

**Heaven v City of New York**

2023 NY Slip Op 33187(U)

August 4, 2023

Supreme Court, Queens County

Docket Number: Index No. 708998/2019

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
MARSHA PATRICIA HEAVEN,

Index No. 708998/2019

Plaintiff,

Part 6

Motion Date: July 24, 2023

-against-

Calendar No. 9

Sequence No. 4

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF HOMELESS SERVICES,  
BEACH 65 LLC, CORE SERVICES GROUP NY,  
INC., CORE SERVICES GROUP, INC., CORE  
SERVICES GROUP BK, INC. and LIBERTY ONE  
QUEENS LLC,

Defendants.  
-----X



The following papers read on this motion by defendant LIBERTY ONE QUEENS LLC for summary judgment and dismissal of plaintiff’s Complaint and all cross-claims against it pursuant to CPLR §3212.

Papers  
Numbered

- Notice of Motion, Affirmation, Memorandum, Facts, Exhibits.....EF111-138
- Affirmation in Opposition, Facts, Exhibits.....EF140-142
- Affirmation in Opposition, Facts, Exhibits.....EF143-146
- Reply Affirmation.....EF147

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant Liberty One Queens LLC’s (hereinafter referred to as “Liberty One”) motion for summary judgment and dismissal of plaintiff’s Complaint and all cross-claims against it pursuant to CPLR §3212 is denied, as there are material issues of fact in dispute with respect to defendant Liberty One’s duty of care.

Plaintiff commenced this action for personal injuries sustained on November 26, 2018 when she slipped and fell on water in the dining room of defendants’ homeless shelter located at 316 Beach 65<sup>th</sup> Street in Far Rockaway, New York. Co-defendants The City of New York and New York City Department of Homeless Services rented the premises from its owner, co-

defendant Beach 65 LLC for the purpose of operating a homeless shelter by co-defendant Core Services. Defendant Liberty One operated as an independent service contractor to co-defendant Core. Plaintiff filed the Summons and Verified Complaint on May 22, 2019 and issue was joined by defendant Beach 655 LLC's Answer filed on July 19, 2019.

Defendant Liberty One argues that it is entitled to summary judgment because it owed no duty of care to plaintiff as a service contractor, and it had no actual or constructive notice of the puddle condition that caused plaintiff's accident. Defendant Liberty One presented the pleadings, deposition testimony of the parties, photographs, Liberty One's employee timecards, an incident report, and co-defendant Core Service's discovery response in support of its motion. Ethan Ross testified on behalf of defendant Liberty One that he is a property manager and Liberty One's work hours were 8:00 am to 4:30 pm. He further testified that based upon the payroll records for the date of plaintiff's accident, the last Liberty One employee signed out at 4:28 pm. Julio DeJesus testified on behalf of co-defendant Core Services that he is a program director and that although Core Services and Liberty One had an agreement, he was unaware of any written contract and believed one did not exist. Carl Pean testified on behalf of Core Services that he is a shift lead and observed water at the subject premises at approximately 4:45 pm. Defendant Liberty argues that based upon the unwritten agreement between itself and Core Services, it had no workers at the premises during plaintiff's accident from when the water was discovered up to and including plaintiff's accident, and therefore had no notice of the watery condition. Defendant Liberty One argues that based upon the foregoing, it is entitled to summary judgment.

Co-defendants Beach 65 LLC, Core Services Group, NY, Inc., Core Services Group, Inc., Core Services Group BK, Inc., The City of New York, and the City of New York s/h/a New York City Department of Homeless Services (collectively referred to as the "Core defendants") oppose defendant Liberty One's motion and argue there are material issues of fact in dispute with respect to Liberty One's duty of care. The Core defendants further argue that although all of Liberty One's employees had signed out on the date of plaintiff's accident, pursuant to Julio DeJesus' testimony, some of its employees were required to stay on-site past the time of the accident and therefore should have been present to observe the puddle and clean it up. DeJesus testified that dinner was between 5pm and 7pm and someone from Liberty One was always there at that time to clean up during and after dinner. The Core defendants further argue that there are questions of fact with respect to whether Liberty One had actual notice of the water because a Liberty One employee may have observed it prior to 4:45pm and failed to clean it. They further argue that they detrimentally relied upon the continued performance of Liberty One's duties to inspect, maintain, and clean the floors and ceiling for which Liberty One should be liable. It is noted that plaintiff also opposed defendant Liberty One's motion to the extent that plaintiff adopted the Core defendants' arguments in opposition. The Core defendants and plaintiff argue that based upon the foregoing, there are material issues of fact in dispute.

Pursuant to CPLR §3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 A.D.3d 678-679 [2d Dept. 2019].)

A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 [2002].) However, there are three exceptions to the general rule: “(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties[;] and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely.” (*Correa v. Town of Brookhaven*, 208 A.D.3d 455, 456 [2d Dept. 2022].)

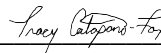
Here, defendant Liberty One demonstrated a prima facie entitlement to summary judgment based upon the pleadings and deposition testimony of the parties. Liberty One demonstrated that it had no actual or constructive knowledge of the water condition because the first time anyone became aware of the puddle was when Pean observed it at approximately 4:45pm. Liberty One further demonstrated that its last employee clocked out at 4:28pm and no one from Liberty One was on the premises after that, and therefore could not have failed to perform cleaning duties. Liberty One further demonstrated that pursuant to an unwritten agreement between itself and Core Services, someone from Liberty One had to be present from the hours of 8:00am to 4:30pm and were not present at the time of plaintiff’s fall. Therefore, based upon the evidence presented, Liberty One established a prima facie entitlement to summary judgment.

However, the Core defendants demonstrated a material issue of fact in dispute. They demonstrated through DeJesus' testimony that the unwritten agreement between Liberty One and Core Services required someone from Liberty One to stay on the premises until 7:00pm to clean up during and after dinner. They also demonstrated that on the date of plaintiff's accident, a Liberty One employee was not present during dinner hours. Therefore, the Core defendants demonstrated material issues of fact in dispute as to their reliance upon Liberty One's practice and agreement to maintain the premises during dinner, and the failure to do so would render Liberty One liable for plaintiff's injuries.

Accordingly, defendant Liberty One Queens LLC's motion for summary judgment and dismissal of plaintiff's Complaint and all cross-claims pursuant to CPLR §3212 is denied.

This constitutes the decision and Order of the Court.

Dated: August 4, 2023



Hon. Tracy Catapano-Fox, J.S.C.

