| **Chang v WFP Tower D Co. L.P.** |
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| 2023 NY Slip Op 33254(U) |
| September 20, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 154743/2019 |
| Judge: Richard Latin |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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JOSHUA CHANG,

Plaintiff,

- v -

WFP TOWER D CO. L.P., ABM INDUSTRY GROUPS, LLC.

Defendant.

**INDEX NO.** 154743/2019

**MOTION DATE** 01/25/2023
01/25/2023

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 55, 57, 59, 60, 63, 65, 67, 68, 69
were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58, 61, 62, 64, 66, 70
were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff Joshua Chang alleges that he sustained personal injuries resulting from a slip/fall accident that occurred on December 4, 2018 at approximately 2:10 p.m. on the retail concourse level of the building located at 230 Vesey Street in Manhattan (the Building). Plaintiff asserts that he slipped and fell on spilled coffee, and his lawsuit against defendant WFP Tower D Co. L.P. (WFP) is grounded in its alleged negligence in the ownership, operation, maintenance, management, supervision, and control over the area where the accident occurred. Plaintiff also asserts that WFP is liable to him as the "managing agent" of the Building (*see* complaint [NYSCEF Doc No. 1], ¶¶ 3-9, 13). Plaintiff further alleges that defendant ABM Industry Groups, LLC (ABM) was responsible for performing general building maintenance services for the Building, and is liable to him on that basis.

Motion sequence nos. 002 and 003 are consolidated for disposition. In motion sequence no. 002, ABM moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it, as well as the cross claims asserted against it by WFP.

In motion sequence no. 003, WFP moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it.

For the reasons set forth below, the motions are granted, and the complaint and cross claims are dismissed.

**FACTS**

Plaintiff seeks recovery for personal injuries allegedly sustained when, at approximately 2:39 p.m. on December 4, 2018, he was injured when he slipped on the floor near or outside the Gucci retail store at the Building (*see* bill of particulars [NYSCEF Doc No. 31], ¶ 4). Plaintiff alleges at that time and on that date, he was caused to sustain personal injuries after slipping on a coffee spill on the concourse retail level at the Building. This building is part of the larger Brookfield Place complex.

At the time of the subject accident, ABM was the janitorial services contractor responsible for maintaining the area where the accident occurred. ABM had been retained by non-party Brookfield Financial Properties, L.P. (Brookfield Properties) pursuant to a Services Contract Agreement between ABM and Brookfield Properties (*see* Services Contract [NYSCEF Doc No. 36]), in Brookfield Properties' capacity as the Operator of the shared area where plaintiff met with his accident. The landlord of the area where the accident occurred is non-party WFP Retail Co, L.P. (Retail). The Services Contract was the agreement in effect on the date of plaintiff's accident.

On December 4, 2018, plaintiff was working for non-party Corporate Concierge Services as a "concierge liaison" at the Building. In this capacity, plaintiff manned an information desk at

the Building, and answered questions from people visiting the Building. Concierge Services was an outside vendor retained by Brookfield (*see* plaintiff's dep [NYSCEF Doc No. 45], at 18, 22, 101). Shortly before the accident, plaintiff left his desk to get lunch, and walked to a nearby escalator that led from the Building to the Oculus at the World Trade Center. After reaching the Oculus, plaintiff went to the second floor to the Wasabi sushi store. After spending between 10-15 minutes at the Wasabi store, plaintiff left to return to his desk at the Building (*see id*. at 3).

After going back up the escalator leading from the Oculus to the Building, plaintiff made a right turn. As he made the right turn, he slipped and fell within two arms-lengths of a column located between the Gucci and the Bottega Veneta stores located on this level of the Building. Plaintiff testified that the brown liquid that he slipped on appeared to be coffee, and that this coffee spill had formed a "big puddle" that took up a large portion of the hallway (*see id*. at 30-31, 41, 44).

Plaintiff further testified that, at the time of the subject accident, there was a security guard posted approximately 10-25 feet away from where the accident occurred, and that the security guard posts are at the top of the escalator and within "viewing distance" of where the accident occurred. Plaintiff also acknowledged that the security guard posted within viewing distance assisted him immediately after the accident, and sat him against a wall at the Bottega Veneta store. This security guard also called ABM following the accident, and requested that a porter come to clean-up the spill (*see id*. at 43, 58, 105, 106).

