

Jacobs v Port Auth. of N.Y. & N.J.

2012 NY Slip Op 31119(U)

April 23, 2012

Supreme Court, New York County

Docket Number: 115644/05

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden
Justice

PART 11

INDEX NO. _____
MOTION DATE 1-12-12
MOTION SEQ. NO. _____

Index Number : 115644/2005
JACOBS, FRANCESCA
VS.
PORT AUTHORITY OF NEW YORK
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

Motion to/for _____
_____ | No(s). _____
_____ | No(s). _____
_____ | No(s). _____

~~Upon the foregoing papers, it is ordered that this motion is to be~~

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

Dated: April 23, 2010

NEW YORK COUNTY CLERK'S OFFICE _____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
JAMIE JACOBS, as administratrix of the estate of
FRANCESCA JACOBS, deceased,

Index No. 115644/05

Plaintiff,

- against -

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, and LARO SERVICE SYSTEMS,

FILED

Defendants.

APR 26 2012

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendant The Port Authority of New York and New Jersey ("Port Authority") moves for (i) summary judgment dismissing the complaint and any cross claims against it, and (ii) an order granting Port Authority's cross-claims against defendant Laro Service Systems, Inc. ("Laro"). Plaintiff Jamie Jacobs, as administratrix of the estate of her mother, Francesca Jacobs ("Decedent"), opposes the motion. Laro has submitted no opposition. For the reasons described below, the motion is granted in part and denied in part.

Background

Plaintiff seeks to recover damages for personal injuries allegedly sustained by Decedent on June 4, 2005, at The Port Authority Bus Terminal (the "Terminal") in Manhattan. Decedent's injuries occurred at approximately 8:45 p.m. after she returned from a day trip to Atlantic City on a Greyhound bus, which arrived at Gate 32 of the Terminal, an outdoor boarding area (the "Gate 32 Area"). After disembarking from the bus, Decedent walked through the Gate 32 Area towards the terminal building (the

“Terminal Building”) and slipped and fell as she tried to step up onto a curb to enter the Terminal Building. Decedent testified that “there was grease in [her] pants and [her] shoes” after her fall. Decedent dep. 27. Decedent further testified that she did not see any debris or grease on the floor of the Gate 32 Area prior to her fall; however, she testified that after her fall she observed that there was “a lot of garbage” in the area where she fell. Decedent dep. at 27-28.

Jerald Jacobs, the long time companion of Decedent, affirms that he witnessed Decedent’s fall and largely corroborates her account of the circumstances in which it occurred. However, unlike the Decedent, Jerald Jacobs states that from the time he stepped off the bus that the Gate 32 Area he observed that the area was littered with trash. Jerald Jacobs Aff. at ¶4. He further states that he and Decedent often took day trips to Atlantic City (at least two or three times per month for many years) and often returned to the Gate 32 Area to disembark. Jerald Jacobs states that he observed that “[t]he Gate 32 walkway/island area was regularly littered with soiled and crushed food wrappers, beverage containers and spillage, and it was obvious that the trash was left there for considerable periods of time.” *Id.* at ¶12. He further states that he had commented on the condition of the Gate 32 Area to bus drivers, that his comments were verbally acknowledged by the bus drivers, and that he never observed any maintenance personnel in the area. *Id.*

After her fall, Decedent testified that Jerald Jacobs and the driver of the bus in which she and Jerald Jacobs had been traveling (the “Bus Driver”) helped her up. Decedent testified that the Bus Driver and Jerald Jacobs took her to a chair inside the Terminal Building and then the Bus Driver went to get a Port Authority Police Officer

(the "P.A. Officer"). The P.A. Officer spoke to Decedent about her accident, went to inspect the location where the accident occurred, and filled out an accident report (the "Accident Report"). In the Accident Report, the P.A. Officer describes the area where the accident occurred as "Dry, well Lit." The Accident Report does not mention that Decedent claimed to have slipped on debris and grease. Rather, the Accident Report states that Decedent "stepped off the bus then slipped off the curb causing her to fall...."

