

Saxe v New York Univ. Hosp.-Downtown Beekman

2008 NY Slip Op 31934(U)

June 30, 2008

Supreme Court, New York County

Docket Number: 0111820/2004

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 30

Index Number : 111820/2004
SAXE, MICHAEL
 VS.
UNIVERSITY HOSPITAL
 SEQUENCE NUMBER : 002
 DISMISS ACTION

INDEX NO. _____

MOTION DATE 8/30/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

in this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED
 JUL 01 2008

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
 NEW YORK

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant New York University Hospital-Downtown Beekman, for an order, pursuant to CPLR 3212, granting defendant summary judgment, dismissing the complaint of plaintiff Michael Saxe, is **denied**; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 6/30/08


 HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 35

MICHAEL SAXE,

Plaintiff,

-against-

NEW YORK UNIVERSITY HOSPITAL-DOWNTOWN
BEEKMAN,

Defendant.

EDMEAD, J.S.C.

Index No. 111820/04

DECISION/ORDER

MEMORANDUM DECISION

Defendant New York University Hospital-Downtown Beekman (“NYUDB”) moves for an order, pursuant to CPLR 3212, granting defendant summary judgment, dismissing the complaint of plaintiff Michael Saxe (“plaintiff”).

This case involves a slip and fall of plaintiff on December 20, 2002 at NYUDB, allegedly resulting in physical injury to plaintiff. Plaintiff was working as a New York City Police Officer, while rushing an infant in need of medical care into NYUDB, when he allegedly slipped and fell in the ambulance bay entranceway of the emergency room at NYUDB, on a water condition that existed in the vestibule area of the ambulance emergency room entranceway which accumulated as a result of rain that had occurred earlier in the day being racked in by the gurneys that were being brought through the ambulance bay entranceway, injuring his back. Plaintiff eventually underwent back surgery and was retired on a line of duty disability, purportedly as a result of the injury sustained from the fall on December 20 2002.

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JUL 01 2008
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NEW YORK

Plaintiff's Deposition

The accident that is the subject of this case occurred on December 20, 2002. Plaintiff was on duty. (p. 91-92) It had been raining all day on the date of the accident. (p. 103) When plaintiff heard the call for assistance with a infant in cardiac arrest, he requested permission from his supervisor to respond. (pp. 105-107) Plaintiff held the infant in his arms and began performing CPR. (p. 109) Another officer drove the patrol car to NYUDB, to the emergency parking area where the ambulances park, while plaintiff continued CPR. (p. 111) Plaintiff continued CPR, got out of the car, proceeded as quickly as he could through the emergency ambulance doors while doing the CPR, . (pp. 111-112) Plaintiff hit a wet area that caused him to slip and fall. (p. 114) When plaintiff got up and went over to the nurses' station, he turned around and the other officers were commenting on the water; plaintiff looked and saw that there were trails of dirty, brownish water that led to a puddle where plaintiff had fallen, and the back of his pants were wet. (p. 120) There was dirty water that looked like a wheel had gone through the water at the front of the door and water had tracked through and there was a puddle about 1 ½ feet round about five or six feet in the hospital. (p. 124) It was still drizzling at the time of plaintiff's accident. The puddle water was muddy; it appeared that the puddle water had been tracked in from outside. (p. 125) It looked like maybe a gurney wheel or a stretcher wheel had run through it. Maybe some footprints had walked through some parts of it before the actual puddle. There were other wet areas on the inside of the door as you walk in. (P. 169) Plaintiff does not know how long the puddle had been there, but it looked like it had been there for a while. (p. 170) There was no carpet, runner, rug or mat on the floor where he fell. (P. 172)

Deposition of Police Officer Patricia Rogers

At 9:25 p.m. a call came over the radio that there was an aided at Park Row and North Street at the checkpoint. She was on her way to the scene on foot when she flagged down plaintiff in his police car responding to the same call. (pp. 9-10) At the scene there was a female Asian child who was listless. (p. 12) When they arrived at NYUDB, they parked right in front of where the ambulance would drop off aided cases, the location where the gurneys with injured people would be brought in route to the emergency room treatment center, also known as the triage center. (p. 17) The group of officers proceeded down a long hallway with plaintiff carrying the infant, when plaintiff slipped on a clear, watery substance on the floor and while holding the child. (p. 20) The water was sufficient that Officer Rogers almost fell down and she had to catch herself. The water area was large enough for a person to fall and for her to lose her balance; possibly 2 feet by 2 feet. (pp. 21-22) She does not recall seeing any wheel tracks through the puddle. (pp. 24-25) This witness does not recall seeing any carpets, rugs, rubber mats or runners on the floor where plaintiff fell. (p. 41)

