

Rizk v Pace Univ.
2007 NY Slip Op 32635(U)
August 15, 2007
Supreme Court, New York County
Docket Number: 0103519/2005
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: JUDITH J. GISCHE

Justice

PART 10

Mohamed Rizk

INDEX NO.

103519/05

MOTION DATE

Pace University

MOTION SEQ. NO.

001

and 3rd party
action

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPER NUMBER

Cross-Motion

Yes

No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

FILED

SEP 22 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

8/15/07

JSG
HON. JUDITH J. GISCHE

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS

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

Mohamed Rizk,
Plaintiff

-against-

Pace University,
Defendant

DECISION/ORDER

Index No.: 103519/05

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C

Pace University,
3rd Party Plaintiff

-against-

Sodexo America, Inc.,
3rd Party Defendant.

FILED
AUG 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Papers	Numbered
Sodexo n/m (3212) w/ASM affirm, exhs	1
Pace U opp w/KGF affirm, exhs	2
Pltff affid of "no opp" w/ADL affirm	3
Sodexo reply w/ASM affirm	4

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

GISCHE, J.

This is a personal injury action by plaintiff Mohamed Rizk ("plaintiff" or "employee"), against Pace University ("Pace"), the owner of the building wherein he sustained the injuries claimed. Rizk was employed by Sodexo America LLC

("Sodexho" or "employer") at the time of his accident. Pace has commenced a third party action against Sodexho for contractual indemnification. Sodexho seeks summary judgment dismissing the 3rd party complaint. Pace opposes the motion and the plaintiff has provided an affidavit of "no opposition," setting forth its position.

Issue has been joined, discovery completed, and the note of issue has been filed. This motion was brought timely within the time limitations set forth in CPLR 3212. It will be considered and decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The court's decision and order follows.

Allegations in the main action and the arguments presented on this motion

Plaintiff was employed as a cook by Sodexho at the time of his accident. He worked in Pace's cafeteria. He contends he slipped and fell on water that had dripped from a leaky sink and accumulated on the floor. He has sued Pace, alleging that it failed to safely maintain the premises, and that it had notice of a dangerous condition in the cafeteria's kitchen. Pace has commenced a third party action against Sodexho for indemnification based upon an indemnification clause in the August 15, 2000 management agreement between them ("management agreement"). The management agreement requires that each of them indemnify the other from claims, etc., "which may arise from the sole negligence, misconduct, or other fault of the indemnifying party . . ." Management Agreement, Article 9.3.

Sodexho contends that because plaintiff was a Sodexho employee at the time of his accident, and his recovery was limited to Workers' Compensation he cannot bring

(and has not brought) an action against Sodexo, therefore the issue of whether Sodexo was negligent in the happening of plaintiff's accident will not be (and cannot be) decided at trial. A second argument presented by Sodexo is that there are no disputed issues of fact that Pace was negligent, therefore Pace cannot seek indemnification for its own negligence because this is prohibited under Section 5-322.1 of the General Obligations Law ("GOL"). A closely related third argument is that the contractual indemnification provision requiring Sodexo to indemnify Pace only applies where the accident is due to the "sole negligence" of either party to the management agreement. Sodexo contends that it was not negligent, and that even if it was, it was not solely negligent.

In support of its motion for summary judgment, Sodexo relies on the deposition testimony of the plaintiff and of Pace's physical plant director ("Mr. Link"), as well as that of its own operations manager ("Mr. Burns"). When Mr. Link was asked whether it would be Pace's responsibility to fix a leaking kitchen sink, as opposed to Sodexo, he answered "yes" and stated further that such a repair would be handled by mechanics who work for Pace. Mr. Burns testified on behalf of Sodexo that the leak had existed for at least two months before the accident and that he had notified Pace it needed to be fixed. Mr. Burns also testified that he told someone from OneSource (a non-party who had a repair or other custodial contract with Pace) about the leak and that the person looked the sink.