Bern D'Aleo ("D'Aleo"), the Contract Administrator for the Maintenance Contract Services Division of Port Authority, states that he conducted a search of Port Authority's maintenance log books ("Port Authority's Log") for information relating to the accident and found no record of Decedent's accident or any incidents which occurred due to the alleged unsafe condition on the date of the accident. D'Aleo specifically states in his affidavit that he was responsible "for maintaining [Port Authority's] records with respect to any and all incidents occurring at the [Port Authority Bus Terminal] which are communicated to Port Authority personnel." D'Aleo Aff. at ¶2.

At the time of the accident, Port Authority had a contract (the "Maintenance Contract") with defendant Laro Service Systems ("Laro") to clean and maintain the Terminal.¹ The Maintenance Contract includes an indemnification provision (the "Indemnification Provision"), which provides in relevant part that:

"[t]o the extent permitted by law, [Laro] shall indemnify and hold harmless... Port Authority, its Commissioners, officers, representatives and employees from

¹ The record indicates that Laro is no longer in existence. Specifically, Port Authority submits the affirmation of Salvatore J. DeSantis ("DeSantis"), a member of the law firm of Molod Spitz & DeSantis ("Molod") who, in connection with a motion to withdraw as counsel for Laro in the present action, states in his affirmation that Laro Holdings, Inc. and all its subsidiaries, including Laro, ceased operations and were liquidated or dissolved around August 31, 2009.

and against all claims and demands, just or unjust, of third persons... arising out of or in any way connected or alleged to arise out of or alleged to be in any way connected with the [Maintenance] Contract and all other services and activities of [Laro] under this [Maintenance] Contract and for all expenses incurred by it and by them in the defense, settlement, or satisfaction thereof, including without limitation thereto, claims and demands for death, for personal injury or for property damage, direct or consequential, whether they arise from the acts or omissions of [Laro], of... Port Authority], of third persons....” Maintenance Contract Attachment F at ¶20.

The Maintenance Contract also includes an insurance provision (the “Insurance Provision”), which requires Laro to maintain a general liability insurance policy covering premises liability, under which Port Authority is named as an additional insured. However, Port Authority contends that Laro failed to name Port Authority as an additional insured under its general liability insurance policy and that no insurer has agreed to provide coverage to Port Authority in this action.

Eduardo Aguilar (“Aguilar”), a supervisor who was employed by Laro, testified at his deposition that Laro’s employees performed maintenance in three different shifts. The first shift (the “First Shift”) began at 10:15 p.m. and ended at 6:15 a.m, the second shift (the “Second Shift”) began at 6:00 a.m. and ended at 2:30 p.m, and the last shift (the “Last Shift”) began at 2:00 p.m. and ended at 10:30 p.m. Aguilar testified that the employees working on the Second Shift and the Last Shift had set schedules. Aguilar testified that the duties of the employee assigned to the station encompassing the Gate 32 Area (“Station 4-16”) during the Last Shift included “policing” certain exterior gates, including the Gate 32 Area, from 5:00 p.m. through 6:30 p.m., and that this policing activity would involve sweeping and spot cleaning. Aguilar dep. at 40-45.

During Aguilar’s deposition, the attorney for Decedent presented Aguilar with a daily log (the “Assignment Sheet”), which shows the names of the Laro employees

working during the Last Shift on the date of the accident and which lists Aguilar as one of the supervisors. The Assignment Sheet shows that Rodney Morales ("Morales") was the employee assigned Station 4-16 and Aguilar confirmed this in his deposition. The Assignment Sheet has a column titled "Late", which is unmarked for most of the employees, although there is an "X" in that column by Morales' name. However, during Aguilar's deposition, when directed towards this mark on the Assignment Sheet, Aguilar testified that he did not know who wrote the "X" in the "Late" column next to Morales' name and that Morales was not late for work on the date of the accident.

