

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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ROBERT GELTZER, as BANKRUPTCY
TRUSTEE of the ESTATE of
FARIDA ABEDIN,

Index No.: 22855/04

Motion Date: 9/11/07

Plaintiff(s),

Motion Cal. No.: 12

-against-

THE GARDENS 75TH STREET OWNERS
CORP., and ARGO CORPORATION,

Motion Sequence No.: 2

Defendant(s).

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The following papers numbered 1 to 3 read on this motion by the defendants, THE GARDENS 75TH STREET OWNERS CORP. and ARGO CORPORATION, for summary judgment dismissing the plaintiff's claims.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits - Memorandum of Law.....	1
Affirmation in Opposition - Exhibits - Memorandum of Law.....	2
Reply Affirmation - Exhibits.....	3

Upon the foregoing papers, the motion is determined as follows:

This action arises from an accident that occurred on April 28, 2004 wherein the plaintiff was allegedly injured as a result of a slip and fall. Said incident took place in the second floor trash closet at the building located at 35-44 75th Street, Jackson Heights, New York, of which the plaintiff is a tenant, the defendant, THE GARDENS 75TH STREET OWNERS CORP. ("Gardens"), is the owner, and defendant, ARGO CORPORATION ("ARGO") is the managing agent.

The plaintiff testified at her deposition that on April 28, 2004, at approximately 10:30 AM - 11:00 AM, as she entered the trash closet to dispose of her garbage, she was caused to slip and fall. Plaintiff further testified that after she fell she observed a sticky/slippery substance on the floor and a bag of garbage on the floor containing beer cans and a soap container.

Plaintiff was questioned as to the procedures for disposing of trash and recyclables, as well as whether garbage was left on the floor of the trash closet on a regular basis. Plaintiff acknowledged that there was a sign on the door of the trash closet which instructed that nothing be left in the trash closet, that the garbage be pushed down the chute, and that boxes, recyclables, breakables and hazardous materials be taken to the basement. When questioned as to the frequency that various types of trash were left on the floor of the trash closet, plaintiff first testified that cardboard boxes were left frequently, then changed her testimony to only sometimes.

Additionally, plaintiff testified that prior to said accident, she did not complain to anyone about garbage being left in the trash room or that the floor being slippery or sticky. Plaintiff further stated she did not remember ever noticing the floor being slippery or sticky prior to her accident.

On behalf of defendants, the porter, STEVEN NEMECEK (“Nemecek”), testified that he was responsible for maintaining and cleaning the trash closet as of the time of the accident. Specifically, Nemecek stated that three times per day he would inspect all the trash closets in the building to check that all garbage was pushed down the chute; to remove, if any, items left in the room; and to sweep and mop. Nemecek testified further that he did not receive any complaints from the tenants regarding garbage being left on the floor of the trash closet, and, specifically, did not receive any complaints from plaintiff regarding the same.

With respect to the subject trash closet on the day of the incident, Nemecek testified that said room was sealed off the day before at approximately 9:30 - 10:00 AM and remained sealed shut for twenty four hours for extermination purposes. On April 28, 2004, at approximately 10:00 AM, Nemecek removed the seal and observed that the room was dry. Plaintiff acknowledged that said trash room was sealed off the day prior for 24 hours.

Plaintiff commenced this action to recover for personal injuries allegedly sustained. Plaintiff’s causes of action claim that the trash chute violated §27-875(d) of the New York City Building Code, that defendant had actual notice of the condition that caused plaintiff’s fall, and that defendant had constructive notice of the condition that caused plaintiff to fall.

The defendants, Garden and Argo, move to dismiss the plaintiff’s causes of action on the basis that the trash chute did not violate any New York City Building Code because it was grandfathered in as it was constructed before the enactment of the code; that even in the event there is a violation, it was not the proximate cause of plaintiff’s fall; and that defendants did not cause or create the condition, nor had notice of the condition that allegedly caused plaintiff accident.

Defendants contend that pursuant to Local Law, Title C, Part I, Article I, §C26-11.0 dated June 22, 1967, (the predecessor to §27-875(d) of the New York City Building Code), the premises located at 35-44 75th Street is not covered by the New York City Building Code in that it was built in 1951, and conformed to the requirements of the code at the time it was built. Defendants argue that said provision only applies to construction performed after the effective date of the code, to wit: June 22, 1967.

Plaintiffs argue that §C26-11.0 applies to the use of existing buildings in the city, and thus, the building code provisions pertaining to trash chutes is applicable to the subject premises. Therefore, plaintiffs claim there is a violation of the current building code (Section 27-875(d) of the New York City Building Code) in that the opening of the trash chute is smaller than the minimum size requirements.

A determination of whether the aforesaid codes apply to the subject premises is not essential herein. The testimony clearly revealed that the bag of garbage on the trash closet floor contained recyclable items. The testimony further evidenced that there was a sign on the trash closet door which stated that recyclables were to be taken down to the basement. The size of the trash chute is completely irrelevant in that the items that plaintiff observed in the bag on the floor of the trash closet were not permitted to be placed down the trash chute. Accordingly, the plaintiff's alleged violation of Section 27-875(d) of the New York City Building Code cannot form a foundation for liability against the defendants as, any such violation would not constitute the proximate cause of plaintiff's slip and fall.

Next, plaintiff asserts that the defendants had actual and constructive notice of the dangerous condition which caused plaintiff to fall. Plaintiff presents myriad allegations pertaining to garbage being left in the trash closet in attempt to sustain her argument that said condition was a recurring condition, and therefore, defendant can be charged with constructive notice of the same.

"To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on a floor, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time". (citation omitted) (Rodriguez v. Sixth President, Inc., 4 AD3d 406, 407, 771 NYS2d 368 [2nd Dept. 2004]).

There was no evidence presented that the defendant created the dangerous condition, to wit: the sticky/slippery substance on the floor. Rather, plaintiff attempts to satisfy her burden of proving notice by arguing that there existed a recurring condition of garbage being left in the trash closet.

Burden of proving that defendant had constructive notice of dangerous condition on defendant's premises, in order to establish a *prima facie* case of negligence, may be met by providing evidence that a recurring condition existed and was routinely left unaddressed by defendant. (Segretti v. Shorenstein Co., East, L.P., 256 AD2d 234, 682 NYS2d 176 [1st Dept. 1998]). Said burden requires more than showing a general awareness, which would be legally insufficient to establish constructive notice. (Segretti v. Shorenstein Co., East, L.P., *supra*).

The Court of Appeals specifically held that neither a general awareness that litter or some other dangerous condition may be present is legally sufficient to charge defendant with constructive notice. (Gordon v. American Museum of Natural History, 67 NY2d 836, 492 NE2d 774 [1986]). In *Gordon*, the Court noted there was no evidence that anyone, including plaintiff, observed the litter prior to the accident.

Contrary to plaintiff's assertions, proof that a defendant may be aware of a general condition is not sufficient to establish constructive notice of the particular condition which caused the injured plaintiff to fall. (McDuffie v. Fleet Financial Group, Inc., 269 AD2d 575, 703 NYS2d 510 [2nd Dept. 2000]). "General awareness that dangerous condition, such as grease and oil on garage floor, may be present, is legally insufficient to constitute notice of particular condition which caused negligence plaintiff's slip and fall" (Mercer v. City of New York, 223 AD2d 688, 637 NYS2d 456 [2nd Dept. 1996]). In the case before this Court, plaintiff's claim that defendants were aware of the general condition of some recyclable materials being left in the trash room, does not bear the legal weight to charge defendants with constructive notice of the sticky/slippery substance on the floor.