In opposition to Sodexo's motion, Pace relies upon other testimony by Mr. Burns, that Sodexo was responsible for mopping up water on the floor and placement

of "Wet Floor" signs where needed in the cafeteria. Pace also relies upon the testimony by Mr. Link that Sodexho was "responsible for cleaning, all cleaning in the kitchen." Pace contends that plaintiff's testimony is that the pipe under the sink was merely dripping, but that the water was allowed to pool and grow into a large line 10-15 feet long, in full view of Sodexho personnel, who did nothing to mop it up, or to contact Pace. Therefore, it is Pace's contention that Sodexho's negligence was the sole proximate cause of plaintiff's injuries, and Pace is entitled to indemnification. For this argument, Pace offers the deposition testimony of Mr. Cerasoli, Sodexho's general manager, who testified that Sodexho was responsible for placing signs up around a wet area.

Both Sodexho and Pace rely upon the management agreement in support of their respective arguments, that the 3rd party action should/ should not be dismissed. Under the management agreement, Sodexho is required to provide food service for Pace and some janitorial services. Article 6.8 of the management agreement is of particular relevance, providing as follows:

"Pace shall, at Pace's expense, provide maintenance personnel and outside management services, parts and supplies to properly maintain the Premises and equipment except to the extent that Sodexho is required to provide maintenance hereunder. Sodexho shall make minor repairs to Food Service equipment. Pace shall be responsible for all costs of maintenance, including labor and supplies, except as provided in paragraph 6.7"

While stating that he takes "no position" on Sodexho's motion, plaintiff nonetheless states that Pace has a non-delegable duty as the owner of this property to

6] maintain it in a safe condition.

Law Applicable to Summary Judgment Motions

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 (2d. Dept. 2003).

Discussion

The prima facie elements of a premises liability negligence case are that the defendant either created a dangerous condition, or it had actual or constructive notice of the condition, and that such defects are visible and apparent. Segretti v. Shorestein Company East, LP, 256 A.D. 2d 234 (1st dept. 1998). Where not defendant created, the condition must have existed for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. Berger v. ISK Manhattan Inc., 10 A.D. 3d 510 (1st dept. 2004).

Section 11 of the Workers' Compensation Law shields an employer from 3rd party

actions except where the employee has sustained a grave injury within the meaning of the statute, or there is a written contract to indemnify the owner. Workers' Comp Law § 11; Flores v. The Lower Eastside Service Center, Inc., 4 N.Y. 3d 363 (2005).

While Sodexho claims that because plaintiff's recourse against his employer is limited under the law to his Workers' Compensation benefits, this does not estop Pace from trying its claim for contractual indemnification against Sodexho. Flores v. The Lower Eastside Service Center, Inc., supra; See: Rodrigues v. N & S Building Contractors, Inc., 5 N.Y.3d 427 (2005).

Although Sodexho correctly argues that GOL § 5-322.1 prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, the issue of negligence has not yet been tried and decided in this case. Not only has plaintiff not yet proved either of these defendants were negligent, neither Pace nor Sodexho has proved its freedom from negligence.

Sodexho's further argument it cannot be found solely negligent because Pace was responsible for fixing the pipe that leaked, presents a factual dispute for trial. Pace has put forth evidence that Sodexho was responsible for maintaining the kitchen area, including mopping up wet areas and posting signs to warn of wet floors. Plaintiff's testimony establishes that the water had grown to a sizeable amount, framing a factual dispute about whether Sodexho failed to take appropriate actions in the face of a dangerous condition.

Since Sodexho has not proved a legal basis for the 3rd party action to be dismissed summarily, and there are factual disputes for trial about which of these defendants was negligent, Sodexho's motion for summary judgment must be, and hereby is, denied.

The note of issue having already been filed, this case is ready to be tried. Plaintiff Mohamed Rizk shall serve a copy of this decision and order on the Office of Trial Support so the case can be scheduled for trial.

Conclusion

It is hereby

ORDERED that 3rd party defendant Sodexho America, LLP's motion for summary judgment, dismissing the 3rd party complaint by Pace University is denied for the reasons set forth in the foregoing decision; and it is further


ORDERED that Plaintiff Mohamed Rizk shall serve a copy of this decision and order on the clerk in the Trial Support Office, 60 Centre Street, so that this case may be scheduled for trial; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED this constitutes the decision and order of the Court

Dated: New York, New York
August 15, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
AUG 22 2007
NEW YORK
COUNTY CLERK'S OFFICE