Aguilar also testified that Laro maintained a different daily log ("Laro's Operating Log") in which any complaints about the condition of an area at the Terminal would be recorded. Aguilar dep. at 27. Laro's Operating Log does not show that any complaints were made as to the condition of the floor of Gate 32 on the date of the accident.

Nelson Pineiro ("Pineiro"), a Port Authority general maintenance supervisor and D'Aleo's superior, testified that certain Port Authority employees (the "Field Maintenance Supervisors") regularly inspected the Port Authority facility to examine the work done by Laro, and took attendance of the Laro employees. Pineiro dep. 25-30. However, the inspections do not appear to have been conducted according to an established schedule.

On or around November 9, 2005, Decedent filed the initial complaint in this action, naming Port Authority as the sole defendant.² On or around November 15, 2007,

² Port Authority subsequently filed a third party complaint against Adirondack Transit Lines, Inc ("Adirondack"). However, this action has since been dismissed as against Adirondack.

Decedent filed a supplemental summons and complaint, which named Laro as an additional defendant. In its amended answer to the supplemental complaint, Port Authority instituted cross claims against Laro for indemnification, in the event that any judgment was made against Port Authority, and for breach of contract based on Laro's alleged failure to indemnify Port Authority for its legal expenses and its alleged failure to name Port Authority as an additional insured on its general insurance policy.

In this motion, Port Authority argues that Plaintiff's claims against it must be dismissed as there are no records which support Plaintiff's position that a dangerous or defective condition existed at the time of Decedent's accident in the area where Decedent fell, or that Port Authority had actual or constructive notice of such a condition.

Additionally, Port Authority argues that it is entitled to summary judgment on the cross claims it asserts against Laro in its amended answer. Port Authority alternatively seeks an order holding Laro in default for failing to comply with this court's order directing Laro to appear at a status conference on October 7, 2010, with its new counsel.

In opposition, Plaintiff argues that there are issues of fact as to the existence of the alleged dangerous condition and whether Port Authority had actual or constructive notice of it. Plaintiff asserts that Jerold Jacobs' testimony establishes that there was a dangerous or defective condition in the Gate 32 Area which caused Decedent's accident, and that the Gate 32 Area was routinely left in a dangerous and hazardous condition, such that Port Authority may be found to have had constructive notice of the condition at issue here. In support of Plaintiff's position, Plaintiff cites cases where property owners were found liable for injuries resulting from dangerous, recurring conditions on a premises, including Weisenthal v. Pickman, 153 A.D.2d 849 (2nd Dep't 1989) and Irizarry v. 15

Mosholu Four, LLC, 24 A.D.3d 373 (1st Dep't 2005), which each held that a landlord may be liable for injuries due to recurrent accumulations of litter in a stairway on a premises.

Plaintiff also asserts that the Assignment Sheet designating Morales as "Late" raises questions of fact as to whether Morales actually performed the maintenance activities required of him as set forth in his work schedule. Additionally, Plaintiff argues that the absence of any record of Decedent's fall in Port Authority's Log shows that Port Authority's recordkeeping practices are inaccurate or incomplete as the incident was known to Port Authority personnel since the P.A. Officer responded to the scene of the accident.

In reply, Port Authority argues that the affidavit of Jerald Jacobs does not show that Port Authority had the requisite notice of an ongoing or recurring dangerous condition since Jerald Jacobs admitted that he had not informed Port Authority personnel of any dangerous condition in the Gate 32 area, and Jerald Jacobs does not specify exact dates when he allegedly witnessed dangerous conditions at Gate 32 in the past. Additionally, Port Authority argues that Jerald Jacobs' affidavit fails to show that Port Authority had constructive notice of the dangerous condition at issue since Jerald Jacobs does not state how long this condition was present on the floor in the Gate 32 Area. Port Authority argues that, at most, the record shows that Port Authority had a general awareness that members of the public could drop pieces of litter and garbage at the outdoor gates of the Bus Terminal.

Port Authority argues that the cases cited by Plaintiff are distinguishable from the circumstances at issue here, as they involved "ongoing and repeated instances of very

specific conditions that occurred in the same location,” in contrast to the alleged condition at issue here. Reply, at 4.

