

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15  
Justice

LUIS RIVERA, x

Index  
Number 15092/1998

Motion  
Date 03/11/03

- against -

Motion  
Cal. Number 13

GREEN ACRES MALL, LLC. et ano.

x

The following papers numbered 1 to 21 read on this motion by defendant ASHLAND MAINTENANCE CORP. for summary judgment, and the cross-motion by defendant GREEN ACRES MALL, LLC. seeking identical relief.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

In this action, plaintiff seeks damages for personal injuries allegedly sustained on April 20, 1997, at approximately 11:50 A.M., when he slipped and fell on a puddle of water on the floor in the mall owned by defendant GREEN ACRES MALL, LLC. (hereinafter "GREEN ACRES"). Defendant GREEN ACRES had a written contract with defendant ASHLAND MAINTENANCE CORPORATION (hereinafter "ASHLAND") to provide indoor cleaning maintenance services inside the mall, including "sweeping and mopping the common areas to maintain a clean and safe shopping center". Defendant ASHLAND moves for summary judgment, seeking a dismissal of the plaintiff's complaint against it, arguing, *inter alia*, that plaintiff was not a third-party beneficiary of the subject maintenance contract. Defendant GREEN ACRES cross-moves for summary judgment seeking identical

relief on the ground that GREEN ACRES did not have actual or constructive notice of the defect allegedly responsible for the plaintiff's injury.

The Court initially addresses the cross-motion of defendant GREEN ACRES seeking summary judgment. For the reasons which follow, the Court is constrained to grant that motion and dismiss the plaintiff's complaint against it.

It is well established that a plaintiff in a slip and fall case must demonstrate that the defendant either created the defective condition or had actual or constructive notice of it. (See *e.g.*, *Goldman v. Waldbaum, Inc.*, 248 A.D.2d 436 [2d Dept. 1998]). A defendant who has actual knowledge of a recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition (See, *Garcia v. U-Haul Co.*, 2003 N.Y. App. Div. LEXIS 2332 [2d Dept. 2003]; *Freund v. Ross-Rodney Hous. Corp.*, 292 A.D.2d 341 [2d Dept. 2002]; *Osorio v. Wendell Terrace Owners Corp.*, 276 A.D.2d 540 [2d Dept. 2000]; *McLaughlan v. Waldbaums, Inc.*, 237 A.D.2d 335 [2d Dept. 1997]).

In the matter at bar, there is an absence of proof as to how long the puddle of water was on the floor, and no evidence to permit an inference that the defendant had constructive notice of the condition. It is clear that the plaintiff did not notice the condition of the floor prior to his accident. Moreover, even if the co-defendant's deposition testimony could establish that defendant GREEN ACRES possessed a "general awareness" of a hazardous condition, this would be legally insufficient to constitute constructive notice of the particular condition that caused the accident. (See, *Smith v. Funnel Equities, Inc.*, 282 A.D.2d 445 [2d Dept. 2001]; *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]; *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]). Thus, even accepting as fact the defendant's "general awareness" of leaks in the ceiling, that "general awareness", standing alone, is insufficient to impute constructive notice to the defendant of the puddle of water which caused the plaintiff's accident. (See, *Carricato v. Jefferson Valley Mall Ltd. Partnership*, 749 N.Y.S.2d 575 [2d Dept. 2002]). As to the putative evidence of a recurring condition, the Second Department has held that, to withstand a motion for summary judgment, a plaintiff is required to show by *specific factual references* that the defendant had knowledge of the allegedly recurring condition, and that conclusory statements, which fail to identify how long the condition existed, or the identity of the persons to whom notice of the condition was allegedly given, and when and how it was given, are without probative value. (*Emphasis supplied.*) (See, *Carlos v. New Rochelle Municipal Housing Authority*, 262 A.D.2d 515 [2d Dept. 1999]; see also, *Stone v. Long Island Jewish Medical Center, Inc.*, 2003 N.Y. App. Div. LEXIS 808 [2d Dept. 2003]; *Young v. Fleary*, 226 A.D.2d 454 [2d Dept. 1996]; *Gloria v. MGM Emerald Enterprises*,

*Inc.*, 298 A.D.2d 355 [2d Dept. 2002]). Plaintiff's evidence of leaks in unspecified areas of the mall premises, and puddles of water in likewise unspecified areas of the mall, which were pointed out to unnamed representatives of defendant GREEN ACRES, constitutes nothing more probative than mere speculation that there was a recurrent condition, namely, a leak in the ceiling in the location of the plaintiff's accident, and unsupported conjecture that this was the cause of the puddle on the floor on which the plaintiff allegedly slipped. (See, e.g., *Goldman v. Waldbaum, Inc.*, *supra*). As in *Anderson v. Central Valley Realty Co.*, 751 N.Y.S.2d 585, 588 [2d Dept. 2002], the evidence presented by the plaintiff to establish the defendant's notice of a recurrent water condition, i.e. related ceiling leaks in other portions of the mall, has no relation to the area where the plaintiff fell, and cannot be used to establish constructive notice.

