Marco v Laro Maintenance Corp.

2008 NY Slip Op 31961(U)

June 26, 2008

Supreme Court, Nassau County

Docket Number: 7755-05/

Judge: Karen V. Murphy

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SCAN

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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ANNA MARCO,

Plaintiff(s),

-against-

LARO MAINTENANCE CORPORATION and DELTA AIR LINES, INC.,

Defendant(s).

---x

LARO MAINTENANCE CORPORATION,

Plaintiff(s),

-against-

LINC FACILITY SERVICES, LLC, f/k/a AFFILIATED BUILDING SERVICES, INC.,

Defendant(s).

---x

Index No. 17755/05

Motion Submitted: 4/7/08
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XX
Reply.....
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....XXX

Motion (seq. No. 1) by the attorneys for the third-party defendant Linc Facility Services, LLC f/k/a Affiliated Building Services, Inc. ("Linc") for an order pursuant to CPLR § 3212 granting summary judgment with respect to defendant, third-party plaintiff Laro Maintenance Corporation's ("Laro") third-party complaint against third-party defendant Linc is denied. Cross-motion (seq. No. 2) by the attorneys for the defendant, third-party plaintiff Laro for an order pursuant to CPLR § 3212 granting summary judgment in favor of Laro dismissing all claims asserted against Laro is denied.

The plaintiff alleges that on August 8, 2005, she slipped and sustained personal injuries due to a wet condition on the floor located in the lower level of Terminal 3 at JFK Airport (the "subject area"). On November 4, 2005, plaintiff filed a verified complaint against defendant Laro. Plaintiff alleges that Laro caused her to fall and is liable for her personal injuries because Laro: (i) after mopping, failed to set out warning signs indicating that the floor was slippery and/or close off the subject area; (ii) failed to properly train its employees with respect to mopping the floor so that it would not be wet; and (iii) caused a dangerous, hazardous and wet condition to exist in the subject area. Laro filed and served a third-party action against Linc on January 25, 2007. Plaintiff never brought a direct action against Linc. Laro's third-party complaint against Linc alleges that Linc violated its legal duty to exercise due care in preventing harm to the plaintiff, and that if Laro is held liable to the plaintiff, such liability will be due solely to the negligence of Linc, the third-party defendant. Laro claims that Linc's operation of the air conditioning unit caused water to form on the duct work located above the ceiling in the subject area, the water dripped off the duct work, filtered through the ceiling tiles, fell to the ground and caused plaintiff to fall. Further, Laro asserts that Linc's operation of the air conditioning system created a "Misty Hallway Situation" during which the ceiling, walls and floor started to sweat, became slippery and caused the plaintiff to fall. The plaintiff alleges she slipped on a freshly mopped floor in the subject area. (Par. 14 of the Verified Complaint) Laro contends that Linc caused the plaintiff to fall because water fell from the duct work, under the control and operation of Linc, located above the subject area.

In support of Linc's motion for summary judgment dismissing Laro's third-party complaint, Linc submits an expert's opinion in the form of an affidavit sworn to January 30, 2008 by Klas Haglid, P.E. in which Mr. Haglid states that "[b]ased upon my education, my professional experience, my review of the materials described in paragraph 5, the test and analysis that I performed during my site visit described in paragraph 6 and, the commonly accepted standards in the industry, it is my professional opinion that: (1) to a reasonable degree of engineering certainty, based upon the design of the heating, air conditioning and ventilation system that serviced the area where plaintiff allegedly fell, Linc's operation of the system could not cause the area, including the walls and the floors, which it services to become slippery and (2) to a reasonable degree of engineering certainty, based upon the

design of the heating, air conditioning and ventilation system that serviced the area where plaintiff allegedly fell, Linc's operation of the system could not cause precipitation to form and subsequently fall from the duct work located above the area where plaintiff allegedly fell."

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (***Sillman v. Twentieth Century Fox Films Corp.***, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. (***Alvarez v. Prospect Hospital***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Winegrad v. New York University Medical Center***, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). The third-party defendant Linc has made an adequate *prima facie* show of entitlement to summary judgment. Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (***Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.***, 46 N.Y.2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Conclusory statements are insufficient. (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980); see, ***Indig v. Finkelstein***, 23 N.Y.2d 728, 244 N.E.2d 61, 296 N.Y.S.2d 370 (1968); ***Werner v. Nelkin***, 206 A.D.2d 422, 614 N.Y.S.2d 66 [2d Dept., 1994]).

In a slip and fall case a plaintiff must demonstrate that the defendant created the condition or had actual or constructive notice of it. Proof of a recurring condition may satisfy the constructive notice criteria as to the defendant and third-party defendant. (See, ***Brown v. Linden Plaza Housing Co., Inc.*** , 36 A.D.3d 742, 829 N.Y.S.2d 571 (2d Dept., 2007); ***Osorio v. Wendell Terrace Owners Corp.***, 276 A.D.2d 540, 714 N.Y.S.2d 116 [2d Dept., 2000]).

Laverne Chisholm (Chisholm) was an assistant manager employed by Laro for the past nine years. She was working in Terminal 3 at Delta Airlines at the subject area. Laro was responsible for general maintenance work in the terminal. It included keeping the floors in Terminal 3 at Delta Airlines clear, clean, and free of debris, liquids and other wet substances. According to Chisholm's testimony at her deposition when the air conditioning was on you would see leaks in the corridor floor in question (pg. 9, L 15-19); Laro would put down caution signs, cardboard boxes and mats when they observed the condition (pg. 10, L 12-13); she was not sure if in the summertime the floor was wet at least once or twice a week (pg. 10, L 14-19); when she observed the wet floor condition, the entire corridor was wet (pg. 11, L 14-16); prior to the date of the accident she had made complaints to Linc about the wet floor condition (pg. 12, L 3-15); prior to plaintiff's accident, Chisholm was aware of a male

employed by Safeguard who slipped and fell at that same location (pg. 18, L 2-22); Chisholm used the hallway in question everyday and in two months prior to Ms. Marco's accident she would notice from "time to time" that the hallway floor was misty (pg. 20, L 15-25); in addition to noticing that the "very, very wet" hallway floor was a recurring condition, she also noticed that the walls in the hallway were wet and sweating and she complained to Linc that the entire area was wet (pg. 22, L 9-20); Chisholm would meet with Laro's porters and give them instructions to use dry mops in the subject hallway because of the misty condition and to use cardboard boxes and walk-off mats (pg. 32, L 3-18); Chisholm contacted Linc about the wet hallway because of drips she had seen from the air conditioner that she personally observed dripping from the ceiling in July of 2005, one month prior to plaintiff's accident (pg. 36, L 21; pg. 57, L 20); Linc responded to Chisholm's complaints and came to the accident location where Chisholm advised Linc that the air conditioning is causing the floor to be "very slippery and wet" (pg. 47, L 17-19); from July of 2005 until August of 2005 the "misty hallway" situation never changes (pg. 58, L 18; pg. 59, L2); on at least 3 or 4 occasions between July 2005 and August 2005 the wet floor condition was such that mats and cardboard boxes were put on the floor of the hallway where the plaintiff fell (pg. 68, L 15-19); when the hallway was misty, it was "very slippery" (pg. 77, L 8-16); prior to August 2005, Laro was aware that the floor was misty and wet and would put up caution signs (pg. 79, L 8-16).

Issue finding, rather than issue determination, is the key to summary judgment (***Greco v. Posillico***, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept., 2002); ***Gniewek v. Consolidated Edison Co.***, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept., 2000); ***Judice v. DeAngelo***, 272 A.D.2d 583, 709 N.Y.S.2d 427 [2d Dept., 2000]). The court should refrain from making credibility determinations (see, ***S.J. Capelin Assoc. v. Globe Mfg. Corp.***, 34 N.Y.2d 338, 313 N.E.2d 776, 357 N.Y.S.2d 478 (1974); ***Surdo v. Albany Collision Supply, Inc.***, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept., 2004); ***Greco v. Posillico, supra***; ***Petri v Half Off Cards, Inc.***, 284 A.D.2d 444, 445, 727 N.Y.S.2d 455 [2d Dept., 2001]), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. (***Glover v. City of New York***, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept., 2002); ***Perez v. Exel Logistics***, 278 A.D.2d 213, 717 N.Y.S.2d 278 [2d Dept., 2000]) Moreover, "[w]here causation is disputed, summary judgment is not appropriate unless 'only one conclusion may be drawn from the established facts.'" (***Speller ex rel. Miller v. Sears, Roebuck and Co.***, 100 N.Y.2d 38, 44, 790 N.E.2d 252, 760 N.Y.S.2d 79 (2003) quoting from ***Kriz v. Schum***, 75 N.Y.2d 25, 34, 549 N.E.2d 1155, 550 N.Y.S.2d 584 [1989]). Such is not the case here. The testimony of Chisholm raises an issue of fact as to whether Linc's operation of the air conditioning unit caused water to fall on the subject area creating a "Misty Hallway Situation" that was the cause of the accident.

Linc asserts that assuming water caused the plaintiff to fall, there are other things besides the "Misty Hallway Situation," such as Laro's mopping, that could have caused the plaintiff to fall. A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof. ***Fromme v. Lamour***, 292 A.D.2d 417, 738 N.Y.S.2d 863 [2d Dept., 2002]). Chisholm's testimony gave rise to an issue of fact as to the cause of the water at the subject premises. Indeed, "[e]ven the color of a triable issue forecloses the remedy." ***(Rudnitsky v. Robbins***, 191 A.D.2d 488, 489, 594 N.Y.S.2d 354 [2d Dept., 1993]). Third-party defendants' (Linc) motion for summary judgment dismissing the third-party complaint is denied.

This court issued an order stating that all summary judgment motions must be made within sixty (60) days of the filing of the Note of Issue. The Note of Issue was filed on December 7, 2007. Laro's summary judgment motion should therefore have been filed by February 7, 2008. It was not filed until March 5, 2008, 28 days late.

Absent "good cause", courts do not have the discretion to decide untimely motions for summary judgment. (***Brill v. City of New York***, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004); ***Miceli v. State Farm Mutual Auto Ins. Co.***, 3 N.Y.3d 725, 819 N.E.2d 995, 786 N.Y.S.2d 379 [2004]). "Good cause" under CPLR § 3212 (a) requires a showing that there is a good reason for the delay in making the late summary judgment motion and that this showing must be more than merely a perfunctory excuse. ***(Brill , supra)***. Parties may no longer rely on the merits of their cases to extricate themselves for failing to show good cause for making the delay in moving for summary judgment pursuant to CPLR § 3212 (a).

Laro's excuse of law office failure, without more, does not rise to the level of good cause. (See, ***Petersen v. Lysaght, Lysaght & Kramer***, 47 A.D.3d 783, 85 N.Y.S.2d 209 [2d Dept., 2008]). Their motion is denied.

The foregoing constitutes the Order of this Court.

Dated: June 26, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
JUL 02 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE