

Azzaro v Super 8 Motels Inc.

2007 NY Slip Op 33645(U)

November 7, 2007

Supreme Court, New York County

Docket Number: 0115949/2005

Judge: Michael D. Stallman

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

PRESENT: **HON. MICHAEL D. STALLMAN**

PART 7

Index Number : 115949/2005

AZZARO, KATHLEEN

vs

SUPER 8 MOTELS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 7/25/07

MOTION SEQ. NO. _____

MOTION CAL. NO. 10

The following papers, numbered 1 to 8 were read on this motion to/for Summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| <u>1-4</u> |
| <u>5-7</u> |
| <u>8</u> |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order,"**

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

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 11/7/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
KATHLEEN AZZARO,

Index No. 115949/05

Plaintiff,

DECISION AND ORDER

- against -

SUPER 8 MOTELS INC., BANTA MANAGEMENT
SERVICES, INC. and JERRY BANTA,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

In this action plaintiff alleges that defendants negligently caused her to slip and fall in a hotel room bathroom. Defendants, Super 8 Motels Inc., Banta Management Services, Inc., and Jerry Banta move for summary judgment dismissing the complaint pursuant to CPLR 3212.

It is undisputed that on July 9, 2005, plaintiff Kathleen Azzaro was a guest in defendant's hotel when she slipped and fell in the bathroom of her room. The complaint alleges that the tile floor of the bathroom area of plaintiff's hotel room and the supplied cotton floor mat, neither of which had a nonskid surface, were unreasonably dangerous. Following joinder of issue, defendants moved for summary judgment.

Plaintiff was a guest in a hotel. In order for a hotel owner to be held negligent and therefore liable for injuries, the evidence must show that there was a dangerous condition on the

property that defendant either created or had actual or constructive notice of (see *Mercer v City of New York*, 88 NY2d 955, 956 [1996]). Defendants, as owners of a hotel, had a duty to maintain the hotel and its bathroom floors "in such a condition that with ordinary use they would be reasonably safe" for the use by guests (*Jungjohann v Hotel Buffalo*, 5 AD2d 496, 498, aff'd, 292 NY 701 [4th Dept 1958]). However, absent competent evidence of a defect in the surface or some deviation from applicable industry standards, simply because a plaintiff fell on a tiled floor that is inherently smooth, and thus slippery, will impose no liability (*Murphy v Conner*, 84 NY2d 969, 971-972 [1994]); *German v Campbell Inn*, 37 AD3d 405 [2nd Dept 2007]; *Portanova v Trump Taj Mahal Associates*, 270 AD2d 757 [3rd Dept 2000], lv denied 95 NY2d 765 [2000]; *Mroz v Ella Corporation*, 262 AD2d 465 [2nd Dept 1999]). The inherent smoothness of floor tiles in a hotel bathroom is not an actionable defect, without more, and thus, does not support recovery by a hotel guest who was injured when he slipped and fell on the bathroom floor (*id.*).

In support of their motion for summary judgment, defendants made a prima facie showing of their entitlement to judgment as a matter of law by coming forward with evidence that the accident was not necessarily attributable to a defect in the floor or the bath

mat, thus demonstrating the absence of any material issue of fact (*Guiffrida v Citybank Corp.*, 100 NY2d 72, 81 [2003]; *Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, supra).

Defendants presented the affidavit of Barbara Beverland, the general manager of the Super 8 at issue, who avers that the towel bath mat supplied to plaintiff was a standard 100% cotton bath mat, intended to be used for a bathroom floor, that over 10,000 guests use these types of bathroom mats each year and that there have been no complaints or similar incidents regarding the bath mat or tub enclosure. Defendant Super 8 motels further argues that even if there were liability, it should be dismissed against Super 8 Motels that neither owned, operated or controlled the motel at issue.

In opposing the motion, plaintiff failed to meet her burden by demonstrating by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition to the motion, plaintiff fails to identify any common law, statutory or relevant industry standard imposing on hotel owners the duty to supply non-skid surfacing in the bathtub area (see, *Lunan v Mormile*, 290 AD2d 249 [1st Dept 2002]; *Portanova v Trump Taj Mahal Assoc.*, 270 AD2d at 757).

In an attempt to distinguish herself from the aforementioned line of slippery floor cases, plaintiff asserts that this is not a

slippery floor case but rather, a case where defendants furnished plaintiff with an inadequate bath mat for use on a slippery floor because it did not have slip-resistant backing which would have stopped plaintiff from falling when coming out of the shower (Affidavit of Kathleen Azzaro, dated June 26th 2007, annexed as Ex A to the Affirmation in Opposition). However, this "distinction drawn by plaintiff[] is not a meaningful one" because, just as in all of the slippery floor cases, "a surface cannot be realistically evaluated except in conjunction with its contact with another object" (*Portanova* 270 AD2d at 758). The New York courts have consistently applied the rationale of slippery floor cases to cases involving contact with intervening objects (*id.*). The more "appropriate inquiry centers not on the involvement of some intermediate object" but on whether plaintiff came "forward with direct evidence of a defect" (*id.*). Here, plaintiff presented no competent evidence of any defect in the bathroom flooring material or in the bath mat (*Murphy v Conner*, 84 NY2d at 971-972; *Portanova* at 758).

Plaintiff provided an affidavit of a licensed professional engineer who maintained that plaintiff's injuries were caused by a failure to have skids on the back of the bath mat which allegedly is a required standard in the industry (Affidavit of Andrew Yarmus,

dated July 11, 2007, annexed as Ex D to the Affirmation in opposition). While ordinarily the opinion of a qualified safety expert that a plaintiff's injuries were caused by a deviation from applicable industry standards would preclude a grant of summary judgment in favor of defendants (*id.*; *Mroz v Ella Corporation*, 262 AD2d 466, *supra*), an expert's conclusions may not be speculative and must be supported by relevant facts (*id.*). Here, however, there was no indication that the "safety expert" actually examined the bathmat or floor in question and thus the expert's comments about the causation of the accident is speculative (*Silva v 81st Street & Aveune A Corp.*, 169 AD2d 402 [1st Dept 1991]). Moreover, even if plaintiff's expert had sufficient information to form an opinion, it does not avail plaintiff that defendants may have known that the bath mat had no skids on the back because it cited no common law rule or regulation unilaterally requiring skids on the back of a bath mat in a hotel. Rather, the safety standard referred to by plaintiff's expert covers walking surfaces for pedestrians wearing ordinary footwear in walkways and is specifically inapplicable to "swimming pools, bath tubs and showers" as beyond its scope (ASTM, Designation F 1637-95, annexed to plaintiff's affirmation as Ex C). Plaintiff's expert fails to identify an industry standard applicable to the situation presented, and thus, he fails to raise

triable issue as to whether the subject mat was defective.

Defendant's motion for summary judgment, dismissing the complaint as a matter of law, on the basis that there is no issue as to liability against defendants, is granted.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment, dismissing the complaint in its entirety, is granted; the Clerk shall enter judgment accordingly.

This decision constitutes the order of the Court.

Dated: New York, New York
November 7, 2007

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED

NOV 13 2007
COUNTY CLERKS OFFICE
NEW YORK