In further support of plaintiff's arguments, plaintiff annexes non-party affidavits of certain family members alleging that garbage was frequently left in the trash room, and that they complained of the situation several times. First, the Court notes that these Affidavits clearly contradict the testimony of plaintiff and defendant's witness, Nemecek. Plaintiff testified first that frequently she observed cardboard boxes in the trash room, which testimony she later changed to sometimes. Further, plaintiff stated that she never observed, prior to her accident, the floor being slippery/sticky. Lastly, plaintiff acknowledged that she did not complain of the condition prior to her accident.

Plaintiff's testimony was corroborated by Nemecek's testimony in that sometimes cardboard was left in the trash room, and that he received no complaints from the tenants, including plaintiff, regarding garbage left in the trash room.

"Judgment may be summarily granted where compelling documentary evidence clearly demonstrates that factual issues raised in opposition to the motion are not genuine, but feigned" (Alvarez v. New York City Housing Authority, 295 AD2d 225, 744 NYS2d 25 [1st Dept. 2002]). Where self-serving affidavits, submitted by a plaintiff in opposition to summary judgment motion, contradict the plaintiff's own deposition testimony and appear to be tailored to buttress plaintiff's arguments, they are insufficient to raise a triable issue of fact. (Phillips v. Bronx Lebanon Hosp., 268 AD2d 318, 701 NYS2d 403 [1st Dept. 2000]).

The non-party affidavits submitted by plaintiff herein attempt to create the necessary elements of a recurring condition. Specifically, the affidavits include allegations that leaky trash bags were left in the trash room on a frequent and ongoing manner, and that several complaints were made to the defendants' employee Nemecek. However, these allegations contradict the plaintiff's testimony herein, as well as the deposition of Nemecek. Furthermore, the Court notes that the plaintiff did not include the names and addresses of said non-party witnesses in Plaintiff's Response to Discovery and Inspection. See, Makaron v. Luna Park Housing Corp., 25 AD3d 770 [2nd Dept. 2006] (proof offered by plaintiff, in opposition to summary judgment motion, of a witness who was not identified in response to defendant's discovery request, was a feigned issue of fact clearly designed to defeat the defendant's motion).

The standard of summary judgment requires the proponent to 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, and such showing must be made by producing evidentiary proof in admissible form. (Santanastasio v. Doe, 301 AD2d 511, 753 NYS2d 122 [2nd Dept. 2003]). Further, when reviewing a defendant's motion for summary judgment we are required to accept as true the allegations of the complaint. (Guggenheimer v. Ginzburg, 43 NY2d 268 [NY 1977]). The burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment. (Zuckerman v. City of New York, 49 NY2d 557 [NY 1980]).

In the instant case, the defendants have satisfied their burden by submitting evidence which demonstrated that they neither created the allegedly dangerous condition, nor had actual or constructive notice of the same. Defendant's witness, Nemecek, testified that he would inspect the trash closets three times per day. On the day of the accident, Nemecek testified that, less than one hour prior to the accident, he unsealed the room, inspected the room, and found it to be clean and dry. Moreover, Nemecek stated he never received any complaints from the tenants, including plaintiff, regarding garbage being left in the trash room or that the floor was sticky or slippery.

Plaintiff, herein, has failed to raise an issue of fact that would be sufficient to charge defendants with creating, or having actual or constructive notice, of the alleged dangerous condition she claims was the cause of her slip and fall. Plaintiff acknowledged that the trash room was sealed off 24 hours prior; stated that prior to her accident she never observed any sticky/slippery substances on the floor; and confirmed that she did not complain to the defendants about either garbage or slippery/sticky condition of the trash room floor.

Accordingly, based upon all the foregoing, it is

ORDERED, that the defendants' motion for summary judgment is granted, and the plaintiff's complaint is dismissed as against the said defendants; and it is further

ORDERED, that the Clerk of the Court is authorized to enter judgment in accordance with the foregoing.

A copy of this Order is being faxed to all parties herein.

Dated: November 30, 2007

LAWRENCE V. CULLEN, J.S.C.