Importantly, plaintiff testified that, when he left his desk to go get lunch, he walked past the area where he ultimately slipped and fell. At the time that he walked past this area on the way to get his lunch, he did not see any coffee spill in the area where he ultimately fell. Plaintiff also testified that, the time from when he initially walked past the area on the way to get his lunch, to

the time he slipped and fell on his way back to his desk, was only between 30 and 60 minutes (*see id*. at 102-104). Furthermore, plaintiff did not know how long the coffee spill was on the floor prior to the accident, and he did not see any coffee cups in the vicinity of the accident after it occurred. Plaintiff also testified that the lighting in the area was normal and appropriate, and that, prior to the accident, he did not make any complaints to anyone concerning the condition of the floor where he fell (*see id*. at 106, 111).

Shancia Zapata, an Assistant Property Manager for Brookfield Properties who managed the shared areas and the retail areas at the Building, also gave testimony in this case. Ms. Zapata testified that the retail component at the Building is owned by non-party Retail, and that the area where plaintiff slipped was part of her management portfolio. Ms. Zapata also testified that ABM was responsible for maintaining the floors and cleaning up spills in the area where plaintiff slipped and fell, and that Brookfield Properties had nothing to do with maintaining the area. She also testified that ABM had porters who did cleaning and maintenance at the Building, and that ABM supplied all tools, equipment and materials necessary to do the janitorial work (*see* Zapata dep [NYSCEF Doc No. 47], at 12, 16, 19-20, 27-28).

Ms. Zapata also testified that security guards positioned in the Building would have the ability to contact ABM through a central security post if any spills or other issues were reported to them. ABM porters would then be dispatched by radio to go to the area of a spill in order to clean it up. She further testified that Mulligan Security, the private firm providing security at the Building, had a guard posted at the top of the escalators within a few yards and "fairly close" to where plaintiff slipped and fell. Security guards were responsible for "remaining vigilant," and that included noticing spills and slipping hazards at the Building (*see id*. at 22-24, 27-33, 40-41).

John Espinosa testified that he was a Project Manager for ABM assigned to the Brookfield Place complex. As Project Manager, he was responsible for a wide range of duties, including supervision, payroll, inventory, training, doing walk-throughs, and constantly checking the facility to make sure that it was running well. In December 2018 he was responsible for the public areas at Brookfield Place, including those at 230 Vesey Street (*see* Espinosa dep [NYSCEF Doc No. 48], at 9-12).

Mr. Espinosa testified that the Building at 230 Vesey Street was open 24 hours a day and 7 days a week. ABM was responsible for cleaning the public areas of the Building. During this time, ABM had 2 day porters at the Building, Hernan Jaranillo and Caesar Santana. They were responsible for policing the interior of the Building to make sure that it was clean and free of spills or debris. The ABM porters had a routine which required them to first clean the bathrooms at the Building at the start of their 7:00 am shift. They would then do rounds and police the public areas at the Building. As part of their policing duties, they would be in the area where the accident occurred every 30-45 minutes on average (*see id*. at 13, 16, 18-21, 48-49).

If ABM porters came upon a spill in the public areas of the Building, they would put up caution or "wet" signs, and mop up the condition and remain on site until it was dry. They would then remove the signage. The ABM porters also had radios, and could be contacted directly by security if a security officer learned about a spill at the Building (*see id*. at 21-22).

Mr. Espinosa testified that Mr. Santana was responsible for maintaining the area between the Bottega Veneta and Gucci Stores. Mr. Espinosa also testified that ABM had a janitorial services contract with Brookfield Properties that required ABM to make sure that all public areas in the Building are cleaned 7 days a week. Mr. Espinosa reiterated that if there was a spill in the Building, it was the responsibility of ABM to clean it up (*see id*. at 33-35). Mr. Espinosa never

learned what caused the coffee spill in the Building, and noted that Mulligan Security guards were positioned at the top of the escalators approximately 15-20 feet away from where the accident is alleged to have occurred (*see id*. at 28).

Mr. Santana testified that he had been a porter for ABM for 28 years at the time of his deposition. In December of 2018, he was responsible for the shared areas at the Building located at 230 Vesey Street. During his 7:00 am to 4:00 pm shift, his duties include maintaining and cleaning certain areas at the Building, including the area where plaintiff alleges to have fallen -- the floor of a common area near or in front of the Gucci retail store (Santana aff [NYSCEF Doc No. 33], ¶ 2). As part of his duties, he checked the floors for debris and garbage, and it was his responsibility to clean up any spills reported to him, including those reported by building security (*see* Santana dep [NYSCEF Doc No. 50], at 8-10).

In December 2018, Mr. Santana would check the bathrooms at the Building every 20-25 minutes, and would also patrol the common area of the Building to see if where was anything out of the ordinary or abnormal. It would take him approximately 20 minutes to walk the entire area that he patrolled. If, while patrolling the Building, he observed a spill, he would get a bucket and mop and clean it up (*see* Santana dep, 11-13; Santana aff, ¶ 5).

Mr. Santana testified that he was working on the day of the accident, and carrying a radio with him. He surveilled the subject area on a continuous circuit, ensuring that each area was inspected for slippery or wet conditions and, if needed, dry mopped every 20-25 minutes. While working in the bathroom wiping down glass, he received a call from Security over the radio that there was a spill in his area of responsibility. Before receiving the call on the two-way radio, Mr. Santana recalled that he had last been in the area between the Bottega Veneta and Gucci stores

about 10 minutes earlier, and that at that time there was nothing on the floor (*see* Santana dep at 16-20; Santana aff, ¶¶ 4-5).

Since the bathroom that he was working in was not that far away from the coffee spill that plaintiff claims he slipped on, it took Mr. Santana only about 2-3 minutes to reach that area with a bucket, mop and a wet floor sign. When he arrived on the scene, he observed that a sign had already been placed in the area. He also observed and smelled coffee on the floor, but did not see any coffee cups in the area. Moreover, nobody at the scene told him they had spilled the coffee. Before getting this call about the coffee spill, Mr. Santana had not received any calls concerning spills in this area, and had not observed any spills in the area prior to the accident. In fact, Santana testified that the area was "spotless" when he last passed by it while doing his rounds (*see* Santana dep, at 22-24, 31-32, 42; Santana aff, ¶ 6).

Mr. Santana testified that he did not know how long the coffee had been on the floor prior to the accident, and he did not speak to anyone that saw the coffee being spilled. In fact, when he arrived on the scene the area was still open to pedestrian traffic (*see* Santana dep, at 24-25, 32).

As set forth in the affidavit of Thomas Feeney, the Security Guard who was the first person to respond following the accident, and who was positioned only 30-35 feet away from where the accident occurred, he began his tour at approximately 7:00 am on the date of the accident. From beginning his tour, up to the time of the accident, he did not observe any spilled coffee, coffee cups or other liquid on the floor in the area where the accident occurred (*see* Feeney aff [NYSCEF Doc No. 51], ¶¶ 2, 4). Furthermore, at no time prior to the accident did anyone approach him and advise him that there was a spill of any kind in the area of the accident. Moreover, he did not observe any signs that coffee or any other liquid was being tracked on the floors in and around the area of the accident (*see id.*, ¶¶ 5, 6). In addition, Mr. Feeney avers that ABM porters are constantly

walking the site, and that no porter made any complaints to him about any spilled coffee in the area of the accident (*see id*., ¶ 7).

In addition, as set forth in the affidavit of James Morrisey, Brookfield Properties' vice president of operations, the area where the accident occurred was and is operated as a shared area by non-party Brookfield Properties. Morrisey avers that WFP, which is the ground lessee of the adjacent building at 250 Vesey Street, did not own, operate, maintain, manage, control, supervise or inspect the area where the accident occurred at 230 Vesey Street (*see* Morrissey aff [NYSCEF Doc No. 52], ¶ 3). Morrisey also avers that a search of the records kept and maintained in the ordinary course of business of Brookfield Place revealed that there were no written or oral complaints made within the 24-hour period prior to the accident concerning any transient coffee spills in the area where the accident occurred (*see id*., ¶ 5).

