Fioriello v Atlantic Realty Trust
2007 NY Slip Op 34590(U)
September 21, 2007
Supreme Court, New York County
Docket Number: 106719/04
Judge: Carol R. Edmead

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

CAROL EDMEAD
J.S.C.

JEAN FIORIELLO,

Plaintiff,

-against-

ATLANTIC REALTY TRUST,
ATLANTIC HYLAN CORP., CHEVY'S INC.,
APPLE-METRO, INC., BATTERY PARK FRESH, LLC,
BRAVO HYLAN, LLC,

Defendants.

Index No. 106719/04

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

Defendants Atlantic Realty Trust and Atlantic Hylan Corp. (the "Atlantic defendants"), in motion sequence 007 seek an order, pursuant to CPLR 3212, (1) dismissing the Complaint of plaintiff Jean Fioriello ("plaintiff") and all cross claims of co-defendants Chevy's, Inc., Apple-Metro, Inc. ("Apple-Metro"), Battery Park Fresh, LLC ("Battery Park"), and Bravo Hylan, LLC ("Bravo") (collectively the "Chevy defendants"),[2] and (2) for summary judgment over and against the Chevy defendants for defense and indemnification from the Chevy defendants, including reimbursement of all attorneys fees and defense costs incurred to date and until the conclusion of the lawsuit, as well as for breach of the separate obligation to procure insurance.

By separate motion sequence 008, the Chevy defendants seek an order, pursuant to CPLR

[1] Motions bearing sequence numbers 007 and 008 are consolidated for joint disposition and decided herein.

[2] Notwithstanding the fact that the Atlantic defendants' notice of motion requests dismissal of the cross claims of the Chevy defendants, the Amended Answer of the Chevy defendants contains no such cross claims against the Atlantic defendants, and the Atlantic defendants' memorandum of law does not address dismissal of any cross claims.

3211 and 3212, dismissing all claims and cross claims against them on the grounds that (1) the plaintiff has failed to make out a *prima facie* case of negligence in that plaintiff has not identified a defect or proximate cause of her alleged accident, and (2) they did not breach the obligation to procure insurance and are not required to indemnify the Atlantic defendants under either contract or common law principles.

This matter is a personal injury action arising from an alleged slip and fall on August 7, 2003, near the entranceway of Chevy's Fresh Mex Restaurant ("Chevy's), located at 2690 Hylan Boulevard, Staten Island, New York (the "accident site"). Plaintiff was lawfully at the restaurant as a patron and exiting the restaurant when she fell due to a slippery condition that she claims was oil that existed on the ramp that provides ingress and egress to the restaurant.

The Atlantic defendants have asserted cross claims against the Chevy defendants for contractual and/or common law indemnification and breach of the obligation to procure insurance coverage.

The lease agreement in effect at the time of plaintiff's accident was dated January 30, 1974 with modifications through the sixth modification dated January 9, 2003 (the "Lease").

Plaintiff's Deposition Testimony

Plaintiff's accident happened near Chevy's Restaurant in the Hylan Plaza Mall (p. 8). Plaintiff has frequented the mall two to three times weekly prior to her accident and had been to Chevy's Restaurant four or five times prior to her accident, and was unaware of any accidents at the mall anywhere at the premises of the mall where someone tripped, slipped and fell (pp. 9-10). Plaintiff had never made any prior complaints to anyone with regard to the premises of the shopping mall and is unaware of anyone else making any complaints, nor had she made any

complaints about the condition of the parking lot or Chevy's Restaurant. Prior to her accident she never noticed any debris or any substances or anything at or near the entrance way to the Chevy's Restaurant (pp. 10-11).

In response to the questions: "what caused you to fall?" plaintiff stated: "It was very slippery. It had just started to rain, like that misty rain, and I just sort of - there is like an incline that I went down and I just - - I was going head first and I just turned and fell on my right side on my knee." (pp. 13-14) It was raining right before the accident occurred (p. 20). After plaintiff's fall, she never turned around to look at the area where she slipped, nor did she return to the site of her fall to see what caused her to fall (pp. 22-23). When asked what was the substance on the ground in the area where she slipped, she answered: "It was rain. It was like very slick....There may have been oil because there were always bikes and cars and everything around that area, but I can't say for sure." (p. 26) When asked if there may have been oil because there were motorcycles in the area on occasion, plaintiff answered: "Not really. It just like seemed, you know, like I just slid, ...I mean, I don't know....I don't want to say for sure that it is definitely oil." (pp. 26-27) On previous occasions she has seen oil all around the area (p. 28).

