolls, and that, at some point the day before the Show, laborers, who were supervised by Freeman, rolled them out. He maintained that Freeman solely determined where the carpets were to be stored until that time.

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 from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *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], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law §§ 200 and 241 (6) Claims Against NYCCOC, Specialty and Freeman (motion sequence numbers 005, 006 and 008)

In their separate motions, NYCCOC, Specialty and Freeman (collectively, defendants) move for dismissal of the Labor Law claims against them, on the ground that plaintiff is not a proper Labor Law plaintiff because she was not involved in any construction work at the time of the accident. As plaintiff does not oppose the dismissal of the Labor Law §§ 200 and 241 (6) claims as against defendants, defendants are entitled to dismissal of the Labor Law §§ 200 and 241 (6) claims against them.

The Common-Law Negligence Claims Against Defendants (motion sequence numbers 005, 006 and 008)

In their separate motions, defendants move for dismissal of the common-law negligence

claim against them. "To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). In addition, a plaintiff must prove that the defendant either created, or had actual or constructive notice of the defective condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

As to NYCCOC and Specialty, it is important to note that "[l]iability for a dangerous condition is generally predicated on either ownership, control or a special use of the property" (*Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]). "It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances" (*Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326 [1st Dept 2006]). Therefore, NYCCOC, as owner, and Specialty, as lessee of the Javits Center, owed a duty of care to plaintiff to keep the Javits Center safe from tripping.

As to Freeman, as "a finding of negligence must be based on the breach of a duty, a threshold question . . . is whether [Freeman] owed a duty of care to [plaintiff]," [a] nonpart[y] to the contractual arrangement between Freeman and Specialty (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *see Church v Callanan Indus.*, 99 NY2d 104, 110 [2002]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138).

In *Espinal*, the Court identified three sets of circumstances, which serve as exceptions to this general rule (*id.* at 140; *Church,* 99 NY2d at 111). The first set of circumstances, and the only one that may arguably apply to the instant case, arises "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to

others, or increases that risk" (*Church*, 99 NY2d at 111, citing *Espinal*, 98 NY2d at 139, 141-142; *Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414, 415 [1st Dept 2014]). This conduct has also been described as "'launch[ing] a force or instrument of harm'" (*Church*, 99 NY2d at 111, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

Here, the evidence in the record fails to establish that any action on the part of Freeman created an unreasonable risk to plaintiff or increased any such risk (*see Miller v Infohighway Communications Corp.*, 115 AD3d 713, 715 [2d Dept 2014] [defendant fiber optic company did not owe a duty of care to a plaintiff who fell on a roadway condition, where the defendant had subcontracted the roadway construction and excavation work to another company]). Initially, both plaintiff and Markus were unsure as to whether or not the roll of carpet was even present in the aisle outside the Booth prior to the accident. Moreover, even in the event it was present outside the Booth, it did not become dangerous until it was moved inside the Booth and pushed up against plaintiff's legs. As both plaintiff and Markus testified that they did not observe any workers in the aisle before the accident, nor did they see anyone move the carpet into the Booth, plaintiff offers no more than speculation that Freeman was the entity responsible for her trip and fall, Freeman does not owe a duty of care to plaintiff on this ground.

"The second set of circumstances giving rise to a promisor's tort liability is where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*Church*, 99 NY2d at 111, citing *Espinal*, 98 NY2d at 140). Here, there is no evidence in the record to support any argument that plaintiff relied on Freeman's continuing performance of its general contracting duties for the Show.

"Third, [Courts] have imposed tort liability upon a promisor 'where the contracting party

has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 112, citing *Espinal*, 98 NY2d at 140, 141 [liability for the plaintiff's slip and fall injuries were not imposed on a snow removal contractor, where the owner effectively "at all times retained its landowner's duty to inspect and safely maintain the premises"]; *Palka v Service Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994] [liability for plaintiff's injuries imposed upon a maintenance company, where its contract with the hospital was "comprehensive and exclusive" in regard to the inspection and repair of the defectively maintained fan that fell on her]).

Here, a review of Freeman's contract with Specialty reveals that it was clearly not the type of contract that was "comprehensive and exclusive," so as to qualify under the requirements of the third Espinal exception. As Freeman was required to use Javits Center laborers, it never completely displaced NYCCOC's common-law duty to maintain the Site safely. Therefore, it owed no cognizable duty to plaintiff, so as to be held liable in negligence for her injuries on this ground.

Thus, as Freeman did not owe a duty of care to plaintiff, it is entitled to dismissal of the common-law negligence claim against it.

In any event, as defendants argue, they are entitled to dismissal of the common-law negligence claim against them because they did not create or have actual or constructive notice of any unsafe condition that caused the accident. Importantly,

> "[a] defendant who moves for summary judgment in a [trip]-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. Once a defendant establishes prima facie entitlement to relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof"

(*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]).