Deposition of Sergeant Kathleen Heavey

Sergeant Heavey put the aided call in. (p. 12) She believes that she entered the hospital first, held the doors, and plaintiff went in with the child, slipped and fell. (pp. 22-23) There were not mats on the floor; the floor was wet and slippery. (p. 23) The water on the floor was dirty. It was raining and there was ice, snow slush on the ground. (p. 24) Her impression was that it was just water that was tracked in and out maybe because of the condition outside; it was dirty water. (p. 27)

Deposition of Sergeant Andrew McEvoy

Sergeant McEvoy began treating the infant at the scene when plaintiff and the other officers arrived. (p. 15) They pulled into the emergency bay area and entered the hospital as a group. (p. 20) He was directly behind plaintiff. (p. 21) He has no recollection of a puddle or accumulated water. The floor was very shiny, as if it had just been cleaned. (pp. 25-27) In his memo book he wrote: As Detective Saxe entered New York Downtown Hospital, I saw him fall and slip on a water spill.” He testified that if he wrote that, then that is what he saw that night. He does not remember at deposition. (p. 39)

Deposition Testimony of Adriana Fargelli

Ms. Fargelli was at the time of this incident, and still is the Director of Housekeeping for NYUDB. (p. 8) She has no personal knowledge of this incident in question. She did not conduct an investigation nor direct anyone else to conduct an investigation of the incident in question. She was unaware of the incident in question until the date of her deposition. (pp. 9-10) Before her deposition, she did not conduct any investigation, did not speak with anyone at the hospital about the incident, did not search for any records, has not seen any accident report related to plaintiff’s incident. (p. 11) She is unaware of any records that would indicate who worked as a housekeeping worker within the month before plaintiff’s accident. She is unaware of any records that would indicate what the day-to-day activities of the housekeeping workers were at the time of plaintiff’s accident. (pp. 30-31) She does not remember if the hospital had any policies or procedures in place in 2002 to address inclement weather. (p. 41) Today, the hospital puts up “wet floor” signs when notified of a situation. And, the hospital mops immediately once a wet floor is reported. (p. 42) She was unaware of any complaint of a

dangerous or slippery condition involving water, liquid or spills in the emergency personnel entrance to the emergency room prior to plaintiff's accident, on the date of plaintiff's accident.

(p. 45) And she did not receive a complaint from risk management concerning plaintiff's accident. (pp. 46-47) There are no mats at the ambulance entrance to the hospital where plaintiff fell because gurneys would get caught in the mat/carpeting. (p. 55) In 2002 during inclement weather, inspections were done, including the area where plaintiff fell, on a regular basis. There were constant rounds, on the hour by supervisory staff. (p. 59)

Deposition of Mauricio Ramos

As manager of operations his duties include supervising the maintenance staff. (p.9) This witness cannot recall whether mats were ever placed in the area where plaintiff fell on or before the date of plaintiff's accident. (pp. 33-34) In inclement weather, they would place "wet floor" signs in the area where plaintiff fell on or before the date of plaintiff's accident. (p. 34) He was unaware of any policy not to put down mats in the area where plaintiff fell because they would inhibit gurneys. (p. 37) If hospital staff saw a water condition, they would usually call it in. (p. 40) And, a worker would be dispatched asap. (p. 42) On rain or snow days, people would track in water and/or snow through the ambulance bay entranceway area, and the hospital would always assign someone to that location to keep it clean. (p. 43) On the date of plaintiff's accident, and/or thirty days before, he does not recall if any complaints of any water condition, snow condition, slippery condition or liquid conditions in the ambulance bay entranceway vestibule area was made.

NYUDB's Contentions

In the instant matter, there has been no testimonial or expert evidence offered by plaintiff which established that the emergency room entranceway was inherently dangerous, or that NYUDB created the alleged condition, or that the entranceway was improperly constructed or excessively slippery, or had actual or constructive notice of the alleged hazardous condition.

