

James v Cushman & Wakefield of N.Y., Inc.
2007 NY Slip Op 33132(U)
September 20, 2007
Supreme Court, Kings County
Docket Number: 0013314/2004
Judge: Laura Lee Jacobson
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At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of September, 2007.

P R E S E N T:

HON. LAURA LEE JACOBSON,

Justice.

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HENRY JAMES AND WENDY JAMES,

Index No. 13314/04

Plaintiffs,

- against -

CUSHMAN & WAKEFIELD OF NEW YORK, INC.,
CUSHMAN & WAKEFIELD INC., AND CITIGROUP, INC.,

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Moticn/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1_____
Opposing Affidavits (Affirmations)_____	2_____
Reply Affidavits (Affirmations)_____	3_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendants Cushman & Wakefield of New York, Inc., Cushman & Wakefield Inc. (collectively Cushman & Wakefield) and Citigroup, Inc. move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint of plaintiffs Henry James and Wendy James on the ground that no triable issues of fact exist with respect to the claim of plaintiff Henry James that he was injured in a slip and fall accident due to the negligence of defendants. Plaintiffs oppose the instant motion

on the ground that triable issues of fact exist concerning whether the defendants had actual or constructive notice of the alleged defective condition which preclude the grant of summary judgment.¹

In the instant action, plaintiff seeks damages for injuries he allegedly sustained on August 14, 2002, when he slipped and fell on an oily substance while traversing a loading dock located at One Court Square in Long Island City. The subject premises is owned by defendant Citigroup, Inc. and managed by Cushman & Wakefield.

At his deposition, plaintiff testified that, at the time of the accident, he had been working as a security guard at the subject premises for several months. For at least two weeks prior to the accident he worked in the loading dock area of the premises every day from 2:00 p.m. to 6:00 p.m. as a relief guard. He described the loading dock as an open area with spaces for trucks and a 9' by 40' concrete platform raised approximately one foot from the ground. His security booth was located on the left side of the raised platform. On the platform itself, about 20 feet away from the security booth, there was a mechanical lift which was used to take heavy deliveries off of trucks. This machine was used at least once a day and sometimes more often. Plaintiff testified that he never saw anyone repairing the lift machine and did not observe any employees of Cushman & Wakefield operating same.

Plaintiff stated that his accident occurred at approximately 3:20 p.m. He had been at the loading dock since 2:00 p.m. Plaintiff described the lighting at the loading dock as fair.

¹ Plaintiff Wendy James is suing derivatively for the loss of society and companionship of her husband, Henry James. The term "plaintiff" when used in the singular herein, will always refer to plaintiff Henry James.

Plaintiff further stated that a soda delivery truck pulled into the middle of the loading dock shortly before 3:20 p.m. After the driver went inside, plaintiff left his booth and walked about 9 feet towards the truck. The truck was parked about 9 feet from the loading device and plaintiff was standing approximately 6 to 7 feet away from said machine as he checked the license plate of the truck. He had last seen the loading device being used the day before to take deliveries off of a truck. Plaintiff testified that his fall occurred on his way back to the security booth as he turned away from the truck to return to the booth. As he turned, he walked a little nearer to the front of the truck than he had when he first approached the truck and fell in an area he had not walked on prior to reaching the truck and checking the license plate. He stated that he fell as his right foot slid away from under him on a patch of oil. He further testified that he fell about 6 to 7 feet from the lifting device.

Plaintiff believed the substance he slipped on was oil because he got some on his hands after he fell. He stated that while he was sitting on the ground after he fell he saw the oil “[j]ust where [his] foot was, [his] right foot after he slid[] there” and the area of oil was “running along the ground. It was a six inch patch.” He also stated that “from the lift machine . . . it [the oil patch] was on the ground . . . six or seven feet, as I said before.” When questioned as to whether the oil spot was about six feet by six inches in size, plaintiff replied “yeah.” Plaintiff also testified that he did not see a patch of oil on the loading platform at any time prior to the date of his accident. On the date of the accident, he did not observe the oil until after he slipped and described it as being so light in color that it looked to be the same gray color as the loading dock.

