

Purcell v York Bldg. Maintenance Corp.
2008 NY Slip Op 31606(U)
June 2, 2008
Supreme Court, New York County
Docket Number: 0116764/2006
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Justice _____

Index Number : 116764/2004
PURCELL, MARY
VS.
YORK BUILDING MAINTENANCE
SEQUENCE NUMBER : # 003
SUMMARY JUDGMENT

INDEX NO. 116764-04

MOTION DATE _____

MOTION SEQ. NO. #003

MOTION CAL. NO. _____

e read on this 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

at ruled

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

FILED
JUN 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/2/08

[Signature]
EMILY JANE GOODMAN ^{J.S.C.}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

-----X

MARY PURCELL,
Plaintiff,

-against-

YORK BUILDING MAINTENANCE CORP. and
CBC (AMERICA) CORP d/b/a TOLI
INTERNATIONAL,
Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

Index No. 11676404



In this personal injury action, plaintiff Mary Purcell alleges that, on May 9, 2003, she slipped and fell in a fifth floor hallway at the Faculty Practice Building at New York University Medical Center (NYU Medical Center), while on her way to the ladies' restroom. Plaintiff subsequently brought this action against, inter alia, the janitorial services company that serviced portions of NYU Medical Center. Defendant York Services Industries, Inc., sued herein as York Building Maintenance Corp., moves for summary judgment dismissing the complaint, contending that it did not create the allegedly dangerous condition which caused plaintiff's injury. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff, an office manager for a surgeon at the hospital, testified at her deposition that she slipped while walking from her office suite to the ladies' room (Plaintiff Dep., at 10, 33). According to plaintiff, the floor on which she slipped was installed approximately one or one-and-a-half months prior to her fall (*id.* at 17-18). Plaintiff did not recall seeing any person wax or buff the floor before she fell, but had previously seen workers sweeping and mopping the floor (*id.* at 19-20). She stated that she observed the floor to be "a little more slippery than usual,"

“very shiny,” and “[a]ppeared overwaxed” or “very waxed” (*id.* at 24-25). Plaintiff testified that she believed that the floor was shinier than it had been on previous days (*id.* at 29). After her fall, she did not observe any liquid or anything else on the floor, and did not recall feeling anything unusual or sticky on her clothing after her fall (*id.* at 37-38). Plaintiff did, however, observe that a carpet and yellow caution signs warning of slippery conditions were placed near where she fell after the accident (*id.* at 75).

Following the accident, York’s building manager, Dennis Sullivan, who was in charge of inspecting the building’s floors, inspected the fifth floor hallway with York’s president, Irving Buchsbaum, after being notified about plaintiff’s fall (Sullivan Dep., at 7, 13-14). Sullivan testified at his deposition that he noticed “absolutely nothing unusual” during the inspection, stating that he “walked from one end of the corridor to the other, and to me it was fine, to my boss it was fine” (*id.* at 14). According to Sullivan, he did not see any substance that should not have been on the floor, such as wax or another foreign substance or liquid (*id.* at 19). Sullivan stated that York did not wax the floor from the time that the floor was installed until plaintiff’s accident because York was “giving it time to set” and “just kept it dusted”; York was waiting for the building administrator’s permission to wax the floor (*id.* at 12). He further stated that York kept maintenance records on the waxing of the floors for two years (*id.* at 27-28).

York’s contract with the hospital required it to sweep, mop, and recoat floor surfaces (Buchsbaum Dep., at 13). After the floor was installed on the fifth floor, NYU Medical Center provided York with the maintenance guide for the floor, which was manufactured by a company named Toli (*id.* at 15-16, 22). York filed for bankruptcy three months after plaintiff’s injury in July 2003, and the nightly maintenance records were sold in a bankruptcy sale to a non-party (*id.*

at 17-18).