**DISCUSSION**

"'[T]he 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980];

*CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]; *see also Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

**ABM's Motion for Summary Judgment (Motion Sequence No. 001)**

To establish a prima facie claim for negligence under New York law, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *accord J.E. v Beth Israel Hosp.*, 295 AD2d 281, 283 [1st Dept 2002]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]).

"Because a finding of negligence must be based on the breach of a duty, a threshold question in torts cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contr., Inc.*, 98 NY2d 136, 138 [2002]; *see also Matter of Agape Litig.*, 681 F Supp2d 352, 359 [ED NY 2010] [the crucial "threshold question" is whether the defendant owed the plaintiff "a legally recognized duty of care"] [internal quotation marks omitted]). Absent a duty of care to the person injured, a party cannot be held liable in negligence (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 341-342 [1928]; *accord 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001] ["Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm"]). Hence, "[t]he

existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" (*Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]).

The New York Court of Appeals has repeatedly held that, as a general rule, a contractor owes no duty to a non-contracting third party arising out of the performance of a contract or contractual obligation (*id*. at 111 ["ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor"]; *see also Espinal*, 98 NY2d at 138 ["Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party"]).

There are, however, limited exceptions to this general rule. In *Espinal*, the Court identified three situations in which the party who enters into a contract to render services may be held liable in tort to a third party: 1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm; i.e., creates or exacerbates a dangerous condition; 2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or 3) where the contracting party entirely displaced the premises owner's duty to maintain the premises safely (*Espinal*, 98 NY2d at 140).

There is no dispute that plaintiff is not a party to the contract between WFP and ABM (*see* Services Contract). Accordingly, ABM has established, prima facie, that it owes no duty of care to plaintiff by virtue of the Services Contract by demonstrating that plaintiff was not a party to that agreement (*Rodriguez v Propark Executive Mgt. Co., LLC*, 207 AD3d 584, 586 [2d Dept 2022] ["Propark also established, prima facie, that it owed no duty of care to the plaintiff by virtue of the parking concession contract by demonstrating that the plaintiff was not a party to that agreement"]; *Qoku v 42nd St. Dev. Project, Inc.*, 187 AD3d 808, 809 [2d Dept 2020] [defendant ABM "established its prima facie entitlement to summary judgment by demonstrating that it did not owe

a duty of care to the plaintiff, who was not a party to the contract between the defendant and the nonparty"]; *Bronstein v Benderson Dev. Co., LLC*, 167 AD3d 837, 838 [2d Dept 2018] ["Here, the defendants established, prima facie, that Amaxx did not owe the plaintiff a duty of care by offering proof that the plaintiff was not a party to the snow/ice removal contract between Amaxx and Benderson"]).

Thus, in order for ABM to be held to have assumed a duty of care to plaintiff, it must be established that one of the exceptions set forth in *Espinal* applies.

At the outset, the court notes that, since it has not been alleged in either plaintiff's complaint or his bill of particulars that any of the *Espinal* exceptions apply, ABM is not required to demonstrate that the exceptions do not apply. Indeed, as courts have held, under such circumstances, proof that the plaintiff was not a party to the contract itself is sufficient to establish the contractor's prima facie entitled to judgment as a matter of law (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]; *accord Karydas v Ferrara-Ruurds*, 142 AD3d 771, 774 [1st Dept 2016]). Nevertheless, as set forth below, it is clear from the evidence that none of the *Espinal* exceptions apply here, and that ABM never assumed a duty of care to plaintiff.

With respect to the first *Espinal* factor, mere negligence in performing contractual obligations alone is insufficient unless said negligence "'launche[s] a force or instrument of harm'" (*Espinal*, 98 NY2d at 140 [citation omitted]). "To suggest, as does the plaintiff, that a mere omission by a contractor, without more evidence, may constitute a launch of a force or instrument of harm, decimates the meaning of the first *Espinal* exception" (*Santos v Deanco Services, Inc.*, 142 AD3d 137, 142 [2nd Dept 2016]).