With respect to the loading device, he testified that prior to his accident he observed oil dripping from the device to an area directly underneath the machine. Such dripping oil was the only oil he ever saw on the loading dock platform area prior to his accident.² He first observed the machine leaking about a week or two weeks before the accident. He testified that he never saw any oil running from the machine to the platform area prior to the date of his fall. He stated that he notified a cleaning or maintenance employee in the Cushman & Wakefield office at the premises about the leaking lift device about two or three times. He did not make a written complaint concerning the leak. He further stated that he showed the leak to an engineer who was passing by and looked at the lifting device, but plaintiff could not remember when this occurred.

Keith Owen, the property manager of One Court Square, testified on behalf of defendant Cushman & Wakefield. He stated that he had been temporarily relocated to another property at the time of plaintiff's accident in August 2002. He testified that at least once a day a cleaning person would inspect the loading dock area and clean any garbage or debris from the floor. If the cleaning person saw oil on the floor, he or she would notify someone. Other than cleaning personnel, the security guard and individuals in the message

² The court notes that after plaintiff made numerous changes to substantive deposition testimony via an "errata sheet," defendants moved to strike the contents of such document. By order of this court dated January 12, 2006 (Kurtz, J.), the motion to strike was resolved to the effect that it was "agreed between the parties that prior to the day of [plaintiff's] accident, the only oil he observed on the platform was under the lifting machine" and in view of such determination "[a]ll questions and answers to which corrections were made to pp. 110, 111, 113 and 114 of [plaintiff's] EBT transcript [could] not be used at trial by any party"

center would be present at the loading dock on a regular basis. The loading dock was open from 6:00 a.m. to 6:00 p.m. and the security guards controlled entry to the dock.

With respect to the loading device, Mr. Owens stated that it was a “scissor lift” which assisted truck drivers to unload goods at the platform. An outside contractor made repairs to the lift as needed and defendants did not maintain records with respect to such repairs. Mr. Owen did not recall any oil leaking from the lift prior to commencing his temporary relocation in April 2001 and was unaware of any complaints about oil on the platform prior to August 14, 2002.

William Brown, a security officer supervisor, testified on behalf of Citibank. He stated that the loading dock always had one security officer posted there whose duty was to check the trucks that entered. He testified that he did not recall anyone ever complaining about the lift machine.

Her further testified that on the day of plaintiff’s accident he went down to the loading dock and spoke to plaintiff who stated that he was taking a licence plate number when he slipped and fell on an oil spot. Mr. Brown observed a wet spot approximately three or four feet away from the lift machine but could not tell if the spot was oil or water. He had never observed any similar spots on the platform prior to August 14, 2002.

Fred Roerden, the night operations manager at the subject premises from October 1998 through June 2003, also testified on behalf of Cushman & Wakefield. Mr. Roerden performed quarterly inspections of the subject premises, including the loading dock. Any issues with the sidewalk or loading dock, including the presence of substances on the floor,

would go under “floor areas” or “cleaning” in the reports generated as a result of such inspections.

The loading dock was cleaned by cleaning personnel. Mr. Roerden testified that he would visit the loading dock area at least once a day, to check the cleaners, see what trucks were arriving and generally observe what was taking place at the dock. He sometimes saw oil near the garbage dumpsters where the trucks drove into the area, but never saw oil on the sidewalk areas of the platform. He stated that if he had seen such oil, he would have called the building cleaners to take care of the spill immediately.

In opposition to the instant motion, plaintiff submits the expert affidavit of Daniel S. Burdett, a licensed engineer. Mr. Burdett opined as follows:

Based upon my educational background and professional experience as a mechanical and professional engineer, it is my opinion that on August 14, 2002, and for some time prior thereto, hydraulic fluid was leaking from the lift mechanism due to a broken seal around the piston. This allowed the hydraulic fluid to be released from the lift mechanism onto the platform, where it spread at least seven (7) feet to an area where the plaintiff fell.