The Chevy Defendants' Contentions

The Complaint alleges that the defendants were negligent in failing to warn plaintiff about a hazardous condition at the Chevy's entranceway. The Bill of Particulars alleges that the defendants were negligent in their "failure to inspect, maintain and repair the dangerous and defective condition on the entranceway of the aforementioned property, namely an oily and slippery substance." Plaintiff further alleges in her Bill of Particulars that defendants had actual and constructive notice of an alleged oily and slippery condition. Based on plaintiff's deposition

testimony, it is clear that plaintiff herself does not know what, if anything, caused her to fall. No one ever told plaintiff they saw oil in the area where she slipped on the date of the accident. No one ever looked at the area where plaintiff fell to have even observed oil. After plaintiff fell, neither she nor her son ever checked the area where she fell to see what, if anything, may have caused plaintiff's fall. Essentially, plaintiff claims to have simply slipped on wet pavement after a misty rain. At best, plaintiff merely speculated at some point that there "may" have been oil on the ground from motorcycles that may have been in the parking lot near the Chevy's entranceway. It should further be noted that plaintiff's emergency room records indicate she stated that she fell outside of a Chevy's restaurant "because" it was raining outside. There is no mention of any oily substance.

Of particular relevance at this juncture are paragraphs 10 and 15(b) of the Lease. Paragraph 10 requires the tenant to maintain and keep in good repair both the interior and exterior of the demised premises and further provides that the tenant must indemnify the landlord against any claims by reason of repair work at the premises. Paragraph 15(b) requires the tenant to procure general liability insurance naming the landlord as an additional insured.

The Chevy defendants argue that the Atlantic defendants' cross claims lack merit. The Atlantic defendants are not entitled to contractual indemnification because plaintiff's injuries/claims did not arise from the Chevy defendants' failure to maintain the premises in good repair and was not by reason of any repair work undertaken by the tenant. Therefore, the indemnification provision of the Lease was never triggered.

And, the Chevy defendants have procured insurance with Zurich American Insurance, Policy # GLO 9309658-00, effective dates 03/01/03 - 01/01/04 (the "Policy"). Specifically, the

Chevy defendants refer to page 10 of the Policy which provides that "any person or organization to the extent required of the insured by a written contract is an additional insured under this policy, but only as respects [to] claims or occurrences which arise from the operation of the named insured." Therefore, the Policy, in conjunction with the applicable Lease, legally grants the Atlantic defendants "Additional Insured" status as required by the Lease.

The Atlantic Defendants' Motion for Summary Judgment and Partial Opposition

Plaintiff cannot establish the existence of a defect. Nor can plaintiff establish the existence of oil at or about the area of her accident at the time it occurred, much less that this alleged condition was the proximate cause of her accident. Inasmuch as plaintiff cannot state what caused her to slip and fall, she cannot establish actual or constructive notice of the alleged condition. Thus, summary dismissal of her complaint is warranted.

Further, it is clear from the Lease that the responsibility for the maintenance of the area where the accident is alleged to have occurred rests with the Chevy defendants herein. Thus, if a dangerous condition existed at or about the time of the accident, which the Atlantic defendants deny, responsibility rests with the Chevy defendants herein.

Moreover, the Atlantic defendants are entitled to contractual and/or common law indemnification, as well as damages, based on the breach of the obligation to procure insurance coverage. And, to date the Chevy defendants have failed to provide a defense and indemnification to the Atlantic defendants despite a timely tender and multiple requests. Thus, the Chevy defendants have failed to procure effective coverage.

The lease in effect at the time of the occurrence required Bravo and Apple-Metro, as the guarantor of Bravo's obligations under the Lease, to maintain the area where the accident

occurred at its sole cost and expense.

According to the affidavit of Nina Frankel ("Frankel"), former controller in the Atlantic Realty Trust office, while Chevy's is not part of the main plaza it is contained within the same parking lot as the Hylan Plaza Shopping Mall.

In August of 2003, Atlantic Realty trust did not employ any janitorial people directly to maintain the Hylan Plaza. Atlantic Realty Trust contracted with Quality Shopping Center Maintenance to perform sweeping in the parking lot. Upon information and belief, Quality Shopping Center Maintenance did not sweep the entranceway to Chevy's. Atlantic Realty Trust also contracted with MJ&T Corp. to perform snow removal in the parking lot. Upon information and belief, MJ&T Corp. did not perform any snow removal on the entranceway to Chevy's.

