

**Gale v BP/CG Ctr. I LLC**

2007 NY Slip Op 31828(U)

June 21, 2007

Supreme Court, New York County

Docket Number: 0106833/2005

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 5

Index Number : 106833/2005

GALE, ERICA

vs

BP/CG CENTER I

Sequence Number : 003

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

**FILED**

JUN 26 2007

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered \_\_\_\_\_ motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6/21/07

**WALTER B. TOLUB**

**WALTER B. TOLUB** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
ERICA GALE

Plaintiff,

Index No. 106833/05  
Mtn Seq. 003

-against-

BP/CG CENTER I LLC, BP/CG CENTER II LLC,  
and TEMCO SERVICE INDUSTRIES, INC.,

Defendant.

**FILED**  
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WALTER B. TOLUB, J.:

By this motion Defendants seek an order granting summary judgment as to liability and dismissing the complaint. Plaintiff's cross-motion seeks a finding that Defendants violated their own safety protocols with respect to placing additional mats on a wet floor in the lobby of Defendants' building. The motion and cross-motion are denied as there are material questions of fact as to liability and violations of protocol.

Facts

Plaintiff claims that in September 8, 2004, at about 9:30 a.m., she slipped and fell on a wet floor in the lobby of 153 East 53<sup>rd</sup> Street, New York, NY ("Premises"). On the day of the incident it was raining outside. Mats were placed in the hallway of the lobby that day as they are year round. Mats were also placed in the hallway leading up to the elevators. The tops of the mats were made of carpet and the bottom of the mats were made of rubber. TEMCO, an independent contractor, would have porters

check the lobby floor and, at times, would add additional mats in the lobby area or wipe up the floor when it became wet.

Plaintiff claims that Defendants did not follow their own safety protocols and were therefore aware or should have been aware of the dangerous condition that existed in the lobby due to the inclement weather. Defendants argue that they are entitled to summary judgment since they did not owe a duty to the Plaintiff, did not create the condition and did not have notice of the condition.

#### Discussion

Summary judgement is a drastic remedy which cannot be granted where there is any doubt as to the existence of triable issues of fact. (Andre v. Pomeroy, 35 NY2d 361 [1974]). Personal injury actions, by their very nature, do not lend themselves easily to summary disposition because issues such as negligence, foreseeability, proximate cause and superseding cause involve the kind of judgment variables which are traditionally left to a jury. (Gilmartin v. Helmsley-Spear Inc, 162 AD2d 275 plst Dept 1990]; Raider v. Friedman, 162 AD2d 112 [1<sup>st</sup> Dept 1990]).

In order to establish a prima facie case in negligence, Plaintiff must demonstrate (1) that the Defendants owed her a duty of care, (2) a breach of the duty, and (3) a resulting injury proximately caused by the breach. (Atkins v. Glens Falls

City School Dist., 53 NY2d 325 [1981]; Solomon v. City of New York, 66 NY2d 1026 [1985]).

It is well settled that an owner of property who permits a large number of people to congregate for gain or for profit must be vigilant and use reasonable care to protect them. (Taieb v. Hilton Hotels Corp., 131 AD2d 257 [1<sup>st</sup> Dept 1987]; Tantillo v. Goldstein Bros. Amusement Co., 248 NY 286 [1928]; Tapley v. Ross Theatre Park, 275 NY 144 [1937]). This is a non-delegable duty and includes the provision of a safe means of ingress and egress. (Backiel v. Citibank, 299 AD2d 504 [2<sup>nd</sup> Dept 2002]). There remains a question of fact as to whether Boston Properties provided a safe route of ingress and egress from the premises and therefore, Boston Property's motion for summary judgment is denied.

Even though a duty is owed in this case by the owner of the premises, Plaintiff has failed to proffer any admissible evidence that TEMCO owed and breached a duty of care. Therefore, under the Court of Appeals decision in Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 [2002], TEMCO is entitled to summary judgment as a matter of law.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." (Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136, 138

[2002] citing Darby v. Campagne National Air France, 96 NY2d 343 [2001]). Here, the issue is whether any such duty ran from TEMCO to the Plaintiff, given that TEMCO's contract was with the property owner. A contractual obligation standing alone, will generally not give rise to tort liability in favor of a third-party because imposing liability under such circumstances could render the contracting parties liable in tort to an indefinite number of potential beneficiaries. (Id. Citing H.R. Moch Co. v. Rensselaer Water Co., 247 NY 160 [1928]).

As the court laid out in Espinal, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care and may potentially be liable on tort to a third person: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm (Moch, 247 NY 160, 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (Eaves Brooks, 76 NY2d 220,226); and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (Polka, 83 NY2d 579, 589). Since none of these exceptions apply to Plaintiff, TEMCO's motion for summary judgment, dismissing the claims against it, is granted.

Plaintiff's cross motion is denied because the condition of the lobby and whether the safety protocols of Defendants were

violated is a question of fact for the jury. It is not clear whether the lobby was in a dangerous or defective condition prior to the time Plaintiff slipped.

Accordingly it is

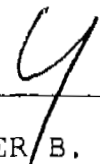
ORDERED that Defendants' motion for summary judgment is denied as there exist questions of fact; and it is further

ORDERED that Plaintiff's cross-motion is dismissed.

Counsel for the parties are directed to appear for a Conference on August 3, 2007 at 11:00 a.m. in room 335.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/21/07

  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
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