Port Authority argues that this case is analogous to Mauge v. Barrow Street Ale House, 895 N.Y.S.2d 499 (2nd Dep’t 2010), where a restaurant owner was found not to be liable for injuries sustained by a man who slipped and fell due to a greasy substance on the restaurant’s stairs “since the restaurant’s owner established that the area was sufficiently inspected...and that he had received no prior complaints about grease on the steps.” Port Authority argues that Aguilar’s testimony shows that the Gate 32 Area was “swept and cleaned several times per day and constantly monitored by the Laro cleaner assigned to that area” and that Pineiro’s testimony shows that Port Authority employees “regularly inspected the Port Authority Bus Terminal to ensure that all areas were cleaned by Laro employees to their satisfaction.” Reply, at 6. Thus, Port Authority argues that it should not be found to have constructive notice of the alleged condition in this case since the area of the accident was sufficiently inspected, and there is no evidence of prior complaints about the condition of the area where Decedent fell.

Discussion

To succeed on a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case....” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

A landowner is under a duty to maintain its premises in a reasonably safe condition in view of all circumstances, including, among others, the likelihood of avoiding injury to others and the burden of avoiding the risk. Basso v. Miller, 40 N.Y.2d 233 (1976). A landowner may be liable for an injury that occurs on its premises if the plaintiff can show that the owner had actual or constructive notice of the dangerous condition that caused the injury and a reasonable amount of time to remedy it. Brock v. Cathedral Parkway Towers Management Co., 259 A.D.2d 263 (1st Dep't 1999).

To constitute constructive notice, a defect must be visible, apparent, and exist for a sufficient length of time prior to an accident to permit the owner or its agents to discover and remedy it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836 (1986). Additionally, “[a] defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition.” Osorio v. Wendell Terrace Owners Corp., 276 A.D.2d 540, 540 (2nd Dep't 2000).

An owner may demonstrate prima facie entitlement to summary judgment dismissing a personal injury claim against it by providing evidence that the area where the injury occurred was routinely maintained and inspected. Mauge v. Barrow Street Ale House, 70 A.D.3d 1016 (2nd Dep't 2010). However, a plaintiff may raise an issue of fact sufficient to defeat summary judgment by providing evidence that a recurring dangerous condition existed in the area of the accident that was routinely left unaddressed. See Weisenthal v. Pickman, 153 A.D.2d 849 (2nd Dep't 1989); see also Irizarry v. 15 Mosholu Four, LLC, 24 A.D.3d 373 (1st Dep't 2005).

Here, Port Authority has not met its burden of demonstrating that it lacked actual

or constructive notice of the alleged dangerous condition. In the case of an alleged slip and fall on a foreign substance on the floor, the defendant meets its initial burden on the issue of lack of constructive notice by offering “some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell.”

Birnbaum v. New York Racing Association, Inc., 57 A.D.3d 598, 599 (2nd Dep’t 2008); see also Granillo v. Toys “R” Us, Inc., 72 A.D.3d 1024 (2nd Dep’t 2010); Przywalny v. New York City Transit Authority, 69 A.D.3d 598 (2nd Dep’t 2010).

This burden can be met by evidence of “frequent inspections for debris and tripping hazards...performed by store employees on the date of the accident, but prior to the accident. Insook Lee v. Port Chester Costco Wholesale, 82 A.D.3d 842, 842 (2nd Dep’t 2011). However, a defendant’s burden on summary judgment is not met by a showing of a “general practice” of inspections and cleaning. Edwards v. Wal-Mart Stores Inc., 243 A.D.2d 803, 803 (3rd Dep’t 1997); see also Porco v. Marshalls Depart. Stores, 30 A.D.3d 284, 285 (1st Dep’t 2006)(evidence that a store is “cleaned daily,” and inspections made “on a regular basis” not proof of cleaning and inspections conducted on the date in question). There has to be evidence of “particularized or specific” inspections and cleaning in the area where the plaintiff fell on the date of the accident.” Birnbaum v. New York Racing Association, Inc., 57 A.D.3d at 599.