And, conclusions based upon surmise, conjecture, speculation or mere assertions are without probative value and are insufficient to maintain a cause of action.

Plaintiff's Opposition

An issue of fact exists as to whether NYUDB created the condition, had constructive notice of the accumulation of the water and/or had actual knowledge of a recurrent dangerous condition. And material and significant questions of fact exist as to whether NYUDB designed and constructed the ambulance bay entranceway, in a safe and proper condition since a highly slippery, non absorbent floor was utilized in the entranceway. Further, significant and material questions of fact exist as to NYUDB's maintenance, operation, control and cleaning and mopping of the ambulance bay entranceway following a rain event.

The combined testimony of plaintiff and the three other police officers who witnessed plaintiff's accident and the dangerous, wet, slippery condition that existed on the floor in the ambulance entranceway of NYUDB on the night of plaintiff's accident, unquestionably demonstrate that plaintiff's accident occurred that evening due to this wet condition. The police officers' testimony unequivocally establishes that the floor was slippery and dangerous as both police officer Rogers almost slipped on the condition as did sergeant Heavey and police officer McEvoy. In addition, the plaintiff testified that the water condition was dirty and his affidavit

indicates that there was dried dirty wheel marks in the area as well.

Further, the totality of the testimony from Ms. Fargelli on behalf of NYUDB indicates that she has no knowledge as to whether any complaints were receive that morning. Also, the testimony of Mauricio, also known as John Ramos was that he could not recall if there were any complaints about the floor of the vestibule area of the ambulance bay regarding spills, liquids or anything else, and was unaware if there were any complaints thirty days before plaintiff's accident.

NYUDB had no records as to who would have worked that day or within thirty days before plaintiff's accident. NYUDB had no records of the policies and procedures in effect at the time of plaintiff's accident with regard to the cleaning schedule for the maintenance staff. And, Ms. Fargelli did not recall if there was any policy and procedure with regard to performing services during inclement weather or concerning spills or liquids on any of the floor surfaces in NYUDB.

Stanley H. Fein, a professional engineer, asserts that NYUDB was negligent in its design and construction of the ambulance emergency room entranceway floor by having a non absorbent, vinyl tile or terrazzo floor which had a very low anti slip coefficient, when NYUDB knew that the emergency room entranceway would be subjected to repeated exposure to bodily fluids being deposited or accumulated on this floor, as well as the fact that gurneys would track water in through this ambulance entrance way following rain or any other type of precipitation.. And there should have been absorbent mats as well as warning signs.

It is clear from NYUDB's combined representatives' testimony that the hospital had actual knowledge of a recurrent dangerous condition in the ambulance entranceway area due to

the fact that water was tracked into this area as they felt the need to have this area constantly staffed during inclement weather. Defendant should be charged with actual notice of a recurrent dangerous condition. Moreover, NYUDB clearly had constructive notice of the slippery condition, which caused plaintiff to fall on the date of the accident. And, defendant had constructive notice of the condition due to the fact that it had stopped raining for several hours as well as because that this water must have been tracked in several hours before. Further, both plaintiff and one of the non-party witnesses testified that the water was dirty and had appeared to be tracked in by gurneys.

NYUDB's Reply

NYUDB objects to any evidence being put forth by plaintiff and/or Mr. Fein as to the inspection conducted on the premises. First, the expert's inspection on defendant's premises was a trespass, conducted without notice or permission from defendant.

More importantly, Mr. Fein's inspection occurred after the entire emergency room of NYUDB, including the flooring, was remodeled subsequent to plaintiff's alleged injury.

Plaintiff simply fails to show actual or constructive notice of a dangerous and/or recurrent condition.

Analysis

Plaintiff first argues that defendant's motion is untimely because this court's rules require summary judgment motions to be made within sixty days of filing a note of issue. The note of issue herein was filed with the clerk's office on November 28, 2007 and as such, any motion for summary judgment should have been made by January 27, 2008.

If counsel for plaintiff had simply perused a calendar, he would have realized that January 27th was a Sunday.