* * *

Hydraulic fluid, which is required in order for the lift to operate, is clear in color. From the repair that was performed on the lift, subsequent to the plaintiff's accident, it is evident that the seal that surrounds the piston had broken, or was compromised in some manner, resulting in hydraulic fluid being released from the machine over a period of time. While the initial release of fluid would only have been slight as the seal began to break, it would have continued over a period of time until the seal completely deteriorated, at which time a larger amount of clear fluid would be released from the lift.

* * *

The testimony of the plaintiff was that he fell approximately seven (7) feet from the lifting mechanism and that after his accident he observed a clear liquid spread on the platform from the lift to where he fell. It is my professional opinion that hydraulic fluid, of the type used in this lifting

mechanism, would have spread across the level platform once it began to leak in large amounts.

Based upon my educational background and professional experience as an engineer, it is my opinion that on August 14, 2002, and for some time prior thereto, hydraulic fluid was leaking from the lift mechanism due to a broken seal around a piston. This allowed the fluid to be released from the lift mechanism onto the platform, where it spread at least seven (7) feet to the place where the plaintiff fell.

Summary judgment should only be granted where there are no triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). In order to prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law (*Prince v Di Benedetto*, 189 AD2d 757, 759 [1993]; *Zarr v Piccio*, 180 AD2d 734, 735 [1992]). Once the movant has established his or her prima facie case, the party opposing the motion bears the burden of “produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *Romano v St. Vincent’s Medical Center of Richmond*, 178 626 [1991]). Stated differently, “the plaintiff must establish the existence of material facts of sufficient import to create a triable issue” (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]). In addition, the evidence presented on summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*Goldstein v Monroe County*, 77 AD2d 232, 236 [1980]). Since summary judgment deprives a party of his or her day in court (*Henderson v City of New York*, 178 AD2d 129 [1991]), it is a drastic remedy that will only be awarded when there

is no triable issue of fact and the court can render a decision as a matter of law (*Barclay v Denckla*, 182 AD2d 658 [1992]). Moreover, “[i]t is well established that negligence cases do not generally lend themselves to resolution by summary judgment, since that remedy is appropriate only where the negligence or lack of negligence of defendant is established as a matter of law” (*Chahales v Garber*, 195 AD2d 585, 586 [1993]). Summary judgment is appropriate, however, even in negligence cases, where the movant satisfies his or her initial burden of proof and the nonmovant’s opposition to the motion for summary judgment is “entirely conjectural and there is no genuine issue [of fact] to be resolved” (*Cassidy v Valenti*, 211 AD2d 876, 877 [1995]). This comports with the general rule that where a party has established his or her prima facie case, a motion for summary judgment based thereupon “may not be defeated merely by surmise, conjecture or suspicion” (*Shaw*, 28 NY2d at 207).

It is well settled that “[i]n order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition” (*Kraemer v K-Mart Corp.*, 226 AD2d 590, 590 [1996]; *see also Hollinger v Chestnut Ridge Racquet Corp.*, 227 AD2d 380, 380 [1986]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). “The mere happening of the accident does not establish liability on the part of the defendant” (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 251 [1984], *affd* 64 NY2d 670 [1984]). Rather, it must be

shown that “the property owner ha[d] a sufficient opportunity, within the exercise of reasonable care, to remedy the situation,” and failed to do so (*see Mercer v City of New York*, 223 AD2d 688, 689 [1996], *affd* 88 NY2d 955 [1996]).

Courts have consistently held that summary judgment is appropriately granted to a defendant where the plaintiff did not notice the alleged defect prior to the accident and there is no evidence as to how long the alleged defect existed before the accident occurred (*see Gordon*, 67 NY2d at 838 [dismissing complaint where neither plaintiff nor anyone else had observed the piece of paper which allegedly caused plaintiff’s injuries prior to the accident’s occurrence, and no evidence was submitted with regard to how long the alleged defect had been present prior to the accident]; *see also Faricelli v TSS Seedman’s, Inc.*, 94 NY2d 772, 774 [1999][“There was no evidence that defendant knew about the banana peel (which allegedly caused plaintiff to fall), or that it had been on the floor long enough prior to the accident that notice might be inferred”]; *Thompson v The Stop & Shop Supermarket Companies, Inc.*, 277 AD2d 48, 48 [2000] [affirming grant of summary judgment to defendant where “plaintiff failed to rebut defendant’s showing that it had no prior notice of the existence of the patch of spilled liquid upon which plaintiff allegedly fell”]; *Lombardo v Island Grill Diner*, 276 AD2d 532, 532 [2000] [defendant entitled to summary judgment where it “established that it neither created the pool of grease, dirt, and oil in the parking lot, nor had actual or constructive notice of the condition”]; *Duhar v Kim*, 228 AD2d 339, 339 [1996][affirming grant of summary judgment to defendant where plaintiff did not see any debris or water on the floor prior to her fall]; *Kraemer*, 226 AD2d at 591 [affirming grant of

