

**Dillman v New Water St. Corp.**

2008 NY Slip Op 30466(U)

February 15, 2008

Supreme Court, New York County

Docket Number: 0108590/2005

Judge: Emily Jane Goodman

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

**EMILY JANE GOODMAN**

PRESENT.

Index Number : 108590/2005

DILLMAN, JEAN

vs

NEW WATER STREET

Sequence Number : 002

SUMMARY JUDGMENT

PART 17

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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 \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided*

*per attached*

**FILED**  
FEB 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/15/08

**EMILY JANE GOODMAN c.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK; PART 17

-----x  
JEAN DILLMAN,

Plaintiff,

-against-

Index No.: 108590/05

NEW WATER STREET CORP., and  
AMERICAN BUILDING MAINTENANCE CO.,  
d/b/a ABM JANITORIAL SERVICES,

Defendants.  
-----x

**EMILY JANE GOODMAN, J.S.C.:**

In this trip and fall case, plaintiff Jean Dillman seeks recovery for personal injuries against defendants New Water Street Corp., owner of the commercial office building (the Owner) located at 55 Water Street, New York City (the Building), and American Building Maintenance Co., d/b/a ABM Janitorial Services (ABM), the contractor that provides cleaning and janitorial services at the Building. After the conclusion of discovery, defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's amended complaint. For the reasons stated herein, defendants' motion for summary judgment is denied.

**Background**

Plaintiff alleges in her amended complaint that the accident happened on May 3, 2004 in the lobby of the Building. She further alleges that the accident was caused by defendants' failure or neglect to use "the customs commonly employed in the

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trade to prevent and/or cure the dangerous condition," that created a "tripping hazard by improperly placing rugs/rain mats which overlapped." Amended Complaint, ¶ 16. At her deposition, plaintiff testified that she has been working for a company whose office is located in the Building since 2001. She also testified that on the day of the accident, while leaving work for home, she fell in the Building's lobby when the bottom of her right foot was caught between two overlapping mats. She further testified that, at the moment immediately before she tripped and fell, she was looking straight ahead as she walked toward the Building's exit, instead of looking down at the floor.

Defendants do not dispute that the mats were overlapped on the day of the accident. Indeed, they state that since 2000, the Building manager, Ernest Rivera, has instructed ABM employees that the mats should overlap each other anywhere from four to six inches when placed on the lobby's floor, which is made of marble tiles. Defendants also state that the mats are laid down during inclement weather (snow or rain) to avoid people from slipping and falling on the wet floors. Defendants also state that, while the mats are of different lengths, they are about 4 feet 10 inches wide, 1/16 inch thick at the edge, and measure 1/8 inch in height when overlapped. Defendants further state that the same mats, which have been in use since 2000, have a fabric top, a rubber-backed bottom, and a rubber edge.

In their summary judgment motion, defendants assert that there is no claim or evidence that plaintiff's accident was caused by mats that were torn, frayed, bunched or curled up, or were otherwise defective. Defendants argue that, because there is no evidence that a defective condition existed with respect to the mats at the time of the accident, summary judgment dismissing the complaint should be granted. They further argue that even if the overlapping mats could be deemed a defective condition, such defect was "trivial" because the mats on which plaintiff tripped and fell were merely 1/16 inch thick, and therefore did not constitute an actionable defect.

In opposition, plaintiff submitted an expert affidavit executed by Anthony Mellusi. In his affidavit, Mellusi opined that, based upon his on-site inspection of the Building lobby and the subject mats, the failure to lay the mats flat, end-to-end, on the marble floor, exposed users to a greater risk of tripping and falling while exiting the Building. He also stated that the mats are 3/8 inch thick, as opposed to defendants' assertion that they are only 1/16 inch thick. Plaintiff asserts that the improper overlapping of floor mats created a tripping hazard, particularly for people (such as plaintiff) leaving the Building, because they were faced with a raised and exposed edge.

#### Discussion

In setting forth the standards for granting or denying

a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals has noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Following the guidance of the Court of Appeals, the trial courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. See e.g., *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1<sup>st</sup> Dept 2006) (because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1<sup>st</sup> Dept 1997) (in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion").

On the other hand, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary

judgment motion. *Alvarez, supra*, 68 NY2d at 324-325. Moreover, summary judgment is generally granted in favor of the movant if there are no material and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2<sup>nd</sup> Dept 1988).