Plaintiff contends that there are questions of fact as to whether ABM exercised reasonable care in maintaining the subject area, and thereby launched a force or instrument of harm. This

court finds, however, that plaintiff fails to raise a triable issue of fact as to whether ABM launched an instrument of harm. ABM presents evidence that its porters regularly patrolled the subject area, and that, if ABM porters came upon a spill in the public areas of the Building, they would put up caution or "wet" signs, and mop up the condition and remain on site until it was dry. ABM also presents evidence that, during his regular shift, Mr. Santana would surveil the subject area on a continuous circuit, ensuring that each area was inspected for slippery or wet conditions and, if needed, dry mopped every 20-25 minutes. Mr. Santana testified that, when he received notice of plaintiff's accident, he had last been in the area between the Bottega Veneta and Gucci stores about 10 minutes earlier, and that at that time, there was nothing on the floor.

Plaintiff also testified that, when he left his desk to go get lunch, he walked past the area where he ultimately slipped and fell, but that he not see any coffee spill. Plaintiff further testified that there was only a 30 to 60-minute period of time from when he initially walked past the area, to the time he slipped and fell on his way back to his desk, that he did not know how long the coffee spill was on the floor prior to the accident, and that he did not see any coffee cups in the vicinity of the accident after it occurred. Plaintiff also testified that the lighting in the area was normal and appropriate.

Accordingly, there is no evidence that ABM failed to exercise reasonable care in its duties, and launched a force or instrument of harm by creating or exacerbating a dangerous condition. Hence, any contention that ABM launched the instrument of harm was purely speculative and conclusory, and such speculation is insufficient to raise a triable issue of fact (*see Qoku*, 187 AD3d at 810; *Bono v Halben's Tire City, Inc.*, 84 AD3d 1137, 1139 [2d Dept 2011]; *Fernandez v Chase Manhattan Bank, N.A.*, 56 Misc 3d 1205[A], 2017 NY Slip Op 50882[U] [Sup Ct, Bronx County, 2017]).

With respect to the second *Espinal* exception, plaintiff submits no evidence that he detrimentally relied upon ABM's performance of any contractual obligations. Indeed, there is no evidence on this record that plaintiff had any knowledge that ABM and the owner's agent and/or the owner of the premises had entered into an agreement with ABM, let alone knowingly relied on such a contract (*see Pollock v Cushman & Wakefield, Inc.*, 210 AD3d 446, 447 [1st Dept 2022] ["it cannot be said that plaintiff detrimentally relied on C&W's continued performance of its contractual duty to repair the roof, as there was no evidence that he knew of this contractual obligation"]).

As to the third *Espinal* exception, this exception only applies where the "contracting party has entirely displaced the other party's duty to maintain the premises" (*Espinal*, 98 NY2d at 140). "This exception to the general no-duty rule requires a 'comprehensive and exclusive' contract under which A [here, ABM] is assuming all of the responsibilities owed by B [here, Brookfield Properties] that otherwise would exist" (*Ellis v JPMorgan Chase Bank, N.A.*, 76 Misc 3d 1207[A], 2022 NY Slip Op 50839[U] [Sup Ct, NY County 2022], *affirmed as modified*, 213 AD3d 486 [1st Dept 2023], quoting *Church*, 99 NY2d at 113). "With respect to a property owner B, it is as though the owner has 'reqlinquish[ed] its duty to inspect and safely maintain the premises' to A" (*id*., quoting *Lehman v North Greenwich Landscaping, LLC*, 16 NY3d 747, 748 [2011]). "A has, in effect, taken B's place; and therefore owes all B's property-owner duties to parties like C [here, plaintiff] who come onto the property" (*id*.).