In sum, the case at bar does not fit within the template of recurrent-condition cases, in which a known defect on the premises is routinely left unattended, thereby causing a recurring hazard. (See, e.g., *Sweeney v. D & J Vending*, 291 A.D.2d 443 [2d Dept. 2002]; [leaking vending machine]; *David v New York City Hous. Auth.*, 284 A.D.2d 169 [1<sup>st</sup> Dept. 2001]; [leaks which caused rainwater to accumulate in a stairwell]; *McLaughlan v Waldbaums, Inc.*, 237 A.D.2d 335 [2d Dept. 1997][unstable supermarket display]; *Garcia v. U-Haul Co., Inc.*, 2003 N.Y. App. Div. LEXIS 2332 [2d Dept. 2003] [metal beams left on the ground 'once in a while']; c.f., *Gloria v. MGM Emerald Enterprises, Inc.*, *supra* [spilled drinks on dance floor not a recurring condition because it cannot be guarded against in advance]).

Accordingly, plaintiff has failed to meet its burden of establishing a triable issue of fact, and defendant GREEN ACRES is entitled to summary judgment in this matter.

Similarly, defendant ASHLAND's motion for summary judgment must be granted, and the plaintiff's complaint against it dismissed.

As the Second Department recently held in the context of a snow-removal contract, in *Baratta v. Home Depot USA, Inc.* (2003 N.Y. App. Div. LEXIS 2299 [2d Dept. 2003]):

A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties (see *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 141-142, 746 N.Y.S.2d 120, 773 N.E.2d 485; *Javurek v. Gardiner*, 287 A.D.2d 544, 731 N.Y.S.2d 475; *Murphy v. M.B. Real Estate Dev. Corp.*, 280 A.D.2d 457, 720 N.Y.S.2d 175; *Pavlovich v. Wade Assocs.*, 274 A.D.2d 382, 710 N.Y.S.2d 615; *Girardi v. Bank of New York Co.*, 249 A.D.2d 443, 671 N.Y.S.2d 321).

The Court finds that, in connection with the maintenance contract at issue in this case, defendant ASHLAND did not assume a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff arising from the negligent performance of such duties. (See, *Bourk v. National Cleaning*, 174 A.D.2d 827 [3d Dept. 1991]). Only where the contract constitutes a comprehensive and exclusive property maintenance obligation such that the contracting parties could have reasonably expected it would displace the landowner's duty to safely maintain the property, or there is evidence that the injured plaintiff detrimentally relied on the contractor's performance of such duties, or the contractor's performance of such duties had otherwise advanced "to such a point as to have launched a force or instrument of harm" (See, *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 [2002]; *Pavlovich v Wade Assocs.*, 274 A.D.2d 382, 383 [2d Dept. 2000], quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168; *Cochrane v Warwick Assocs.*, 282 A.D.2d 567; *Murphy v M.B. Real Estate Dev. Corp.*, 280 A.D.2d 457 [2d Dept. 2001]) will such a duty attach. (See also, *Mitchell v. Fiorini Landscape, Inc.*, 284 A.D.2d 313 [2d Dept. 2001]; *Javurek v. Gardiner*, 287 A.D.2d 544 [2d Dept. 2001]; *Phillips v. Y.M.C.A.*, 215 A.D.2d 825 [3d Dept. 1995]; *Donahue v. E. Petracca & Co.*, 277 A.D.2d 346 [2d Dept. 2000]; *Brenner v. Johnson Controls, Inc.*, 277 A.D.2d 412 [2d Dept. 2000]).

Defendant ASHLAND's maintenance obligations did not constitute the type of comprehensive and exclusive property obligation which the parties could reasonably expect to displace defendant GREEN ACRES' duties as landowner to maintain the property safely. Nor has there been any evidence adduced of detrimental reliance on the part of the plaintiff upon the defendant's performance, nor has the defendant's performance otherwise created an independent duty to protect the plaintiff. Accordingly, defendant ASHLAND did not owe a duty to the plaintiff, and is entitled to summary judgment dismissing the plaintiff's complaint.

In light of the foregoing order of dismissal in favor of defendant GREEN ACRES, the Court need not address defendant ASHLAND's right to summary judgment with respect to the cross-claims for contribution asserted by defendant GREEN ACRES against it, or defendant GREEN ACRES' request for summary judgment on its cross-claim for indemnity against defendant ASHLAND, which are now moot.

Accordingly, defendant ASHLAND's motion for summary judgment is *granted*; defendant GREEN ACRES' cross-motion seeking the same relief is also *granted*, and the plaintiff's complaint against them is dismissed.

Dated: March 21, 2003

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JANICE A. TAYLOR, J.S.C.