In the present case, Port Authority has produced evidence of general inspection and cleaning schedules, but no admissible first-hand evidence to show that, on the date of the accident, employees from Port Authority and/or Laro had actually inspected the Gate 32 Area . See Porco v. Marshalls Depart. Stores, 30 A.D.3d at 285 (defendants did not meet burden of showing no constructive notice of substance in aisle of store causing

plaintiff to fall where defendants offered no testimony from employees regarding the last time the aisle was checked). In addition, while Aguilar testified that Morales reported for work on time and would have performed his scheduled duties, which would include cleaning the Gate 32 Area, the Assignment Sheet, which was presented to Aguilar during his deposition, appears to show that Morales was marked late and, thus, raises a question as to whether Morales performed his full duties.³ Furthermore, Aguilar did not testify that he personally observed that the Gate 32 Area was cleaned on the date of the accident either by Morales or an employee on the Second Shift. And, while Pinero testified on behalf of the Port Authority that a Port Authority employee regularly inspected the Port Authority facility to examine the work done by Laro, it appears from the record that such inspections did not take place on a regular schedule.

In view of Port Authority's failure to present first-hand evidence that the Gate 32 Area was inspected on the date of the accident, it has failed to meet its initial burden on this motion for summary judgment to establish a prima facie case that it had no actual or constructive knowledge of the alleged condition, which caused Decedent's accident.

In any event, even if Port Authority had sustained its initial burden of showing that it lacked actual or constructive notice, record raises issues of fact as to whether Port Authority had constructive notice of the dangerous condition by virtue of its recurrence. Jerald Jacobs has alleged that the Gate 32 Area was regularly littered with debris, and Pineiro testified that Port Authority's Field Maintenance Supervisors inspected the facility to observe whether Laro had adequately performed its maintenance work. As

³ It is for a trier of fact to determine whether Aguilar's testimony is to be credited or whether the Assignment Sheet accurately indicated that Morales was late for his shift.

such, there is an issue of fact as to whether Port Authority employees observed that the Gate 32 Area was regularly littered with debris, as Jerald Jacobs alleges, thus giving Port Authority actual knowledge of the existence of the dangerous condition. Furthermore, since “[a] defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence” (Freund v. Ross-Rodney Hous. Corp., 292 A.D.2d 341, 342 (2nd Dep’t 2002); see also Osorio v. Wendell Terrace Owners Corp., supra.), there is an issue of fact as to whether Port Authority had constructive notice of the dangerous condition at issue here based on previous observations of the Field Maintenance Supervisors.

Port Authority’s motion for summary judgment as it relates to its cross claims for breach of contract and contractual indemnification is granted in part based on uncontroverted evidence that Laro failed to procure general liability insurance naming Port Authority as an additional insured on its general liability policy. However, as there are triable issues of fact as to Port Authority’s negligence, it is premature to determine whether Port Authority is entitled to summary judgment on its cross claim for contractual indemnification. See General Obligations Law Section 5-322.1; Cuevas v. City of New York, 32 A.D.3d 372, 374 (1st Dep’t 2004).

Conclusion

In view of the above, it is

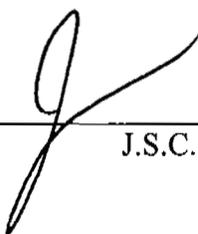
ORDERED that Port Authority’s motion for summary judgment is denied to the extent it seeks dismissal of the complaint against it; and it is further

ORDERED that Port Authority’s motion is granted to the extent of granted it summary judgment as to liability on its cross claim for breach of contract based on

Laro's failure to obtain general liability insurance naming Port Authority as an additional insured, but is denied in so far as it seeks summary judgment on its cross claim for contractual indemnification; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 11, 60 Centre Street, room 351, New York, New York, on June 13, 2012 at 10:00 a.m.

Dated: April 23, 2012



J.S.C.

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