Paragraph 10 of the Lease required the tenant to maintain the interior and exterior of the demised premises, including the sidewalks, at its sole cost and expense. Paragraph 15 of the Lease required the tenant to provide and keep in force general liability insurance in which the landlord was to be named an additional insured with minimum limits for bodily injury of $500,000 per person and $3 million per occurrence. The policy was to cover the entire premises including sidewalks and streets abutting thereon.

Frankel explains that at the time of her deposition, she had only assumed the position of property manager a mere two weeks earlier, and had no knowledge as to whom would be responsible for maintaining the light gray cement area directly in front of the entrance to Chevy's. Inasmuch as she has since reviewed the Lease in her capacity as property manager and based also on the custom and practice at the Hylan Plaza Shopping Mall with regard to sweeping and snow removal, she now knows that the tenant is responsible for maintaining that area.

Finally, she is not aware of any accidents or complaints with respect to the light gray cement area or entranceway prior to the plaintiff's accident.

Plaintiff's Opposition

It is undisputed that on the date of the accident, there was a car show permitted to take place in the parking lot adjacent to the location where the plaintiff slipped and fell. In addition, these car shows were permitted to take place in the aforementioned parking lot on Wednesday evenings for several summer seasons prior to the date of the accident. These car shows often included hundreds of motorcycles and cars from different time periods. At her deposition, plaintiff testified that on prior occasions she did in fact observe the presence of oil on the concrete entranceway where she slipped and she states that she saw motorcyces parked at the entrance ramp where the oil was the caused her to slip.

Also, the representative of Chevy's produced at deposition testified that the black spots at the entranceway to the restaurant had existed at the location since he began his employment.

The Chevy Defendants' Reply

Paragraph 4 of plaintiff's opposition wrongfully states that plaintiff "fell due to a slippery condition that she claims was oil." Paragraph 12 wrongfully states that plaintiff "did observe the presence of oil on the concrete entranceway where she slipped." Paragraph 58 wrongfully states that plaintiff "expressly states that oil caused her to fall." However, a review of plaintiff's deposition testimony regarding oil, as cited in Chevy's affirmation in support of this motion, shows that (a) plaintiff did not know whether there was any oil in the area of her fall at the time of her fall; (b) plaintiff never observed the presence of oil on the concrete where she fell on the date of her accident; (c) the only thing plaintiff expressly stated at deposition was that she did not

observe any oil in the area of her fall on the date of her accident, was never told by anyone that they saw oil in the area of her fall on the date of her accident, and has no clue as to what caused her to fall.

Plaintiff's self-serving affidavit now conveniently asserts in the most unequivocal terms that she slipped due to an oil substance. However, a self-serving affidavit prepared in response to a defendants' summary judgment motion cannot substitute plaintiff's prior and unambiguous deposition testimony, that she simply does not know what caused her to fall.

Plaintiff's speculation concerning car shows cannot salvage an action that should be dismissed as a matter of law.

The Atlantic defendants' Reply

The Atlantic defendants maintain that plaintiff's testimony establishes that she does not know what caused her to slip and fall, cannot prove that oil was present in an around the subject area at the time of her accident, that the car shows are irrelevant to the facts of this case, and that there are no outstanding requests for discovery. Further, as to their cross claims against the Chevy defendants, no such insurance coverage has been made available to the Atlantic defendants and that the Lease implicates indemnification for reimbursement of attorneys fees and defense costs in favor of the Atlantic defendants.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d

546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Both the Chevy defendants and the Atlantic defendants have established their *prima facie* basis for entitlement to summary judgment dismissing the plaintiff's Complaint.

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

Where there is a question of weather being a factor in causing a dangerous condition, in general, to impose liability for an injury proximately caused by a dangerous condition created by weather, a defendant must either have created the dangerous condition, or had actual or constructive notice of the condition, and a reasonable time to undertake remedial actions (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646; *Yearwood v Cushman & Wakefield*, 294 AD2d 568, 742 NYS2d 661; *Negron v St. Patrick's Nursing Home*,

248 AD2d 687, 671 NYS2d 275). Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

Defendants have established that they received no prior actual or constructive notice of a dangerous or defective condition that caused plaintiff's accident. In fact, the only sure thing deduced from plaintiff's deposition testimony is that it had just started to rain, it was slippery and she fell. With respect to any potential oily condition, there is no evidence of any actual or constructive notice of said condition resulting in plaintiff's accident.

Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv. dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

In the instant case, there is not one scintilla of evidence of notice of an oily condition causing plaintiff's accident. Plaintiff's deposition testimony indicates that she was not sure that there was any oil at the site of her accident. There is no evidence that defendants breached any duty of care to the plaintiff.

Speculation

In opposition to the instant summary judgment motions, plaintiff argues that it is undisputed that on the date of the accident, there was a car show permitted to take place in the parking lot adjacent to the location where the plaintiff slipped and fell. In addition, these car shows were permitted to take place in the aforementioned parking lot on Wednesday evenings for several summer seasons prior to the date of the accident. These car shows often included hundreds of motorcycles and cars from different time periods. At her deposition, plaintiff testified that on prior occasions she did in fact observe the presence of oil on the concrete entranceway where she slipped and she states that she saw motorcycles parked at the entrance ramp where the oil was the caused her to slip.

Not only does this litany of supposition fail to constitute probative evidence (*see Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 754 N.Y.S.2d 195, 784 N.E.2d 68 [2002]), but the assertions are belied by the record.

And, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344

NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Further, hindsight reasoning is insufficient to defeat summary judgment (*see Zawadzki v Knight,* 76 N.Y.2d 898, 561 N.Y.S.2d 907, 563 N.E.2d 278 [1990]). Plaintiff's self-serving affidavit prepared in response to a defendants' summary judgment motions cannot substitute plaintiff's prior and unambiguous deposition testimony, that she simply does not know what caused her to fall. As plaintiff failed to raise an issue of fact as to defendants' liability, the Complaint is dismissed.

As such, the common law indemnification cross claims are moot. However, the record fails to establish that the cross claims for contractual indemnification, including attorneys fees, contractual duty to defend, and breach of duty to procure insurance claims lack merit as a matter of law at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Chevy's Inc., Apple-Metro, Inc., Battery Park Fresh, LLC and Bravo Hylan, LLC, (motion sequence 008) for an order, pursuant to CPLR 3211 and 3212, dismissing the Complaint of plaintiff Jean Fioriello is granted, the entire complaint is severed and dismissed, and **the Clerk of the Court is directed to enter judgment accordingly**. It is further

ORDERED that the branch of the motion (motion 008) of defendants Chevy's Inc., Apple-Metro, Inc., Battery Park Fresh, LLC and Bravo Hylan, LLC, for an order, pursuant to CPLR 3211 and 3212, dismissing all cross claims against them asserted by defendants Atlantic

Realty Trust and Atlantic Hylan Corp., is granted to the extent that the cross claim for **common law indemnification** is dismissed, in light of the instant decision. It is further

ORDERED that the branch of the motion (motion 008) of defendants Chevy's Inc., Apple-Metro, Inc., Battery Park Fresh, LLC and Bravo Hylan, LLC, for an order, pursuant to CPLR 3211 and 3212, dismissing the cross claim of defendants Atlantic Realty Trust and Atlantic Hylan Corp. for contractual indemnification, breach of obligation to procure insurance, and contractual duty to defend, is denied. It is further

ORDERED that the motion of defendants Atlantic Realty Trust and Atlantic Hylan Corp. in motion sequence 007 for an order, pursuant to CPLR 3212, dismissing the Complaint of plaintiff Jean Fioriello is granted, the entire complaint is severed and dismissed, and **the Clerk of the Court is directed to enter judgment accordingly**. It is further

ORDERED that the branch of the motion by defendants Atlantic Realty Trust and Atlantic Hylan Corp. for judgment over and against the Chevy defendants for defense and indemnification, including reimbursement of all attorneys fees and defense costs incurred to date and until the conclusion of this lawsuit (motion 007) is denied as to their cross claims against the Chevy defendants for contractual indemnification, breach of obligation to procure insurance, and claim for attorneys' fees, and denied as moot as to Atlantic's common law cross claims in light of this court's decision dismissing plaintiff's complaint in its entirety. And it is further

ORDERED that counsel for the Chevy's defendants shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

CAROL EDMEAD
J.S.C.

This constitutes the decision and order of the Court.

Dated: September 21, 2007

Hon. Carol Robinson Edmead, J.S.C.