summary judgment to defendant where the injured plaintiff did not notice, prior to her accident, either the cardboard or plastic ticket which allegedly caused her fall, and there was no evidence as to how long these items had been on the floor]; *Deegan v 336 East 50th Street*, 216 AD2d 59, 59-60 [1995][summary judgment granted to defendant where plaintiff was unable to testify that she observed any debris before she fell and there was no evidence that the alleged defective condition existed for a sufficient length of time prior to the accident]; *Cipolla v Supermarkets General Corp.*, 215 AD2d 346, 347 [1995][summary judgment granted where the evidence was too speculative to establish that the complained of puddle was in existence for a sufficient time prior to the plaintiff's accident]).

In this case, defendants have established, prima facie, that they did not receive any complaints, either from plaintiff who worked in the area for at least two weeks prior to his accident, or from any other individuals either employed by defendants or otherwise present at the premises, concerning the presence of oil on the loading dock platform. In response, plaintiff has failed to raise a triable issue of fact as to the defendants' actual or constructive notice of the alleged dangerous condition or creation of same. Plaintiff claims that he slipped on a clear liquid substance, which he believed to be oil, located on the subject loading platform. He did not observe such liquid on the date of his accident prior to his fall nor did he complain to anyone at his job site on that date with respect to the presence of such liquid on the platform. He had never observed or come into contact with oil on the platform prior to that date although he had been working at the loading dock for a portion of each day for at least two weeks prior to his accident. Although he testified that he informed two

employees of Cushman & Wakefield - namely an engineer and a cleaning person - in the weeks prior to his accident that he had witnessed oil leaking from the subject lift to an area directly below the machine, a general awareness on the part of defendants that the lift sometimes leaked and that such leakage was confined to an area under the lift which was not identified as being accessible, and therefore potentially hazardous to, individuals traversing the platform, does not constitute actual or constructive notice of the specific hazardous condition complained of by plaintiff, namely the presence of oil on the platform itself, particularly where, as here, the alleged complaint by plaintiff failed to contain any indication that the leakage he observed ever extended onto the platform area from the lift (*cf. Lupi v Home Creators, Inc.*, 265 AD2d 653, 654 [1999], *lv denied* 94 NY2d 758 [2000][affirming trial court's grant of summary judgment to defendant on the basis that said defendant lacked actual or constructive notice of an alleged dangerous icy condition at an enclosed horse riding stable where the only notice provided to defendant of a water leak on the premises concerned a leaking hydrant which caused water to run outside the stable and down an adjacent driveway, but did not result in any ice or water accumulation on the riding floor itself]).

Although a defendant will be held liable "where a known defect on the premises is routinely left unattended and causes a recurring hazard" (*Gloria v MGM Emerald Enterprises, Inc.*, 298 AD2d 355, 356 [2002]), a mere general awareness "that a dangerous condition, such as grease and oil on a garage floor, may be present, is legally insufficient to constitute notice of the particular condition which caused [plaintiff's] fall" (*Mercer*, 223