However, where the property owner/manager "effectively 'at all times retain[s] its landowner's duty to inspect and safely maintain the premises,'" the contractor cannot be said to have entirely displaced the property owner/manger's duty to safely maintain the property, and *Espinal's* third exception cannot be met (*Church*, 99 NY2d at 113 [citation omitted]; *see e.g.*

*DaeCruz v Airway Cleaners, LLC*, 210 AD3d 951, 952 [2d Dept 2022] ["Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against Airway Cleaners, LLC by demonstrating that a limited janitorial service agreement between Airway Cleaners, LLC, and American Airlines was not a comprehensive and exclusive agreement which entirely displaced American Airlines' duty to maintain the premises in a reasonable safe condition"]; *Rodriguez*, 207 AD3d at 586 [defendant established, prima facie, that "the parking concession contract was not so comprehensive and exclusive as to displace NYCHHC's duty to maintain the premises safely"]; *Camara v Appiah*, 187 AD3d 460, 461 [1st Dept 2020] ["The Supreme Court also properly granted summary judgment in favor of Hellman Electric; plaintiff's argument that Hellman Electric entirely displaced the City's duty fails in light of the fact that" the evidence showed that Hellman Electric "did not entirely absorb the City's broad duty to maintain the roadway, sidewalk and crosswalk in a reasonably safe condition"]).

Likewise, here, ABM has shown, prima facie, that its contractual obligations to clean the share space did not entirely displace the owner's duties. Mr. Espinosa, ABM's project manager, testified that WFP/Brookfield and ABM maintained discretion over ABM's performance of duties under the Service Contract. For example, WFP/Brookfield and ABM jointly determined ABM's working schedule (*see* Espinosa dep, at 39). WFP/Brookfield would also direct ABM employees to do maintenance if they saw something that needed attention while inspecting the premises (*id*. at 38-39).

This testimony demonstrates that WFP/Brookfield maintained supervisory discretion and control over ABM's performance of the work, and, in fact, exercised that discretion and control. Accordingly, the Services Agreement at issue is clearly not the type of comprehensive and exclusive property-maintenance obligation designed to displace the owner's duty to maintain the

premises, or one that removed from the owner or its agent all supervisory discretion and/or control (*see e.g. Pollock*, 210 AD3d at 448 ["it cannot be concluded that C&W entirely displaced Verizon's duty to maintain the roof area safely, given the evidence establishing that Verizon retained control over roof repairs"]; *Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1524 [4th Dept 2017] [contract was not so comprehensive and exclusive that it entirely displaced duty of owner to maintain premises safely; its terms made provider directly responsible to property manager who had right to request additional services and oversaw maintenance of property, including snowplowing]; *Eisleben v Dean*, 136 AD3d 1306, 1307 [4th Dept 2016] ["(contract with) property owner was not so comprehensive and exclusive that it entirely displaced the property owner's duty to maintain the premises safely .... 'it also gave the property owner the right to request additional services (or reperformance), and employees of the property owner monitored the performance of the snow plowing contract'"] [citation omitted]).

Accordingly, it is clear that none of the *Espinal* exceptions apply to the case at bar and that, therefore, ABM did not owe a duty to plaintiff. Thus, ABM's motion for summary judgment dismissing the complaint as against it is granted.

**WFP's Motion for Summary Judgment (Motion Sequence No. 002)**

Plaintiff's action against WFP is grounded in its alleged negligence in the ownership, operation, maintenance, management, supervision, and control over the area where the accident occurred. Plaintiff also asserts that WFP is liable to him as the "managing agent" of the Building. WFP contends that it did not own, operate, maintain, manage, supervise or control the area where the accident occurred, and that, because WFP had no legal connection to the location where the accident occurred, it did not owe any legal duty to plaintiff.

Under New York law, in order to hold WFP liable for plaintiff's injuries, WFP would (1) have to have a legal duty to protect plaintiff against the risks he encountered at the time of his accident, (2) would have to have breached that duty, and (3) its breach would have to be a substantial factor in bringing about plaintiff's injuries (*see Solomon*, 66 NY2d at 1027 [1985]; *Elmaliach v Bank of China, Ltd.*, 110 AD3d 192, 199-200 [1st Dept 2013]). "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]; *accord Adriana G. v Kipp Wash. Hgts. Middle Sch.*, 165 AD3d 469, 469 [1st Dept 2018]). Absent evidence of ownership, occupancy, control or special use, liability cannot be imposed (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 297 [1st Dept 1988]; *accord Ruggiero v City Sch. Dist. of New Rochelle*, 109 AD3d 894, 895 [2d Dept 2013] ["Without evidence of ownership, occupancy, control, or special use of the property upon which the defect is situated, a defendant cannot be held liable for any injuries caused by the defect"]; *Cerrato v Rapistan Demag Corp.*, 84 AD3d 714, 716 [2d Dept 2011] [same]).

