

Halpern v Avon Prods., Inc.

2007 NY Slip Op 31357(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0115842/2004

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 115842/2004
HALPERN, SUSAN
vs
AVON PRODUCTS
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion sequence #'s 002 + 003 are consolidated for
consideration

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

MAY 22 2007

Dated: _____

HON. JUDITH J. GISCHE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

Susan Halpern,
Plaintiff,

-against-

Avon Products, Inc., d/b/a
Avon Salon & Spa, Inc.,
Onesource Management, Inc. d/b/a
Onesource

Defendants.

DECISION/ORDER

Index No.: 115842/04
Seq. No.: 002, 003

Present:
Hon. Judith J. Gische, JSC

-----X

Avon Products, Inc., d/b/a
Avon Salon & Spa, Inc.
3rd party Plaintiffs,

-against-

Onesource Management, Inc. d/b/a
Onesource
3rd party Defendants.

FILED
MAY 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
<u>Motion Sequence #2</u>	
Def Avon N/M (§3212) w/PE affirm, NF affid (as exh), exhs	1
Pltff's opp w/MMO affirm, MS affid (as exh)	2
Avon's reply w/PE affirm, exh	3
Pltff's further opp (to both motions) w/MMO affirm	4
<u>Motion Sequence #3</u>	
Def One Source N/M (§3212) w/MCG affirm, exhs (in 2 parts) . .	1
Avon's opp w/PE affirm	2
Onesource's reply w/MCG affirm	3

Upon the foregoing papers the court's decision is as follows:

This is a personal injury action by plaintiff Susan Halpern. Avon Products, Inc., d/b/a Avon Salon & Spa, Inc. ("Avon") has commenced a third party action against Onesource Management, Inc. d/b/a Onesource ("Onesource"). Plaintiff has amended her complaint to directly assert claims against Onesource.

Avon and Onesource now each separately move for summary judgment. Avon's motion is to dismiss all the claims against it, including cross and counterclaims by Onesource. Onesource's motion is for summary judgment against Avon, also for the dismissal of all the claims against it, including cross and counterclaims by Avon. Plaintiff opposes both motions. They have previously been consolidated by the court for disposition (Order, Gische, J., 4/5/07).

Since issue has been joined, and the motions were brought not more than 120 days after the note of issue was filed, they are both properly before the court for an adjudication on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

Background

Plaintiff alleges in her complaint that she sustained personal injuries when she slipped and fell in the salon owned and operated by Avon on the afternoon of December 20, 2002. In her bill of particulars, plaintiff described her accident as being "due to the slippery, waxy, debris ridden condition of the floor." She elaborated that there was a "slippery substance" and also that the "defendants failed to insure that the floor was properly constructed, operated and maintained; further said floor was

cluttered with refuse causing dangerous and hazardous conditions . . .”

Plaintiff was deposed and testified that on the day of her accident, she leaned over to hand an Avon employee a tip and as she turned around and took a few steps and she “went flying.” Plaintiff described the area where she slipped as follows: “[i]t was like an ice skating arena” and “[i]t was literally slick like ice.” The accident happened at approximately 4pm in the afternoon.

Upon being questioned by defense counsel, about why she thought the surface was slippery, plaintiff testified that although she did not see anything on the floor, nor were her clothes wet, she slid on her left hip when she fell. She also testified that when she was helped up, she noticed both her shoes were slippery, and she described a motion like she was ice skating. Plaintiff testified she did not touch the soles of her shoes or notice footprints on the floor.

Plaintiff testified that immediately upon falling, the salon manager, Maria Sanders came over and said to her: “Don’t feel so badly. This happened to me over there [pointing] to the left corner . . .” Ms. Sanders also allegedly told the plaintiff that: “[i]t’s from the chemicals and hair solutions they use in the salon and they wax the floor [* * *] they are supposed to alcohol them [the floor] because of all the solutions. . . she said its not done constantly.”

Avon owns and operates the salon where the accident took place and it has a contract with Onesource for maintenance and cleaning services. Both defendants separately present similar arguments as to why plaintiff’s claims against them must be dismissed.

Each contends that plaintiff cannot establish that either one of them had actual or constructive notice of a hazardous or dangerous condition at the salon. Both argue that plaintiff really has no idea what caused her fall. For this point they rely on plaintiff's deposition testimony and the blunderbuss language of her bill of particulars ("due to the slippery, waxy, debris ridden condition of the floor"). She did not testify about any kind of debris or clutter at her deposition, but only about slipperiness.

Each defendant argues that the statements allegedly made to plaintiff by Ms. Sanders are inadmissible hearsay. Avon separately argues that the statements, if made by Ms. Sanders, were made without her having been authorized by Avon (her employer) to do so. Onesource contends that assuming the statements were made, they show Avon had actual notice, but not Onesource, which is a reason to dismiss the case against them.

Both defendants also rely upon the deposition testimony of Sherrod Johnson, the security guard assigned to the Avon Salon. Mr. Johnson filled out an incident report following the accident. He has testified that he recorded what plaintiff told him had happened, but he did not personally investigate or observe a slippery condition where she fell.

Avon argues separately that the salon was kept clean and free of any spills and debris. To support this argument it offers the deposition testimony of Pedro Carrillo, its assistant manager. Mr. Carrillo testified that he had never received any complaints about the salon floor prior to the date of the accident, nor had there been any accident prior thereto.

Onesource argues that although it has to wax the floor under its contract with Avon, this would have been done on a Tuesday, but plaintiff fell on a Friday. It relies upon the testimony of Mr. Carrillo and its contract with Avon to establish this point. Mr. Carrillo also testified that the Onesource cleaning staff was only allowed into the salon after it closed for the day, which would have been several hours after plaintiff's accident. He also testified that if they did come into the salon before the end of the day they were not permitted to clean areas where the customers were.

