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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 121072/2003
MAYA, MARGARITA
VS
PORT OF NEW YORK AUTHORITY
Sequence Number : 003
DISMISS

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

is 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 is decided per attached

FILED
NOV 30 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/19/07

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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MARGARITA MAYA,

Plaintiff,

-against-

Index No. 121072/03

PORT OF NEW YORK AUTHORITY, AMERICAN AIRLINES, INC., LARO SERVICE SYSTEMS, INC., and ONESOURCE FACILITY SERVICES, INC.,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

In this action seeking recovery for personal injuries, defendants American Airlines, Inc. and OneSource Facility Services, Inc. move for summary judgment dismissing the second amended complaint. For the following reasons, the motion is denied.

At approximately 9:30 A.M. on December 13, 2002, plaintiff Margarita Maya, a pre-boarding screener then-employed at LaGuardia Airport, slipped and fell on candy wrappers on a staircase within the American Airlines terminal at the airport, while ascending the stairs on her way to work (Plaintiff 5/30/06 EBT, at 53, 84, 86). Defendant American Airlines, Inc. (American) is allegedly the lessee of the building. American entered into a contract with defendant OneSource Facility Services, Inc. (OneSource), pursuant to which OneSource provided cleaning services at LaGuardia during the relevant period.

Plaintiff testified at her examination before trial that she entered the building through the flight attendant's entrance, and then proceeded up the staircase (*id.* at 68, 79). Her accident occurred on the second flight of stairs (*id.* at 89). Plaintiff did not see the wrappers before she

fell (*id.* at 87). She stated that there were "a lot" of candy wrappers on the stairs, and estimated that there were "20, maybe 30" on the stairs (*id.* at 84). The wrappers were scattered on the stairs and on the top of the landing (Plaintiff 5/31/06 EBT, at 62, 63). She also testified that the wrappers were "different colors, like those juicy candy wrappers" and that "they [were] silver inside and they [were] colorful outside" (Plaintiff 5/30/06 EBT, at 91). According to plaintiff, she first saw the wrappers the night before, on December 12th, as she was leaving the building at about 4:30 or 5:00 P.M. (*id.* at 84-85, 86). Plaintiff further testified that, while not often, she had seen candy wrappers on the stairs prior to December 12th, but never made any complaints about them to anyone (*id.* at 85-86). She allegedly injured her right knee as a result of the accident.

Plaintiff commenced this action against defendants Port of New York Authority, American, OneSource, and Laro Service Systems, Inc. (Laro). She alleges that defendants permitted a debris-strewn, unsafe, slippery, defective and dangerous condition to remain on the stairway. By stipulation of discontinuance dated February 12, 2007, plaintiff agreed to discontinue the action against Port of New York Authority (Motola Affirm., Exh. K). A review of the County Clerk's file also reveals that plaintiff discontinued the action against Laro on July 11, 2006.

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (CPLR 3212 [b]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). A failure to make such a showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (*Ayotte*, 81 NY2d at 1063). If the movant meets this burden, then the burden shifts to the nonmovant to show, also through admissible

evidence, that there is an issue of fact warranting a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*id.*).

Defendants argue that OneSource did not owe a duty of care to plaintiff arising out of its cleaning services contract with American. Before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*Strauss v Belle Realty Co.*, 65 NY2d 399, 402 [1985]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976], *rearg denied* 41 NY2d 901 [1977]). "'[I]n the absence of duty, there is no breach and without a breach there is no liability'" (*Sheila C. v Povich*, 11 AD3d 120, 125 [1st Dept 2004], quoting *Pulka*, 40 NY2d at 782). The question of whether or not a legal duty exists is a legal issue for the court (*see Eiseman v State of New York*, 70 NY2d 175, 187 [1987]).

In general, a contractor such as OneSource does not owe a duty of care to noncontracting third parties such as plaintiff (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept], *lv dismissed* 4 NY3d 739 [2004]). However, there are three exceptions to this general rule: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111); (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*id.*); and (3) "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 112, quoting *Espinal*, 98 NY2d at 140).