"To constitute constructive notice, a defect must be visible and apparent and . . . must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see also Seneglia v FPL Foods*, 273 AD2d 221, 221 [2d Dept 2000]). A general awareness of the existence of a dangerous condition does not supply the requisite notice. Rather, the plaintiff must prove that the respective defendant had notice of the specific defect that allegedly caused the accident (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Here, plaintiff claims that she was caused to trip and fall because a mystery person allegedly moved the subject roll of carpet from the aisle outside of the Booth to the inside of the Booth, and then pushing it up against her legs. Notably, as discussed previously, plaintiff and Markus specifically testified that they did not see any workers in the aisle outside the Booth when they entered it, nor did they have any clues as to how the carpet ended up behind plaintiff. Moreover, according to plaintiff, the whole episode happened very quickly - within a minute. As a result, plaintiff cannot establish that defendants had actual or constructive notice of the subject unsafe condition.

In opposition to defendants' motions, plaintiff argues that although the placement of the rug outside the booth may have not posed a hazard on its own, a question of fact exists as to whether it was foreseeable that a person might move the carpet roll into the booth, so as to make

way for the delivery of other items, thereby creating a hazard. As the Court of Appeals stated in *Derdiarian v Felix Contr. Corp.* (51 NY2d 308 [1980]):

> "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act, which breaks the causal nexus. Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve"

(*id.* at 315 [internal citations omitted]; *see also Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 371-372 [2d Dept 2014]).

Here, first and foremost, plaintiff has failed to sufficiently establish that the roll of carpet that she tripped and fell over was ever situated in the aisle outside the Booth prior to the accident.[2] In addition, it was unforeseeable that someone would be able to sneak such a large and bulky item into the Booth in such a way that no one inside the Booth would notice.

Moreover, the placement of the carpet in the aisle outside the booth would have only furnished the occasion for someone to move it into plaintiff's booth. Importantly, a party which merely furnishes the occasion leading up to the happening of an accident is not responsible for

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[2]As defendants argue, given the subject carpet roll's size, during the time that the carpet roll was allegedly present in the aisle, said alleged obstructive condition was open and obvious and was not inherently dangerous (*Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]). While "[t]he scope of a landowner's duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition . . . a landowner has no duty to warn of an open and obvious danger" (*id.*; *Matthews v Vlad Restoration Ltd.*, 74 AD3d 692, 692 [1st Dept 2010]). Unless a hazard is latent, a person entering the property is just as aware as the landowner of the condition of the property and the risks associated with it (*see Tagle v Jakob*, 97 NY2d 165, 169-170 [2001]).

the accident itself (*see Singh v McCrossen*, 111 AD3d 531, 532 [1st Dept 2013]).

Thus, defendants are entitled to dismissal of the common-law negligence claim against them.

The Cross Claims Asserted Against Defendants (motion sequence number 006, 007 and 008)

In their separate motions, defendants also move to dismiss any and all cross claims against them. In light of the fact that the complaint is dismissed in its entirety as against defendants, said cross claims are moot.

Thus, defendants are entitled to dismissal of any and all cross claims against them.

Plaintiff's Cross Motion to Strike Freeman's Answer for Spoliation

Plaintiff cross-moves to strike Freeman's answer for spoilation of evidence. Plaintiff asserts that, as NYCCOC deleted key surveillance footage of the accident, she cannot show who pushed the roll of carpet behind her legs, causing her to fall. In support of her cross motion, plaintiff puts forth only Lopez's testimony that the Javits Center had surveillance cameras "everywhere" (Lopez tr at 15). It should be noted that Lopez acknowledged that the surveillance cameras at the Javits Center on the day of the accident were in the process of being updated. Lopez also could not state whether the cameras in 2014 "panned or were stationery [sic]" (*id.* at 14).

In opposition to plaintiff's cross motion, NYCCOC argues that there has never been any surveillance footage of the accident to preserve, and that NYCCOC advised all of the parties of this fact during discovery, when plaintiff was provided with a copy of the accident report and the photographs taken by the public safety officer. In addition, NYCCOC puts forth the affidavit of Ken Dixon, NYCCOC's safety director. In his affidavit, Dixon states that he was employed by

NYCCOC as the director of security and safety solutions on the day of the accident. He also stated that

> "[i]n 2014 the Javits Center was in the middle of undergoing a major renovation throughout the entire building which was completed in late 2016 and at which time surveillance cameras were installed throughout the building including the exhibit halls. Prior to the renovation there were surveillance cameras with old analog technology which were located in only limited areas in the Javits Center and were not operational. The cameras located within the exhibit halls were installed as part of the renovation and became operational after the renovation project was completed in 2016. There was no video footage of the Markus accident that occurred in 2014. All that Javits has are photos taken by the public safety officer who responded to the incident"

(NYCCOC's opposition to plaintiff's cross motion, exhibit A, Dixon aff).

As the Court noted in *De Los Santos v Polanco* (21 AD3d 397 ([2d Dept 2005]):

> "The Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence. Because striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading. A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense

(*id.* at 397-398 [internal citations omitted]; *Klein v Ford Motor Co.*, 303 AD2d 376, 377 [2d Dept 2003]; *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653 [2d Dept 2001]).

Here, while Lopez did testify that there were surveillance cameras in place at the Javits Center on the day of the accident, his testimony is vague as to whether said cameras were operational and/or whether they actually recorded the accident. In contrast, Dixon's affidavit sufficiently establishes that there was no surveillance footage of the accident in existence to

preserve.

Thus, plaintiff is not entitled to an order striking Freeman's answer on the ground of spoilation.

The Third-Party Complaint Against Manamim (motion sequence number 009)

Manamim moves to dismiss Freeman's third-party complaint against it. The third-party complaint sounds in contribution and common-law indemnification and breach of contract for failure to procure insurance.

Freeman's Third-Party Contribution and Common-Law Indemnification Claims Against Manamim

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, there is no indication in the record that Manamim was guilty of any negligence that contributed to or caused the accident. It did not own the Booth where the accident occurred, it was not responsible for supervising or directing any of the workers for the event and it did not

create the unsafe hazard that caused plaintiff to fall. Thus, Manamim is entitled to dismissal of the third-party claims against it for contribution and common-law negligence.

The Third-Party Breach of Contract For Failure to Procure Insurance Claim Against Manamim

Additional Facts Relevant to this Issue:

Manamim participated in the Show pursuant to a display package order (the Package Order) that it entered into with non-party Israel Export and International Cooperation Institute (IEI). The Package Order did not require Manamim to procure liability insurance for the event. The Package Order did indicate that IEI "operates according to regulations for participating in International exhibitions . . . and the content of the regulations also binds [the exhibitor]" (Manamim's notice of motion, exhibit L, the Purchase Order, ¶ 27).

Specialty posted details about its events on its website, which could be navigated by clicking on various tabs. One of the tabs was entitled "Show Rules & Regulations," and another tab was entitled "FAQ's, Guides & Show Contracts" (Manamim's notice of motion, exhibit B). Notably, there was no insurance procurement requirement in the "Show Rules & Regulations" section of Specialty's website. However, in the section covering frequently asked questions, it was stated that all exhibitors for the show must procure insurance on behalf of NYCCOC, Specialty and Freeman.

Here, as no contract exists requiring Manamim to procure additional insured coverage for the benefit of Freeman, Manamim is entitled to dismissal of Freeman's claim for breach of contract for failure to procure insurance. To that effect, Manamim never contracted directly with either Specialty or Freeman. In addition, the Purchase Order only required that Manamim be

bound by "regulations for participating" in the Show. Importantly, the "Show Rules and Regulations" section of Specialty's website does not contain an insurance procurement provision. While an insurance procurement requirement is included in the section entitled "FAQ's, Guides & Show Contracts," a reasonable person would not expect to be bound by anything that they might read in a section of a website devoted to frequently asked questions.

"It is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Thus, Manamim is entitled to dismissal of Freeman's third-party claim against it for breach of contract for failure to procure insurance.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant/third-party plaintiff Freeman Expositions, Inc., f/k/a Freeman Decorating Services, Inc. s/h/a Freeman Decorating Co.'s (Freeman) motions, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence number 005), as well the cross claims asserted against it by New York Convention Center Operating Corporation (NYCCOC) and Specialty (motion sequence number 007) are granted, and the complaint and cross claims are dismissed as against Freeman with costs and disbursements to Freeman as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Freeman; and it is further

ORDERED that defendant Specialty Foods Association, Inc.'s (Specialty) motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and all cross claims are dismissed as against Specialty with costs and disbursements to Specialty as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Specialty; and it is further

ORDERED that NYCCOC's motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and all cross claims are dismissed as against NYCCOC with costs and disbursements to NYCCOC as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of NYCCOC; and it is further

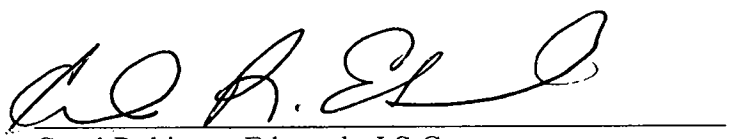
ORDERED that plaintiff Liora Markus's cross motion to strike NYCCOC's answer for spoliation is denied; and it is further

ORDERED that third-party defendant Manamim Food Industries, LTD's (Manamim) motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it is granted, and the third-party complaint is dismissed as against Manamim with costs and disbursements to Manamim as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Manamim, and is further

ORDERED that counsel **Freeman** shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: September 17, 2018

ENTER:



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