Onesource's district manager, Mr. Sinishtay testified that he knew of no complaints about the floor in the salon. He testified that the waxing of the floors occurred only once a month, on a Tuesday, but there was no set schedule as to which Tuesday that had to be done, but was left to the discretion of his staff. Mr. Sinishtay testified that his staff did a visual check each Tuesday to see if the floor could "go another week" without waxing.

Onesource separately argues, based upon Mr. Carillo's testimony on behalf of Avon, that it may have been Avon who created the slippery and dangerous condition. Mr. Carillo testified that Avon's own housekeeping staff were present during the day when the salon was open. These persons cleaned upon spills consisting of hair color or drinks dropped by clients and that they kept some cleaning supplies for that purpose.

In partial opposition to Onesource's motion, Avon denies that its cleaning staff did anything to create a dangerous condition at the salon.

In opposition to both motions, plaintiff presents the sworn affidavit of Ms. Sanders who no longer works for Avon. She states that "[p]rior to December 20, 2002, I

had slipped and fallen on the Fifth floor of the Avon Salon & Spa at the aforesaid location as the floor was slippery. An Avon Salon & Spa customer, thought to be Susan Halpern, had fallen some time after me in the same area of the salon, due to the floor being slippery as well." Plaintiff contends that both defendants had control of the area where she had her accident and they failed to maintain the areas in safe manner, or created the condition that caused her accident.

Discussion

The moving party seeking summary judgment has the initial burden of proving its *prima facie* case. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment, as a matter of law, will the burden then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980).

The alleged inconsistencies between the bill of particulars and plaintiff's testimony are not a basis to dismiss plaintiff's complaint. Although her testimony is more narrow than her statements in the bill (e.g. she did not testify about debris or clutter on the salon floor), she has consistently attributed her fall to something slippery or slick on the floor. *Compare*: Duncan v. Toles, 21 AD3d 984 (2nd dept. 2005); Williams v. Dover Home Improvement, 276 AD2d 626 (2nd dept. 2000). Therefore this does not form a basis to grant either defendant's motion.

At trial a plaintiff in a slip and fall case must establish that the defendant either

created the condition that caused the accident or that it had actual or constructive notice of the dangerous condition. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986). Since the defendants are moving for the dismissal of plaintiff's complaint, each must prove their defense, that either they did not have notice of the dangerous condition, or that they did they create the condition that was a proximate cause of her accident. Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 (1979).

Based upon plaintiff's own testimony, both defendants have proved their defense that the dangerous condition alleged was neither visible nor apparent. Plaintiff makes no claim that she complained about the floor being slippery, etc., before she fell. Plaintiff's testimony is that she did not see anything slippery on the fall, but felt it under the soles of her shoes.

Ms. Sanders sworn affidavit does not establish a factual dispute for trial about whether Avon had actual notice of a dangerous condition where plaintiff fell because Ms. Sanders fell on the 5th floor whereas plaintiff's accident was on the 6th floor. Other testimony by plaintiff about what Ms. Sanders allegedly said to her that day is inadmissible hearsay. These statements are not made (or restated) by Ms. Sanders in her sworn affidavit in support of plaintiff's motion. None of the persons who were deposed could recall any prior incident or complaint about a dangerous condition on the 6th floor of the salon. Therefore, both Avon and Onesource have proved that they did not actual notice about a slippery condition on the 6th floor of the salon prior to plaintiff's accident, and any claims against them that are based on actual notice are severed and

dismissed.

Neither defendant, however, has proved that it did not have constructive notice or that they did not create the dangerous (slippery/slick) condition that plaintiff contends was on the floor and caused her to fall. Kraemer v. Kmart, Corp., 226 AD2d 590 (2nd dept 1996)

Although Onesource claims plaintiff has not proved it negligently applied wax to the floor, or even that she fell due to wax having been applied to the floor, this record shows that Onesource was responsible for waxing the floor each month and cleaning it at the end of the day. A reasonable jury could conclude that Onesource created the dangerous condition in that particular area of the salon because of how it maintained it. Khaimova v. Osnat Corp., 21 AD3d 401 (2 Dept. 2005). Onesource's district manager also testified that the waxing of the floors had to be done in the evening when no customers were present. Onesource had considerable discretion on what kind of wax to use, when to do it and how to do it.

There is also evidence that Avon used substances in the salon that could have created a dangerous condition. There is also testimony that things were sometimes spilled on the floor, like hair color, and drinks. In fact Avon had its own housekeeping staff on duty during salon hours to make sure any spills, messes, etc. were cleaned off the floor. A reasonable jury could conclude that Avon created or improperly cleaned the slick or slippery condition that was a proximate cause of plaintiff's slip and fall.

Since each defendant was in control of the salon at various points in the day for cleaning the floor, and no one knows exactly what plaintiff slipped on, it will be for the jury to decide whether plaintiff can prove her claims against these defendants.

Granting the motions for summary judgment is the functional equivalent of a trial, therefore, it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

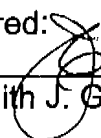
Conclusion

Although the defendants have proved they did not have actual notice of a dangerous condition, they have failed to otherwise their defenses. Therefore, plaintiff's claims, only to the extent they are based on actual notice, are severed and dismissed. The remaining claims have to be tried. Since the note of issue had been filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision on the office of trial support so that it may be scheduled for trial and assigned.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 22, 2007

So Ordered: 
Hon. Judith J. Gische, J.S.C

FILED
MAY 29 2007
NEW YORK
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