Under the first exception, a defendant owes a duty where it creates or exacerbates an

unreasonable risk of harm to others (*id.* at 111). This exception was described in the landmark Court of Appeals case of *Moch Co. v Rensselaer Water Co.* (247 NY 160 [1928]) as "launch[ing] a force or instrument of harm" (*id.* at 168). Other iterations of this exception emphasize whether the contractor made the subject area "less safe" than before the work began (*see Timmins*, 9 AD3d at 67, citing *Church*, 99 NY2d at 112). In this case, plaintiff claims that OneSource was negligent in failing to remove the candy wrappers on the staircase. By failing to remove the wrappers, it cannot be said that OneSource created an unreasonable risk of harm, or "launched a force or instrument of harm" to plaintiff. There is no evidence that OneSource, in performing its contractual duties, made the staircase less safe. Therefore, this exception does not apply.

As for the second exception, a defendant owes a duty of care where the plaintiff detrimentally relies upon the performance of a contractual obligation, and inaction would result not "'merely in withholding a benefit, but positively or actively in working an injury'" (*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990], quoting *Moch*, 247 NY at 167). The nexus between the defendant's contractual obligation and the noncontracting plaintiff's reliance and injury "'must be direct and demonstrable, not incidental or merely collateral'" (*Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44, 48 [1st Dept 2002], quoting *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 587 [1994]). Since there is no evidence that plaintiff relied on OneSource's cleaning contract or even knew about it, this exception also cannot apply (*see e.g. Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413 [2d Dept 2007] [exception did not apply because plaintiff testified that she had no knowledge of snow removal contract]; *Bugiada v Iko*, 274 AD2d 368, 369 [2d Dept 2000], *lv dismissed and denied in part* 96 NY2d 726 [2001] [no evidence that plaintiff knew of snow removal contract or relied

upon past performance by defendant contractor]).

Finally, a defendant may owe a duty under the third exception if it has a "comprehensive and exclusive" contractual obligation to inspect and maintain the premises safely (*see Palka*, 83 NY2d at 584, 588). In order for this exception to apply, the contractor must entirely displace the landowner's duty to maintain the premises safely (*see Espinal*, 98 NY2d at 141; *see also Timmins*, 9 AD3d at 68).

Determining whether the contractor has a "comprehensive and exclusive" maintenance obligation typically depends upon the specific language of the contract. In *Palka*, *supra*, the plaintiff, a nurse, was injured when a defectively maintained fan fell on her while she was caring for a patient in a hospital (*Palka*, 83 NY2d at 582). The Court of Appeals imposed a duty of care on the maintenance company with whom the hospital had a service contract, since the contract was "comprehensive and exclusive" (*id.* at 588) as to preventative maintenance, inspection and repair, thus making the defendant the "sole privatized provider for a safe and clean hospital premises" (*id.* at 589). In *Espinal*, *supra*, the plaintiff slipped and fell in an icy parking lot, and sued the owner's snow removal contractor (*Espinal*, 98 NY2d at 138). The Court held that this exception did not apply because, under the terms of that contract, the promisee "at all times retained its landowner's duty to inspect and safely maintain the premises" (*id.* at 141).

Cleaning services have been held to owe a duty of care to a third party if they have a comprehensive and exclusive contractual obligation to maintain an area of the premises. In *Riley v ISS Intl. Serv. Sys.* (5 AD3d 754 [2d Dept 2004]), the plaintiff, an assistant engineer, was injured when he slipped and fell on dirt, soil, and water as he was descending a ramp located in the sub-basement of a building (*id.* at 755). The defendant ISS was hired to perform cleaning

services in the commercial areas of the building, including the sub-basement (*id.* at 755-756). The plaintiff alleged that a dangerous and defective condition existed due to the presence of soil, dirt, and water deposited on the ramp, which was not timely discovered and cleaned by ISS (*id.* at 756). The Appellate Division, Second Department, concluded that ISS failed to demonstrate its entitlement to summary judgment, because "the comprehensive and exclusive contractual obligation of ISS to provide cleaning services in the relevant area of the building area [was] sufficient to support a duty of care running to the plaintiff" (*id.* at 757).