AD2d at 691; *see also Panetta v Phoenix Beverages, Inc.*, 29 AD3d 659, 660 [2006][holding that evidence that defendant had a general awareness that oil could leak from trucks entering the subject recycling facility “was insufficient to charge (defendant) with constructive notice of the particular grease or oil spot which allegedly caused the plaintiff’s fall on a theory that it had actual notice of a recurrent dangerous condition”]; *see also Segretti v The Shorestein Co., East, L.P.*, 256 AD2d 234, 235 [1998]; *Yearwood v Cushman & Wakefield, Inc.*, 294 AD2d 568, 569 [2002]; *Allen v Brooks*, 246 AD2d 438, 438 [1998]; *cf. Sweeney v D & J Vending, Inc.*, 291 AD2d 443, 443 [2002][question of fact existed as to defendant’s constructive notice of each specific reoccurrence of alleged dangerous condition where evidence existed “that water often accumulated on the floor in the area where the plaintiff fell as the result of leaking or condensation from the subject vending machine” and plaintiff’s supervisor “had complained about this problem to the defendant on numerous occasions before the accident”]). In the instant case, even if plaintiff did inform employees of Cushman & Wakefield of the alleged leaking lifting device, such notice did not alert defendants to a specific recurring hazardous condition or even provide awareness that a general potentially dangerous condition existed, given that such leak was allegedly confined to an area directly underneath the lifting device and did not encroach upon any portion of the platform which was regularly traversed. Accordingly, as plaintiff has failed to raise a question of fact as to whether the defendants “either created the patch of oil, or had actual or constructive notice of the condition and a reasonable time to correct it” (*Peygumbari v*

Forest Plaza Assocs., 29 AD3d 768, 768 [2006], the court is constrained to grant the defendants' motion for summary judgment.

Moreover, plaintiff's expert's report is similarly insufficient to raise a triable issue of fact. As an initial matter, it is within the court's discretion to disregard such expert affidavit as the expert in question was not identified by plaintiff during pre-trial disclosure and the affidavit was not served until after the note of issue was filed (*see Dawson v Cafiero*, 292 AD2d 488, 489 [2002], *lv denied* 98 NY2d 610 [2002]). In any event, the affidavit is of no evidentiary value, as plaintiff's expert did not visit the accident site or inspect the subject loading device and his conclusions, therefore, are improperly speculative and conclusory (*see Tedone v Success Homes, Inc.*, 31 AD3d 745, 746 [2006]). The expert affidavit is also based on inadmissible evidence of subsequent repairs (*see McConnell v Santana*, 30 AD3d 481, 482 [2006][“Evidence of repairs and remedial measures subsequent to the accident is not discoverable or admissible in a case based on negligence”]) given that such evidence is proffered to demonstrate the negligence of defendants as opposed to resolving an issue related to the identity of the party responsible for control or maintenance of the subject loading dock or lifting device (*see Watson v FHE Services, Inc.*, 257 AD2d 618, 618 [1999]).

Moreover, the court finds that the affidavit misconstrues the deposition testimony of plaintiff upon which it relies. Rather than definitively stating that the oil spill he stepped on visibly emanated from the subject loading device and spread to the area approximately 7 feet away from said device where plaintiff fell, plaintiff instead testified that he fell six or seven feet away from the loading device, first observed the oil as he was sitting on the ground after

he fell and noticed that such oil was located “[j]ust where [his] foot was, [his] right foot after he slid[] there” and the area of oil was “running along the ground. It was a six inch patch.” He also stated that “from the lift machine . . . it [the oil patch] was on the ground . . . six or seven feet, as I said before.” Although when questioned as to whether the oil spot was about six feet by six inches in size, the plaintiff replied “yeah,” the court, even in affording the plaintiff every favorable inference, cannot say, given his initial aforementioned testimony concerning the location and size of the “oil patch,” that plaintiff’s testimony can conclusively be construed as demonstrating that plaintiff observed the oil patch as being six inches by six feet and stretching directly to the subject loading device as opposed to being merely six inches in length and located six to seven feet away from such device. Accordingly, the expert’s conclusion that there was definitive visible evidence at the time of plaintiff’s accident that the alleged leak emanated from the lift and created an area of oil which continued in an uninterrupted fashion from the lift to the area where plaintiff fell approximately 6 or 7 feet away is unduly speculative.

As a result, the summary judgment motion of Cushman & Wakefield and Citigroup, Inc. is granted in its entirety and the complaint is dismissed as against them.

The foregoing constitutes the decision and order of the court.

ENTER,

J.S.C

HON. LAURA JACOBSON