In her verified bill of particulars, plaintiff alleges that York created a dangerous condition by, inter alia, “overwaxing,” “improperly and inadequately waxing,” “failing to properly buff [the] floor,” and “improperly and inadequately buffing” the floor (Verified Bill of Particulars, ¶ 3). Plaintiff further alleges that York failed to warn her about the allegedly “ultra-slippery” condition of the floor (*id.*). She claims that notice is not an issue because York created the dangerous condition (*id.*, ¶ 10).

During discovery, plaintiff requested that York produce the following documents and information: (1) the identities of York employees who mopped the hallway on the evening of May 8, 2003; (2) nightly reports for a one-month period before May 9, 2003; and (3) purchase orders for Johnson & Johnson products used on the hallway for a two-month period before May 9, 2003. York subsequently provided an affidavit of good faith search from Buchsbaum stating that these documents could not be located (Montanile Affirm., Exh. 7).

DISCUSSION

“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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Since summary judgment is the procedural equivalent of a trial, it should not be granted where there is any doubt as to the existence of a

material issue of fact (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005]).

To make its prima facie showing, York submits the deposition testimony of plaintiff, Sullivan, York's building manager, and Buchsbaum, York's president. York contends that there is no evidence that it created a dangerous, overwaxed condition, considering that plaintiff only testified that the floor was "very shiny" and "overwaxed," but did not recall feeling any wax on her clothing or shoes after her fall or seeing any wax or other foreign substance on the floor. York's building manager testified that York did not wax the floor at the time of plaintiff's accident because it was giving the floor time to settle. Furthermore, Sullivan's inspection of the floor after the fall revealed "absolutely nothing unusual."

In opposition, plaintiff contends that summary judgment must be denied because York spoliated "obviously critical business records that will either support the Defendants or the Plaintiffs' [sic]," which "[u]nfortunately [] no longer exist" (Montanile Affirm., ¶ 28), and requests a missing document charge at trial.¹ Plaintiff also provides the affidavit of good faith search from Buchsbaum, stating that York could not locate maintenance records for dates preceding plaintiff's accident. In addition, plaintiff maintains that Sullivan's claim that York merely dusted the floor is contradicted by a nightly work log from March 27, 2003 which states "SCRUB AND SEPB" for the fifth floor hallway. And, the maintenance guide for the floor did not require that York wait to wax or recoat the floor. Plaintiff also contends that York's motion

¹Plaintiff also appears to argue that her accident occurred on March 28th, not May 9th (Montanile Affirm., ¶¶ 21, 23, 28). However, according to her verified complaint, verified bill of particulars, and deposition testimony, her accident occurred on May 9th (Complaint, ¶ 21; Verified Bill of Particulars, ¶ 1; Plaintiff Dep., at 22).

is also solely predicated on hearsay and that her testimony that the floor appeared “very shiny” and “overwaxed” is sufficient to establish a prima facie case of negligence. Finally, plaintiff takes the position that the caution sign is prima facie evidence that there was a dangerous condition that day and a recurrent condition thereafter.

As a preliminary matter, the court notes that plaintiff’s claim of spoliation is without merit. Spoliation is the intentional or negligent loss, destruction, or alteration of key evidence (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998]). Plaintiff has failed to show that York lost or destroyed any evidence (*see Garcia v Pepe*, 11 AD3d 654 [2d Dept 2004], *lv dismissed in part, denied in part* 5 NY3d 821 [2005]). According to Buchsbaum’s deposition testimony, York’s maintenance records were sold to a non-party in a bankruptcy sale, and York no longer maintains the records (Buchsbaum Dep., at 17-18).

It is well settled that, in order to make out a prima facie claim in negligence, a plaintiff must demonstrate that a defendant 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]). “Absent proof of the negligent application of wax or polish, the fact that a floor is slippery by reason of its smoothness or having been polished does not give rise to an inference of negligence” (*Kudrov v Laro Servs. Sys., Inc.*, 41 AD3d 315 [1st Dept 2007], citing *Pagan v Local 23-25 Intl. Ladies Garment Workers Union*, 234 AD2d 37, 38 [1st Dept 1996]). However, “[a] prima facie case of the negligent application of wax may be established by evidence that a dangerous residue of wax was present on the floor” (*Galler v Prudential Ins. Co. of Am.*, 63 NY2d 637, 638 [1984]).

In *Aronoff v United Fedn. of Teachers* (232 AD2d 311 [1st Dept 1996]), the plaintiff's evidence that the floor was "very slippery" and appeared to be frequently waxed was held to be insufficient to defeat summary judgment (*id.* at 312). And, in *Lee v Rite Aid of N.Y.* (261 AD2d 368 [2d Dept 1999]), the Court stated that:

The plaintiff adduced no proof as to the cause of her slip and fall in the defendant's store. Indeed, the plaintiff merely averred that the floor was "very slippery", and speculated that this condition was caused by the defendant's improper waxing. However, she further testified that she did not notice any foreign matter or any wax buildup in the area where she fell, nor did she observe that her clothes were in any way stained as a result of coming into contact with the floor.

(*id.* at 368-369 [citations omitted]).

In view of the deposition testimony, York has made a prima facie showing of entitlement to summary judgment. While plaintiff testified that the floor appeared "very shiny" and "overwaxed," York's building manager stated that it did not wax the floor at the time of her injury.² Contrary to plaintiff's contention, York's motion is not based on hearsay, given that plaintiff and York's employees testified about their observations at or about the time of the accident.

Nonetheless, plaintiff also testified that she saw a carpet and a yellow "slippery" or "caution" sign placed down near where she fell right after the accident (Plaintiff Dep., at 75). Evidence of a subsequent condition is admissible to show the existence of the condition at the time in issue, "provided the facts of the case permit an inference of the earlier condition from

²The court rejects plaintiff's argument that Sullivan's deposition testimony should be given "little to no weight," because he testified that his memory was "shot" (Sullivan Dep., at 25). The court's role in resolving summary judgment motions is not to weigh the evidence or resolve issues of credibility, but rather to determine whether there are issues of fact for trial (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004]).

proof of the later one. Whether such inference may be drawn depends upon the interval of time involved, the nature of the condition and the surrounding circumstances” (Prince, Richardson on Evidence § 4-619 [Farrell 11th ed]). Plaintiff’s testimony that a carpet and a “slippery” or “caution” sign were put down right after the accident, in addition to her testimony that the floor was “very shiny” and “overwaxed,” permits an inference that the floor was in a dangerous condition at the time of her fall sufficient to defeat summary judgment, whether that condition was caused by waxing or by wet mopping, and that York’s workers created the condition (*see Mazurek v Home Depot U.S.A.*, 303 AD2d 960, 961 [4th Dept], *rearg denied* 306 AD2d 953 [4th Dept 2003] [evidence of defendant’s subsequent remedial actions in clearing floor of water was admissible to establish floor’s condition 5 to 10 minutes after plaintiff fell, which would permit inference as to condition at time when plaintiff fell]; *see also Fasolino v Charming Shoppes*, 155 AD2d 869, 870 [4th Dept 1989], *revd on other grounds* 77 NY2d 847 [1991]). In view of the factual issues as to whether York created a dangerous condition on the floor, summary judgment must be denied.

Plaintiff’s request for a missing document charge to the jury is premature on this motion for summary judgment (*see Boyle v City of New York*, 291 AD2d 315 [1st Dept 2002]). It is

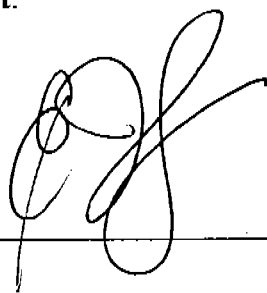
ORDERED that the motion by York Services Industries, Inc., sued herein as York Building Maintenance Corp., for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

Dated: June 2, 2008

FILED
 JUN 12 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:



EMILY JANE GOODMAN