

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - November 8, 2012

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2011-07727

DECISION & ORDER

Annie Ingram, plaintiff-respondent, v Long Island College Hospital, defendant third-party plaintiff-appellant-respondent; AFMSM, Inc., third-party defendant, Fresenius Medical Care, etc., third-party defendant-respondent-appellant.

(Docket No. 36311/06)

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, N.Y. (Melissa A. McCarthy of counsel), for defendant third-party plaintiff-appellant-respondent.

Christopher P. Di Giulio, P.C., New York, N.Y. (William Thymius of counsel), for third-party defendant-respondent-appellant.

Joseph B. Strassman, Huntington, N.Y., for plaintiff-respondent.

In an action to recover damages for personal injuries, the defendant third-party plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Battaglia J.), dated June 9, 2011, as denied those branches of its cross motion which were for summary judgment dismissing the complaint and on its third-party causes of action for contractual and common-law indemnification, and the third-party defendant Fresenius Medical Care cross-appeals, as limited by its brief, from so much of the same order as denied those branches of its motion which were for summary judgment dismissing the complaint and the third-party complaint insofar as asserted against it.

December 12, 2012

Page 1.

INGRAM v LONG ISLAND COLLEGE HOSPITAL

ORDERED that the order is reversed, on the law, with one bill of costs to the defendant third-party plaintiff and the third-party defendant Fresenius Medical Care, payable by the plaintiff, those branches of the cross motion of the defendant third-party plaintiff and the third-party defendant Fresenius Medical Care, which were for summary judgment dismissing the complaint are granted, that branch of the cross motion of the defendant third-party plaintiff which was for summary judgment on its third-party causes of action for contractual and common-law indemnification is denied as academic, and that branch of the motion of the third-party defendant Fresenius Medical Care which was for summary judgment dismissing the third-party complaint is granted.

The plaintiff allegedly tripped and fell over a piece of plastic used for bundling bed sheets while she was walking to her chair for treatment in the dialysis unit of the defendant third-party plaintiff, Long Island College Hospital (hereinafter LICH). Thereafter, the plaintiff commenced this action against LICH to recover damages for personal injuries, and LICH commenced a third-party action against, among others, Fresenius Medical Care (hereinafter FMC). Subsequently, FMC moved, inter alia, for summary judgment dismissing the complaint and the third-party complaint insofar as asserted against it, and LICH cross-moved, inter alia, for summary judgment dismissing the complaint and on its third-party causes of action for contractual and common-law indemnification.

In a trip-and-fall case, a plaintiff must demonstrate that the defendant had actual or constructive notice of the allegedly dangerous condition that caused the fall, or created that condition (*see Teplin v Bonwit Inn*, 64 AD3d 642, 642-643; *Brown v Outback Steakhouse*, 39 AD3d 450).

LICH and FMC satisfied their respective prima facie burdens of establishing their entitlement to summary judgment dismissing the complaint. They established that LICH did not create the allegedly dangerous condition by demonstrating that the employees of New York Dialysis Services, Inc., a nonparty, removed the plastic from the sheets (*see Ameneiros v Seaside Co., LLC*, 81 AD3d 760, 761). Further, it was demonstrated that LICH did not have actual or constructive notice of the alleged dangerous condition. Through the deposition testimony of Ramesh Deonarain, LICH's housekeeper, and that of Alan Zwerin, FMC's area manager, it was demonstrated that LICH had not received any complaints about plastic on the floor and had never observed that condition in the past. The unit in which the plaintiff received treatment was cleaned overnight, and she was one of the first patients in the unit at 6:00 A.M. on the day of her accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Neither the plaintiff nor the nonparty witness, Alice Moye, observed any plastic on the floor before the plaintiff's accident (*see Bravo v 564 Seneca Ave. Corp.*, 83 AD3d 633, 634; *Crapanzano v Balkon Realty Co.*, 68 AD3d 1042, 1043; *Doherty v Great Atl. & Pac. Tea Co.*, 265 AD2d 447, 448). It was also demonstrated that LICH did not have actual knowledge of an ongoing and recurring dangerous condition such that it should be charged with constructive notice of each specific reoccurrence of that condition (*see Brown v Linden Plaza Hous. Co., Inc.*, 36 AD3d 742). Although the plaintiff previously had observed plastic on the floor, she admitted that she had never complained about it, and while Moye had written a letter complaining about the general condition of the unit, she never mentioned the specific condition at issue (*see Anderson v Central Val. Realty Co.*, 300 AD2d 422, 423). In opposition to this prima facie showing, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted those branches of LICH's cross motion and FMC's motion which were for summary judgment dismissing the complaint.

In light of this determination, that branch of LICH's cross motion which was for summary judgment on its third-party causes of action for contractual and common-law indemnification should have been denied as academic, and that branch of FMC's motion which was for summary judgment dismissing the third-party complaint should have been granted (*see Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 939; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372).

RIVERA, J.P., DILLON, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court