Defendants' Summary Judgment Motion Should Be Denied

In support of their summary judgment motion, defendants cite to several cases that stand for the proposition that, if a plaintiff was unable to describe a defective condition affecting the mat/rug that caused her to fall, or failed to establish an issue of fact as to whether the mat/rug that caused the accident was bunched/bumped up prior to the accident or was bunched/bumped up as a consequence of the accident, the defendant was entitled to summary judgment dismissing the complaint. *Kasner v Pathmark Stores, Inc.*, 18 AD3d 440, 440 (2<sup>nd</sup> Dept 2005) (plaintiff "failed to present any evidence that the bump in the entrance mat existed for any appreciable length of time prior to the accident"); *Christopher v New York City Transit Authority*, 300 AD2d 336, 336 (2<sup>nd</sup> Dept 2002) (complaint dismissed because plaintiff "did not know what caused her foot to become hooked on the floor mat"); *Richardson-Dorn v Golub Corp.*, 252 AD2d 790, 791 (3<sup>rd</sup> Dept 1998) ("plaintiff acknowledged that she did not notice any problem with the rug prior to the accident and only saw it bunched up after she was already lying on the floor").

The above cases cited by defendants are inapposite and

distinguishable. In this case, plaintiff testified that the overlapped mats caused her right foot to be caught between them (i.e. her foot was caught by the raised edge of the top mat), which resulted in her trip and fall. Contrary to defendants' cited cases, plaintiff knows the cause of her accident, and does not claim that the mats were bunched or bumped up before the accident. On the other hand, although plaintiff does not claim that the mats were worn or frayed, she (and her expert) asserts that the overlapping of mats was an inherently defective condition because it enhanced the risk of people tripping over them, which was the proximate cause of her injury.

Notably, there is a disputed issue of fact as to whether the mats are only 1/16 inch thick (as measured by ABM's employee Dzemal Cobovic) or 3/8 inch thick (as measured by plaintiff's expert). The difference in thickness is 600%. In other words, it takes six mats of 1/16 inch to equal to the thickness of one 3/8 inch mat; and when two mats of 3/8 inch overlap, they measure 3/4 inch (versus 1/8 inch) in height. Because defendants failed to demonstrate the absence of material triable issue of fact, summary judgment cannot be granted in their favor, with respect to the mat thickness issue alone. *Thomas v Holzberg*, 300 AD2d 10, 11 (1<sup>st</sup> Dept 2002) (motion for summary judgment denied because defendant failed to produce admissible evidence that no triable issue of fact existed).

Further, defendants argue, without submitting any expert affidavit or testimony, that the overlapping of mats was not a defective condition because the building manager, Ernest Rivera, has allegedly instructed and required that the mats be overlapped.<sup>1</sup> This argument is without merit and not supported by legal precedent. *Adams v Hilton Hotels, Inc.*, 13 AD3d 175, 178 (1<sup>st</sup> Dept 2004) ("Expert testimony is justified where resolution of issues involved requires professional or scientific knowledge or skill beyond the range of the ordinary person's training or intelligence"). Thus, a defendant's own practice, standing alone, cannot serve as evidence of a non-defective condition, especially when defendant failed to demonstrate that its practice is in conformity with industry standards or community practices.

Conversely, plaintiff's expert, Anthony Mellusi, opines that defendants' "failure to lay the floor mats flat [without overlapping] on the marble floor was a deviation from generally good and accepted engineering standards as it exposed users to greater risk of tripping and falling". Mellusi Affidavit, ¶ 17. Defendants have not addressed the issue of whether their practice of overlapping mats complies with "good and accepted engineering standards," such as the standards or guidelines proposed or adopted by the American Society of Safety Engineers, or whether

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<sup>1</sup> The record does not show whether Rivera has been deposed or otherwise given testimony in this case.

such practice otherwise complies with any applicable national, state or local rules or regulations. This issue is particularly relevant when overlapping mats exceed a certain thickness or height so as to pose a tripping hazard.

In their reply to plaintiff's opposition, defendants neither accept nor deny that the mats are 3/8 inch thick, as asserted by plaintiff's expert. Instead, they insist in arguing that the "elevation differential" (3/8 inch versus 1/16 inch in height) is a "trivial matter," and that plaintiff's complaint should be dismissed as a matter of law. Reply Affirmation, ¶ 7. Notably, however, it is perplexing why in their reply, defendants repeatedly refer to the mat's height (or thickness) as its width when they speak of an "elevation differential." See e.g., Reply Affirmation, ¶ 4 ("the overlapping edge upon which plaintiff tripped being only 1/16 or 3/8 of an inch in width"); ¶ 5 ("the width of the edge of the mat over which plaintiff tripped"); and ¶ 6 ("3/8th of an inch in width edge").

In support of their argument that the mat elevation differential is trivial, defendants rely on a litany of specific cases, as discussed below, which stand for the proposition that a difference in height elevation of 3/4 inch (or even higher) was too trivial to be actionable as a matter of law. See e.g., *Zalkin v City of New York*, 36 AD3d 801 (2d Dept 2007) (3/4 inch difference in height between adjacent edges of concrete slabs was

trivial); *Joseph v Villages at Huntington Home Owners Ass'n, Inc.*, 39 AD3d 481 (2d Dept 2007) (5/8 inch in height difference between curb and sidewalk was trivial); *Hawkins v Carter Community Housing Dev. Fund Corp.*, 40 AD3d 812 (2d Dept 2007) (height difference of 1-1/4 inch between two sidewalk slabs was trivial). It is noteworthy that none of defendants' cited cases involved injuries caused by overlapping mats; instead, most, if not all, of the cited cases dealt with height difference defects that involved sidewalks, curbs, front door saddles, potholes, drain holes, parking lots and similar outdoor structures. As defendants have not demonstrated that the tripping risks associated with height differentials in outdoor structures are comparable to the tripping risks associated with uneven mats placed in building lobbies, defendants' cited cases are of limited value.

In *Trincere v County of Suffolk* (90 NY2d 976 [1997]), in addressing whether a 1/2 inch elevation difference of a concrete slab in the plaza area of a municipal building was non-actionable as a matter of law, the Court of Appeals held that there is no "minimal dimension test" or "per se rule" that a defect must be of a certain minimum height to be actionable, and that a defendant's liability "depends on the peculiar facts and circumstances of each case and is generally a question of fact" for the trier of facts. *Id.* at 977. While noting that "a

mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable," the Court affirmed the lower court's decision because no triable issue of fact was presented in that case to preclude the granting of summary judgment in favor of the defendant. *Id.* at 977-978.

Similarly, in addressing whether a shallow dip or depression in a parking lot was a trivial defect, the Appellate Division, First Department, stated that "[W]hile a gradual, shallow depression is generally regarded as trivial ... the presence of an edge which poses a tripping hazard renders the defect nontrivial," and that it would be appropriate to assess the hazard posed by the defect "in view of the peculiar facts and circumstances" of the case. *Glickman v City of New York*, 297 AD2d 220, 221 (1<sup>st</sup> Dept 2002) (citations and internal quotation marks omitted). More recently, in *Jacobsen v Krumholz* (41 AD3d 128, 129 [2007]), in affirming the denial of defendant's motion for summary judgment where plaintiff tripped and fell on the border of a parking lot surface adjoining defendant's sidewalk, the First Department held that "there were triable issues of fact as to whether the defect was trivial and as to whether the defendant had constructive notice" that the "complained-of condition was not suddenly created."

In light of the foregoing, defendants' argument that the elevation differential in this case is trivial, "as a matter

of law," is without merit. As the First Department specifically stated in *Glickman, supra*, "the presence of an edge" caused by height difference could render a defect "nontrivial" because it posed a "tripping hazard." The instant case involves potential hazards posed by overlapping mats, which formed a raised edge that could increase the risk of tripping. Under *Glickman*, this renders the height differential caused by the overlapped mats "nontrivial," and summary judgment cannot be granted in favor of defendant as a matter of law. Further, although compliance with industrial standards or community practices may provide a safe harbor for a defendant, defendants have not provided any evidence that their practice of placing overlapping mats in the Building's lobby complies with any applicable standard.<sup>2</sup>

Accordingly, it is

ORDERED that the motion for summary judgment by the defendants are denied; and it is further

ORDERED that the parties appear before Part 17, Room 422, on March 25, 2008 for settlement, and, if no settlement is reached, the parties will be immediately sent out to select a

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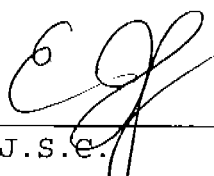
<sup>2</sup>In their reply brief, defendants raised for the first time the issue of "notice requirements." Reply Affirmation, para. 4. Because this issue is not timely raised, it is not entitled to consideration by the court. *Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 159 (1<sup>st</sup> Dept 2003); *Scherrer v Time Equities, Inc.*, 218 AD2d 116, 120-121 (1<sup>st</sup> Dept 1995) ("Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion") (citation omitted).

jury for trial.

**This constitutes the Decision and Order of the court.**

Dated: February 15, 2008

ENTER:

  
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J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
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