In support of its motion, WFP makes a prima facie showing that it did not own, operate, maintain, manage, control, supervise or inspect the retail area at 230 Vesey Street where the accident occurred, and thus did not have shared maintenance responsibilities with respect to the area where plaintiff's accident occurred. In its answer, WFP denied that it owned, operated, maintained, managed, controlled or supervised the area where the accident occurred, or that it was the managing agent of the Building's Owner. Rather, WFP made clear in its answer that it was the Ground Lessee of the adjacent building located at 250 Vesey Street, had no relation to 230 Vesey Street where the Building was located, and that non-party Brookfield Properties was the Operator of the area where the accident occurred. WFP further alleged that Brookfield Properties

was the entity that retained co-defendant ABM to perform janitorial services in this area, and that it did so as the Operator of the shared areas at the Brookfield Place complex (*see* answer [NYSCEF Doc No. 2], ¶¶ 2-3). WFP also submits the Services Contract between Brookfield Properties and ABM, which confirms that ABM was retained by Brookfield Properties, and not WFP, to maintain the shared area where plaintiff met with his accident.

In addition, WFP submits Ms. Zapata's deposition testimony, which established that non-party Retail (and not WFP) was the landlord of the area where the accident occurred (*see* Zapata dep, at 12). Finally, WFP submits the affidavit of Mr. Morrisey, Brookfield Properties' vice president of operations, in which he avers that the area where the accident occurred is operated as a shared area by non-party Brookfield Properties, and confirms that WFP, which is the ground lessee of the adjacent building at 250 Vesey Street, did not own, operate, maintain, manage, control, supervise or inspect the area where the accident occurred at 230 Vesey Street (Morrisey aff, ¶ 3).

In opposition to the motion, plaintiff argues that WFP, as the ground lessee of 250 Vesey Street, had a shared responsibility to maintain the area where the accident occurred with non-party Retail, the Landlord at 230 Vesey Street where the accident occurred, and with non-party Brookfield Properties, the Operator of the shared areas in the Brookfield Place complex, including the retail area where plaintiff met with his accident (*see* affirmation of Christopher S. Joslin, Esq. [NYSCEF Doc No. 59], ¶ 17). However, plaintiff fails to submit any evidence in support of this argument. Rather, plaintiff speculates that "[i]t stands to reason that WFP as the ground lessee of 250 Vesey Street had a non-delegable shared responsibility to maintain the common areas of 230 Vesey Street," or, "[a]t the very least, there remains a question of fact as to whether WFP had a non-delegable duty to maintain the subject area where the accident occurred" (*id.*, ¶ 19). However,

this argument ignores WFP's prima facie showing that it was Brookfield Properties, and not WFP, that retained defendant ABM to maintain the area where the accident occurred, which is clear evidence that WFP did not have shared maintenance responsibilities for the area where the accident occurred.

Plaintiff also points to the phrase "shared expense areas," as that phrase is used in the Services Contract, and contends that, because this contract allocates the shared expenses for maintenance, but does not specify which entities pay the shared expense for maintenance, an issue of fact is raised as to whether WFP had shared maintenance responsibilities with Retail and Brookfield Properties for the area where the accident occurred (Joslin affirmation, ¶ 2). However, ABM submits the affidavit of Michael Bosso, Brookfield Properties' Senior Vice President of Operations (NYSCEF Doc No. 66), which rebuts this assertion, and clearly demonstrates that WFP did not have shared maintenance responsibilities for the area where the accident occurred.

In his affidavit, Mr. Bosso sets forth the history of the various entities that have ownership, management, operational or other interests in both the office towers and the retail shopping space (the Retail Space) that comprise Brookfield Place. Mr. Bosso alleges that Brookfield Place was formerly known as the World Financial Center, and that it features four separate office towers and the Retail Space. The Retail Space is located on both the street and concourse levels of the building known as and located at 230 Vesey Street (Bosso aff, ¶ 3).

On December 4, 2018, the area where plaintiff fell, i.e., the space outside the Gucci and Bottega Veneta retail stores, was located in the Retail Space at 230 Vesey Street. On that date, non-party Retail was both the Landlord at 230 Vesey Street, and the Lessor under the retail leases for both the Gucci and Bottega Veneta stores (*id*., ¶ 5). The four office towers at Brookfield Place all have separate addresses. For example, Tower A at Brookfield Place is known as 200 Liberty

Street, Tower B is known as 225 Liberty Street, Tower C is known as 200 Vesey Street, and Tower D at the complex is known as 250 Vesey Street (*id*., ¶ 6).

On December 4, 2018, WFP was the ground lessee of the building at 250 Vesey Street under a severance lease with non-party Battery Park City Authority (BPCA), dated June 15, 1983. On that same date, non-party Brookfield Properties was the operator of the shared expense or common areas at Brookfield Place under a Project Operating Agreement (the POA), dated June 15, 1983, which was also with the BPCA (*id*., ¶ 8). The shared expense or common areas that Brookfield operated in December, 2018 under the POA included the Winter Garden, the Retail Space at issue in this lawsuit, the Liberty Street Bridge, the Central Plant, the Courtyard that sits between 250 Vesey Street and 200 Vesey Street and several other common areas, including the loading docks and driveways that are located beneath Brookfield Place (*id*., ¶ 9).

The costs and expenses incurred in maintaining the shared expense or common areas under the POA are shared by several parties with no connection to this lawsuit, including non-party Brookfield Properties One WFC Co. LLC, non-party WFP Tower B Co. L.P., non-party BFP Tower C Co. LLC, non-party American Express Travel Related Services Company, Inc. and non-party American Express Company. WFP also contributes its proportionate share under the POA to maintaining the shared expense or common areas (*id*., ¶ 10).

However, and importantly, even though WFP contributes to the costs and expenses in maintaining the shared expense or common areas under the POA, Bosso alleges that it does not own, operate, maintain, manage, repair, control or inspect the shared expense or common areas including the Retail Space where plaintiff claims he slipped. Moreover, Bosso alleges, WFP has no responsibility whatsoever to maintain the Retail Space, and it has never undertaken or assumed

any role or responsibility in maintaining the Retail Space or any other shared expense or common area at Brookfield Place (*id*., ¶ 11).

Finally, Bosso alleges that, on December 4, 2018, the sole entity responsible for the maintenance of the shared or common areas under the POA, including the Retail Space where the accident occurred, was non-party Operator Brookfield Properties (*id*., ¶ 12). Based upon its status as Operator of the shared expense or common areas, and because it was solely responsible for maintaining those areas, Brookfield Properties (and not WFP, or any other party contributing to the shared expenses), entered into the Services Contract with ABM, pursuant to which ABM provided porters on both a day and evening shift to maintain the shared expense or common areas including the Retail Space (*id*., ¶ 13).

Accordingly, because WFP has made a prima facie showing that it did not own, operate, maintain, manage or control the area where the plaintiff's accident occurred, and plaintiff fails to submit any non-speculative evidence sufficient to raise a triable issue of fact that WFP shared maintenance responsibilities for the area where the accident occurred with Brookfield or any other party, WFP's motion for summary judgment dismissing the complaint as against it is granted.

Because both parties' motions for summary judgment dismissing the complaint are granted, their motions to dismiss all cross claims asserted as against them are also granted (*see Ghodbane v 111 John Realty Corp.*, 210 AD3d 498, 499 [1st Dept 2022]).

Accordingly, it is

ORDERED that the motion of defendant ABM Industry Groups, LLC for summary judgment (motion sequence no. 002) is granted, and the complaint and all cross claims asserted as against it are dismissed; and it is further

ORDERED that the motion of defendant WFP Tower D Co. L.P. for summary judgment (motion sequence no. 003) is granted, and the complaint and all cross claims asserted as against it are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

9/20/2023
DATE

RICHARD LATIN, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | X | GRANTED | | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |