

Olshow v RCP Assoc.

2008 NY Slip Op 32070(U)

July 22, 2008

Supreme Court, New York County

Docket Number: 0108199/2006

Judge: Carol R. Edmead

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PRESENT: Hon. Carol Edmead

PART 35

Justice

Index Number : 108199/2006

OLSHOW, JOHN

VS.

RCP ASSOCIATES

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/14/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

ORDERED that the motion of defendants RCP Associates, A New York Limited Partnership, Tishman Speyer Properties, L.P. and ABM Building Maintenance Co. of New York, for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff John Olshow, **is granted, the complaint is dismissed and the Clerk of the Court is directed to enter judgment accordingly;** and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

FILED

JUL 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/22/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

... ALL REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

JOHN OLSHOW,

Plaintiff,

-against-

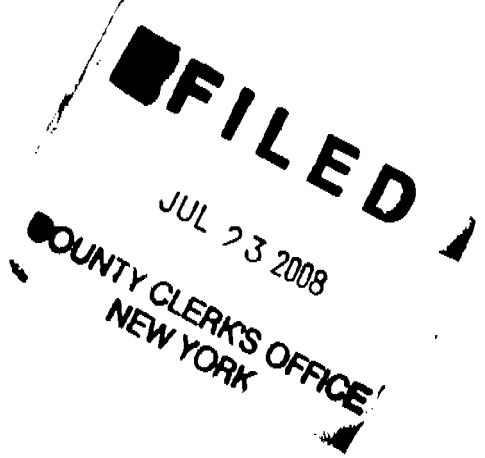
RCP ASSOCIATES, A NEW YORK LIMITED
PARTNERSHIP, TISHMAN SPEYER
PROPERTIES, L.P., and ABM BUILDING
MAINTENANCE CO. OF NEW YORK,

Defendants.

EDMEAD, J.S.C.

Index No. 108199/06

DECISION/ORDER



MEMORANDUM DECISION

Defendants RCP Associates, A New York Limited Partnership (“RCP”), Tishman Speyer Properties, L.P. (“Tishman”) and ABM Building Maintenance Co. of New York (“ABM”) (collectively “defendants”), move for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff John Olshow (“plaintiff”).

This is a personal injury action wherein plaintiff claims that he was caused to slip and fall on water on the lobby floor of 10 Rockefeller Center, New York (the “accident site”) while employed as a security guard for non party Summit Security.

Plaintiff's Deposition

At the time of plaintiff's accident, he was and is employed by Summit Security as a security guard (p. 6). His accident occurred approximately 11:00 a.m. (p. 8). It was raining lightly during the Today Show, which is on from 7a.m. until 10 a.m.(p. 13). His accident occurred when he was coming into the building after escorting one of the guests either across the street to their office, or to a waiting car (p. 14). He cannot recall if it was raining at the time he

returned to the building just before his accident (p. 15). He went through the revolving door, took two steps and slipped forward on his right knee. He slipped on water (p. 16). He did not see the water before he fell. After he fell, he saw water all over the floor. It was a little puddle (p. 17). He approached the Tishman security guard stationed in the lobby (Quill) and told him to get maintenance and have them mop up the floor and put the "rug" down (mats) (p. 18). He believes the water came in from the people coming through the revolving door. The water tracked in and accumulated. He didn't notice water anywhere else at any time during his shift (p. 20). There were no mats in the lobby area at the time of his fall (p. 21). He does not know how long the water he slipped on was there before his fall. He does not know if anyone complained about the water before his fall. He is unaware of anyone else falling in the lobby area (p. 22).

Deposition of Kevin Quill

Kevin Quill ("Quill") is a security guard employed by defendant Tishman (p. 6). ABM was the maintenance company for the building (p. 8). He heard a noise and went over to plaintiff and asked if he was okay. When he first saw plaintiff, plaintiff was standing up (p. 14). As he approached plaintiff, he does not remember seeing water on the floor at that location (p. 16).

During the times when Quill has been working at the building, when it has been raining, he has seen ABM maintenance people put mats down. He does not recall if mats were on the floor in the lobby at the time of plaintiff's accident (p. 18). Also he has seen ABM maintenance people routinely come and mop the floor in the area by the revolving doors when it has been raining, in addition to laying the mats (p. 19).

Deposition of James Whitten

James Whitten ("Whitten") is employed by ABM as a supervisor. ABM is in the

business of building maintenance and cleaning (p. 6). In the event of rain, the procedures were to put down runoff mats leading from the entrance either to the revolving door or the side door. The purpose of the mats is to dry the bottom of people's shoes as they enter the building, and to prevent accidents. Mats would be put down as soon as it started to rain, if the mats were not already down because of a preset knowledge of a high likelihood of rain. In addition to the mats, the matron or porter would monitor the area (pp. 16-18). The matron or porter would keep the area as dry as possible (p. 19).

The court takes judicial notice that according to the History for Central Park, New York Weather Readings, submitted by defendants, at 10:51 it was reported "Mostly Cloudy," at 11:51 "Light Rain," 12:51 "Rain." Plaintiff's accident occurred shortly after 11:00 a.m. when plaintiff escorted a show guest outside.

Defendants' Contentions

By plaintiff's own admission, he did not observe any water on the floor prior to his accident and did not know how long the water was present prior to his fall. In addition, plaintiff admits that it was raining at the time of the accident. Given that the area near the revolving door was an area wherein guests and tenants were likely to shake out their umbrellas or track in rain from their shoes or raincoats, it is highly probable that the water could have accumulated mere seconds prior to plaintiff's fall, which is insufficient to establish constructive notice. In fact, since plaintiff was coming from outside, it is just as likely that his own shoes caused the watery condition on the floor. In short, it appears that plaintiff is asserting that the defendants had constructive notice of the condition merely because it was raining at the time of the incident. However, defendants' mere knowledge of inclement weather is insufficient to establish

constructive notice.

Alternatively, plaintiff is asserting that the defendants caused or contributed to his accident by failing to ensure that mats were in place and/or by failing to continuously mop up the area. There is no evidence that ABM's general procedure of having mats directly in front of both revolving doors (as one enters the lobby) was not followed on the date of the accident.

Plaintiff cannot establish that defendants had actual notice of the alleged watery condition that caused his fall. It is undisputed that plaintiff did not voice any complaints regarding the subject floor prior to the accident, nor was he aware of any complaints being made by others prior to his fall. Plaintiff was also unaware of any prior, similar accidents. Also, the witness produced on behalf of defendants had no recollection of receiving any complaints regarding the subject floor prior to the plaintiff's accident.

Plaintiff's Opposition

In this case, defendants specifically had in place an established routine whereby they would set out mats and have attendants mopping unmatted areas as soon as it began raining. According to plaintiff's deposition, it had been raining lightly from 7a.m. up to and including the time of the accident, approximately 11a.m. During these four hours, water had puddled up at the accident site. Defendants never set out mats and never sent anyone to mop. The established procedure makes the plaintiff's accident foreseeable and creates a duty upon defendants. Further, the witness produced by defendants testified that part of his job function was to report wet conditions to the maintenance company, and that it was company practice to put out mats in inclement weather.

[*6]

Defendants' Reply

Plaintiff concedes that he cannot establish that the defendants had actual notice of the watery condition. Plaintiff further concedes that the mere fact that it was raining for approximately four (4) hours prior to the accident is insufficient to establish constructive notice on the part of the defendants. Nevertheless, plaintiff attempts to create an issue of fact by asserting that the defendants failed to follow their established inclement weather procedures on the date of the accident.

Whether or not ABM followed its established procedures on the date of the accident has absolutely no bearing in determining whether the defendants are entitled to summary judgment. This is a tort action, not a breach of contract action. Thus, regardless of the contractual obligations undertaken by defendants, plaintiff is still required to establish that the defendants had actual or constructive notice of the condition that caused his fall. Here, plaintiff conceded that he did not see any puddles in the lobby prior to his fall and was unaware how long the particular puddle that allegedly caused his fall existed.

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 Perlbiner*, 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

[* 8]

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).

Actual notice is not an issue in the instant case.

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*).

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).

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 a case involving the same premises and defendant RCPI, defendants argued that they had satisfied any existing duty because they placed mats on the floor. In *Kassirer v RCPI Hold Co, LLC*, 17 Misc.3d 1132(A), 851 N.Y.S.2d 70 (N.Y.Sup.,2007), there was no dispute that non-party ABM, which had contracted with defendant and premises owner, RCPI Landmark Properties, LLC to provide certain maintenance services at the premises, had placed rain mats at the entrances of the premises. Although it is unclear how long the mats were, it is undisputed that the mats did not cover the entire lobby floor, and stopped short of the escalators, leaving an area of uncovered terrazzo floor between the end of the mats and the escalator. In *Kassirer*, defendants argued that the evidence demonstrated that they placed mats and caution signs in the premises, thereby fulfilling any duty they had to plaintiffs during a rain storm.

The court in *Kassirer* held that imposing a burden on defendants to demonstrate an inspected, dry floor during a rainstorm in order to establish the lack of constructive notice is incompatible with established precedent concerning the scope of a defendant's duty during such a storm, which does not entail providing a constant remedy to the problem of water being tracked into a building (*Gibbs v Port Authority of New York*, 17 AD3d 252,255 [1st Dept 2005], *quoting Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]); *Yearwood v*

Cushman & Wakefield, 294 A.D.2d 568 [2d Dept 2002]; *Keum Choi*, 278 A.D.2d at 107), or placing mats over the entire surface area of the floor (*Dubensky v 2900 Westchester Co., LLC*, 27 AD3d 514 [2d Dept 2006]; *Ford v Citibank, N.A.*, 11 AD3d 508 [2d Dept 2004]; see *Solazzo v New York City Transit Authority*, 21 AD3d 735 [1st Dept], *affd* 6 NY3d 734 [2005]; *Kovelsky v City Univ. of NY*, 221 A.D.2d 234, 235 [1st Dept 1995]). Furthermore, any general awareness that defendants may have had that water might be tracked into the premises during a storm does not establish constructive notice of the condition alleged here (see *Piacquadio*, 84 N.Y.2d at 969; *Yearwood*, 294 A.D.2d at 569), or give rise to a duty to do any more than they did here.

In *Garcia v Delgado Travel Agency*, 4 A.D.3d 204, 771 N.Y.S.2d 646 [2004]), the Court held that “[t]he fact that it was raining and water was being tracked in does not constitute notice of a dangerous situation warranting more than laying floor mats. Indeed, defendants were under no obligation to cover the entire floor with mats and to continuously mop up all tracked-in water” (citations omitted)].

However, absent constructive notice, defendants cannot be found negligent for failing to take safety measures, such as putting down mats (see *Joseph v Chase Manhattan Bank*, 277 A.D.2d 96, 716 N.Y.S.2d 390 [2000]). Only once a defendant has notice of a dangerous condition does the obligation ripen to undertake reasonable and appropriate remedial actions.

Thus, notwithstanding defendants’ usual habit of laying mats during inclement weather, there is no evidence on this record that would permit a finder of fact to infer that defendants had constructive notice of a dangerous condition. There is no evidence demonstrating how long the allegedly watery condition existed on the floor where Olshow fell (see *Gibbs*, 17 AD3d at 255 [“(g)iven the total lack of evidence on the issue of the length of time the [condition] was present,

there is no evidence from which a jury could infer that such condition existed for a sufficient period to allow” defendants to discover and remedy it (citation omitted); *Rouse v Lex Real Assoc.*, 16 AD3d 273 [1st Dept 2005] [“(t)here was no evidence that defendants created a dangerous condition or had actual or constructive notice of a hazard that could have been prevented ...”]; *Garcia v Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004] [“(v)iewing this matter in a light most favorable to plaintiff, there is no evidence that defendants either created the wet condition in the lobby or had notice of a hazard that could have been prevented by the exercise of reasonable care”]; see *Dombrower v Maharia Realty Corp.*, 296 A.D.2d 353 [1st Dept 2002] [reversing denial of summary judgment in favor of defendant where “plaintiffs offered no testimony disclosing how long the allegedly slippery condition existed on the floor where the injured plaintiff fell” and plaintiffs claim that defendant created the unidentified condition on which the injured plaintiff slipped was unsupported by any evidence in the record]); *Keum Choi v Olympia & York Water St. Co.*, 278 A.D.2d 106 [1st Dept 2000] [“(e)ven were we to assume that water was visible, despite plaintiff’s inability to recall seeing water, there is no evidence from which a jury could reasonably conclude that such condition existed for a sufficient period of time to allow defendants to have discovered and remedied it”]).

Conclusion

Based on the foregoing, it is hereby

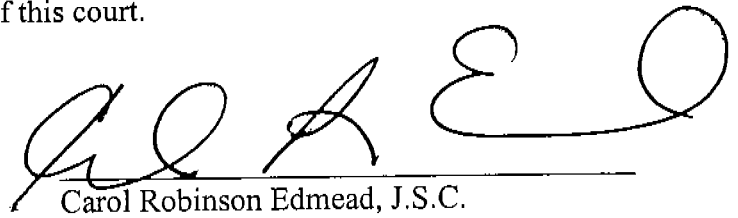
ORDERED that the motion of defendants RCP Associates, A New York Limited Partnership, Tishman Speyer Properties, L.P. and ABM Building Maintenance Co. of New York, for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff John Olshow, **is granted, the complaint is dismissed and the Clerk of the Court is**

directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: July 22, 2008



Carol Robinson Edmead, J.S.C.

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