In contrast, the cleaning services contractor in *Jackson v Board of Educ. of City of New York* (30 AD3d 57 [1st Dept 2006]) was found not to owe a duty of care. In that case, the plaintiff slipped and fell on a food substance in a food preparation area near a freight elevator at a college (*id.* at 58, 65). The defendant American Building Maintenance Co. (ABM) was hired to perform certain janitorial services at the college (*id.* at 59). The First Department held that the company had no duty of care to plaintiff under the third exception in *Espinal* (*id.* at 65). Specifically, the First Department noted that ABM's contract was not comprehensive because it only assumed a responsibility for those areas specifically designated in its contract with the college (*id.*). The contract was also not exclusive since the college had a contract with another services provider to perform cleaning duties in the area where plaintiff fell (*id.* at 65-66).

Here, defendants' only evidence that OneSource did not have a "comprehensive and exclusive" obligation is deposition testimony that another company, former defendant Laro, provided cleaning services in the public areas of the American terminal (Jimenez EBT, at 8). Defendants have not submitted OneSource's contract with American in support of their motion. Curiously, they have not pointed to any specific provision of the contract to demonstrate that

OneSource merely had a limited contractual undertaking as opposed to a "comprehensive and exclusive" maintenance obligation. It also cannot be concluded that OneSource's obligation was nonexclusive in light of the above deposition testimony, given that plaintiff fell in a different area, near the flight attendant's entrance to the terminal[1] (*cf. Jackson*, 30 AD3d at 66 ["Since the . . . contract lacks exclusivity in the area where plaintiff fell, it cannot constitute the type of comprehensive and exclusive property maintenance obligation required to fit within the third exception"]). Consequently, defendants have failed to meet their burden of establishing that OneSource owed no duty of care to plaintiff (*see Dugan v Crown Broadway, LLC*, 33 AD3d 656, 657 [2d Dept 2006] [where defendant cleaning service failed to establish its entitlement to summary judgment on the ground that it owed no duty of care to the plaintiff, the burden never shifted to plaintiff to raise a triable issue of fact]).[2]

Defendants also assert that the evidence shows as a matter of law that they were not negligent. A lessee is under a duty to maintain the property in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [citation and internal quotation marks omitted]; *see also Kipybida v Good Samaritan Hosp.*, 35 AD3d 544, 545 [2d Dept 2006]). It is well settled that, in order to make out a prima facie case in

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[1]According to American's facilities manager, Patrick Brazill, this entrance was kept locked, and employees were issued keys to unlock the door (Brazill EBT, at 7-9). Thus, it appears that plaintiff's fall did not occur in a public area of the terminal.

[2]In any event, the court's review of the County Clerk's file shows that OneSource's contract with American is not a part of that file. Thus, the court cannot determine, at this juncture, whether OneSource entirely displaced the landowner's duty to maintain the premises safely.

negligence, a plaintiff must demonstrate that a defendant with a duty of care either created or had actual or constructive notice of the hazardous condition that caused the injury (*see Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [1st Dept 2007]; *Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275 [1st Dept 2005]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 226 [1st Dept 2002]). On a defendant's motion for summary judgment dismissing the complaint for lack of notice, the defendant must affirmatively establish that it had no notice of the condition as a matter of law (*see Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]; *DeMatteis v Sears, Roebuck & Co.*, 11 AD3d 207 [1st Dept 2004]; *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]).

In the instant case, there is no evidence that either American or OneSource created the dangerous condition by leaving the candy wrappers on the staircase, or had actual notice that the wrappers were on the staircase. Thus, the issue is whether defendants had constructive notice of the condition. "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]; *see also O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1st Dept 1996]). The notice must be of the specific hazardous condition and its location (*Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 351 [1st Dept 2006]). A "general awareness" that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's fall (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Although defendants argue that plaintiff has speculated about the length of time that the candy wrappers were present on the staircase, the record does not support that claim. Plaintiff

testified that, approximately 16 hours before her accident, she observed the candy wrappers on the staircase as she left the building (Plaintiff 5/30/06 EBT, at 84, 85, 92). She also submits an affidavit in which she avers that the candy wrappers that she slipped on were the same ones that she saw the day before (Plaintiff Aff., ¶ 6).[3] In view of plaintiff's testimony and affidavit, the court concludes that there are issues of fact as to whether the candy wrappers existed for a sufficient length of time for American and OneSource to discover and remove them[4] (*see Roussos v Ciccotto*, 15 AD3d 641, 643 [2d Dept 2005] [issues of fact as to constructive notice where plaintiff testified that he observed newspapers on stairwell approximately 24 hours before accident]; *Fundaro v City of New York*, 272 AD2d 516, 517 [2d Dept 2000] [defendants had constructive notice where plaintiff testified that he saw styrofoam plates, milk cartons, and napkins on the stairway about two hours before his accident]; *cf. Espinal v New York City Hous. Auth.*, 215 AD2d 281, 281-282 [1st Dept 1995] [lapse of five-minute interval between deposit of banana or other debris and accident was insufficient to establish constructive notice as a matter of law]).

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[3]Defendants argue that plaintiff's affidavit contradicts her deposition testimony, and thus presents a feigned issue of fact. They also contend that plaintiff is impermissibly attempting to change her deposition testimony. Defendants appear to base these arguments on plaintiff's testimony that she could not recall the type or size of the candy wrappers or the specific wrapper that she slipped on (Plaintiff 5/30/06 EBT, at 85, 87, 88). This, however, does not establish that she did not observe them that evening. In any event, plaintiff's statement in her affidavit is entirely consistent with her deposition testimony that the candy wrappers caused her accident, and that she saw the candy wrappers the night before (*id.* at 84, 85, 92). By offering an affidavit, plaintiff is also not seeking to change the transcript of her deposition (*see* CPLR 3116 [a]), and any issues of credibility are for the jury.

[4]Defendants have also offered no evidence as to when the subject staircase was last cleaned or inspected prior to plaintiff's accident (*see Marshall v Jeffrey Mgt. Corp.*, 35 AD3d 399, 400 [2d Dept 2006]).

Defendants further contend that plaintiff has failed to show that American used the staircase from the time she first saw the candy wrappers and her accident. This argument is without merit. As previously noted, it is defendants' initial burden to establish the lack of notice on a motion for summary judgment (*see Giuffrida*, 279 AD2d at 404).

Defendants' reliance on *Rivera v 2160 Realty Co., L.L.C.* (4 NY3d 837 [2005]) and *Cruz v New York City Tr. Auth.* (31 AD3d 688 [2d Dept 2006], *affd* 8 NY3d 825 [2007]), is misplaced. In *Rivera*, *supra*, the plaintiff tripped and fell on a beer bottle on a stairway at 5:00 A.M. (*Rivera*, 4 NY3d at 838). The plaintiff acknowledged that the bottle was not present on the stairs at 8:30 P.M. the night before (*id.*). There was also no evidence that the landlord was notified of the debris or that the bottle was present for a sufficient length of time for the landlord's employees to discover and remedy the problem (*id.*). The Court concluded that on "'the evidence presented, the [beer bottle] that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation'" (*id.* at 838-839, quoting *Gordon*, 67 NY2d at 838). In *Cruz*, *supra*, the plaintiff claimed that she slipped and fell on a newspaper that was lying on a subway staircase (*Cruz*, 31 AD3d at 689). She claimed that she had seen the newspaper, which was folded with grease stains on it, in the same position two days earlier (*id.*). The Second Department reversed the trial court's denial of the New York City Transit Authority's motion, pursuant to CPLR 4404 (a), to set aside the verdict and for judgment as a matter of law dismissing the complaint (*id.*). The Court found that the plaintiff's testimony at trial was "utterly incredible" (*id.* at 690). In contrast to *Rivera*, there is evidence herein as to how long the candy wrappers were on the staircase – plaintiff testified that she saw them 16 hours earlier. *Cruz* is also distinguishable because that case dealt with a motion to set

aside the verdict. On a summary judgment motion, the court's task is issue-finding, not issue determination, and the plaintiff's credibility only raises an issue of fact for trial (*see Quinn v Krumland*, 179 AD2d 448, 449-450 [1st Dept 1992]).

Next, defendants argue that plaintiff cannot prevail, because she cannot identify the specific candy wrapper that caused her fall. It is true that a plaintiff's failure to identify the cause of her fall is normally fatal to the complaint because "'the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation'" (*Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007], quoting *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570 [2d Dept 2003]). As noted above, however, plaintiff testified that her accident was caused by the candy wrappers on the staircase, and the testimony appears to indicate that she observed 20 to 30 wrappers on the stairs the night before she slipped and fell (Plaintiff 5/30/06 EBT, at 84). While plaintiff could not identify any specific wrapper that she slipped on, she provided a description of the wrappers and a sufficient nexus between the condition of the staircase and the circumstances of her fall to establish causation (*see id.*; *see also Zanki v Cahill*, 2 AD3d 197, 198-200 [1st Dept 2003], *affd* 2 NY3d 783 [2004]; *Kelsey v Port Auth. of N.Y. & N.J.*, 52 AD2d 801 [1st Dept 1976]; *Gramm v State of New York*, 28 AD2d 787, 788 [3d Dept 1967], *affd* 21 NY2d 1025 [1968]). "Circumstantial evidence or common knowledge may provide a basis from which the causal sequence may be inferred" (*Gramm*, 28 AD2d at 788 [internal quotation marks and citation omitted]). To the extent that defendants argue that the candy wrappers plaintiff allegedly slipped may not have been the same wrappers that plaintiff saw the night before, the court notes that defendants have submitted no proof that the stairway at issue was cleaned that evening, to refute plaintiff's claim.

Finally, the court rejects defendants' assertion that the candy wrappers were, as matter of law, an "open and obvious" condition that was not inherently dangerous. Whether an alleged dangerous condition is latent or open and obvious is generally a question of fact (*see DeJesus v F.J. Sciame Constr. Co., Inc.*, 20 AD3d 354 [1st Dept 2005]; *Garrido v City of New York*, 9 AD3d 267, 268 [1st Dept 2004]). "For a condition to be open and obvious as a matter of law, it must be one that could not be overlooked by any observer reasonably using his or her ordinary senses" (*Garrido*, 9 AD3d at 268). A court may determine that a risk is open and obvious as a matter of law when the established facts compel that conclusion, based on clear and undisputed evidence (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). In this case, it is for the jury to decide whether the candy wrappers were open and obvious. Contrary to defendant's contention, plaintiff did not testify that she saw the wrappers *immediately* before her accident; rather, she testified that she saw them before her accident (Plaintiff 5/30/06 EBT, at 87:5-7, 16-18). She testified that she was looking upwards as she walked up the stairs (*id.* at 86).

Even if defendants had established that the condition was open and obvious, it would only relieve them of the duty to warn of the condition, but would not relieve them of the duty to keep the premises in a reasonably safe condition (*see Garrido*, 9 AD3d at 268). That an alleged defective condition is open and obvious only raises an issue of fact as to the plaintiff's comparative negligence (*see Jackson v Fenton*, 38 AD3d 495, 496 [2d Dept 2007]).

Accordingly, it is

ORDERED that the motion (seq. no. 003) by defendants American Airlines, Inc. and OneSource Facility Services, Inc. for summary judgment dismissing the second amended

complaint is denied.

This Constitutes the Decision and Order of the Court.

Dated: November 19, 2007

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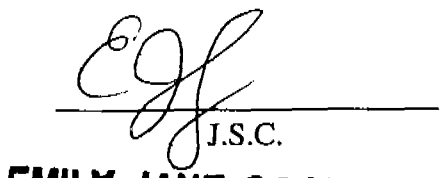

J.S.C.

EMILY JANE GOODMAN