Further, this court rejects the expert affidavit of Mr. Fein. First, plaintiff failed to provide any explanation as to why this inspection was not performed earlier, *See Hlenski v. City of New York*, ---N.Y.S.2d ---, 2008 WL 2209913, 2008 N.Y. Slip Op. 04835, N.Y.A.D. 2 Dept., May 27, 2008. Plaintiff's accident occurred in 2002; Mr. Fein's inspection was in 2008, some 6 years later. Second, the inspection of a surface subsequent to remodeling is insufficient to establish a dangerous condition of the flooring prior to the remodeling. This is not a case where plaintiff's expert acknowledges that renovations occurred and established that the renovations were minor and did not prevent him from rendering an opinion. *See Bellinzoni v Seland*, 128 A.D.2d 580, 512 N.Y.S.2d 846 (A.D. 2d Dept., 1987). ("Moreover, although there had been minor alterations to the structure from which the plaintiff... fell between the time of the accident and the expert's inspection, none of these changes was sufficient to prevent the expert from becoming familiar with and testifying with regard to the condition of this mezzanine at the time of the accident and the method of construction....").

CPLR 3212: Summary Judgment

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). 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]).

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 tracked into a building, 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).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (see *Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; see also *Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Gutierrez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (see *Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; see also *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (see *Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; see also *Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

In the seminal case of *Gordon v American Museum of Natural History*, 67 NY2d 836,

501 NYS2d 646 (1986), the Court of Appeals stated:

“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 (Negri v Stop & Shop, 65 NY2d 625, 626; Lewis v Metropolitan Transp. Auth., 64 NY2d 670, affg on opn at 99 AD2d 246, 249). The record contains no evidence that anyone, including plaintiff, observed the piece of white paper prior to the accident. *Nor did he describe the paper as being dirty or worn, which would have provided some indication that it had been present for some period of time* (cf. Negri v Stop & Shop, supra, at p 626 [broken baby food jars were dirty]). Thus, on the evidence presented, the piece of paper 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. (Emphasis supplied)

In the instant case, the record contains precisely the evidence lacking in *American Museum of Natural History*. Plaintiff testified as follows:

When plaintiff got up and went over to the nurses' station, he turned around and the other officers were commenting on the water; plaintiff looked and saw that there were trails of dirty, brownish water that led to a puddle where plaintiff had fallen, and the back of his pants were wet. (p. 120) There was dirty water that looked like a wheel had gone through the water at the front of the door and water had tracked through and there was a puddle about 1 ½ feet round about five or six feet in the hospital. (p. 124) It was still drizzling at the time of plaintiff's accident. The puddle water was muddy; it appeared that the puddle water had been tracked in from outside. (p. 125) It looked like maybe a gurney wheel or a stretcher wheel had run through it. Maybe some footprints had walked through some parts of it before the actual puddle.

The instant case has factual testimony similar to that in *Negri v Stop & Shop*, 65 NY2d 625, 626 (1985) wherein the record contained some evidence tending to show that defendant had constructive notice of a dangerous condition which allegedly caused injuries to its customer. There was testimony that the injured plaintiff, while shopping in defendant's store, fell backward, did not come into contact with the shelves, but hit her head directly on the floor where "a lot of broken jars" of baby food lay; that the baby food was "dirty and messy."

As in *Negri*, viewing the evidence in a light most favorable to the plaintiff and according plaintiff the benefit of every reasonable inference (see, *Sagorsky v Malyon*, 307 NY 584), it cannot be said, as a matter of law, that the circumstantial evidence was insufficient to permit the jury to draw the necessary inference that a slippery condition was created by water tracked into the ambulance bay entranceway that remained there for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy the condition.

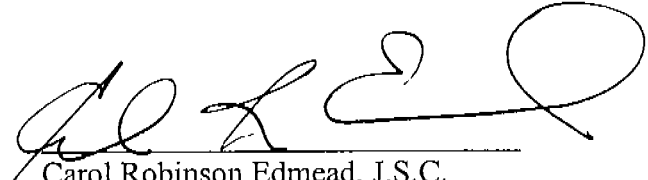
Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant New York University Hospital-Downtown Beekman, for an order, pursuant to CPLR 3212, granting defendant summary judgment, dismissing the complaint of plaintiff Michael Saxe, **is denied**; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: June 30, 2008



Carol Robinson Edmead, J.S.C.

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