

**Delmanzo v Aramark Healthcare Support Servs.,
LLC**

2008 NY Slip Op 32519(U)

September 17, 2008

Supreme Court, Albany County

Docket Number: 0051102/0071

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARTHA DELMANZO and
DONALD DELMANZO,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 5110-07
RJI NO. 01-08-093636

ARAMARK HEALTHCARE SUPPORT
SERVICES, LLC, ALBANY MEDICAL CENTER
HOSPITAL and ALBANY MEDICAL COLLEGE,

Defendant.

Supreme Court Albany County All Purpose Term, September 12, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On June 29, 2006, Ms. Delmanzo was walking in Albany Medical Center Hospital when she slipped, fell and injured her left knee. The injury she sustained required surgery. Ms. Delmanzo, and her husband derivatively, commenced this action against defendants seeking damages caused by her slip and fall. Discovery is now complete, and defendants Albany Medical Center Hospital and Albany Medical College bring this motion for summary judgment.

Plaintiffs oppose the motion of Albany Medical Center Hospital but do not oppose the motion of Albany Medical College. The motion of Albany Medical College, unopposed by plaintiffs, is granted. The motion of Albany Medical Center Hospital, however, is denied as they have failed to meet their initial burden of proof on their summary judgment motion.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On this summary judgment motion, Albany Medical Center Hospital, as the landowner, has “the threshold burden when seeking summary judgment of establishing that they maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition.” (Candelario v. Watervliet Housing Authority, 46 AD3d 1073, 1074 [3d Dept. 2007]; Salerno v. North Colonie Cent. School Dist., 53AD3d 1145 [3d Dept. 2008]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). The movant for summary judgment fails to meet their burden by “pointing to gaps in... proof”, rather the movant’s obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 AD2d 913, 914 [3d Dept.1996]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

Albany Medical College seeks summary judgment, pursuant to Workers' Compensation Law §11, due to their employment of Ms. Delmanzo at the time of her accident and her receiving workers' compensation benefits for her injury. Ms. Delmanzo's opposition papers admit the employment relation and consent to the dismissal of her complaint against Albany Medical College, due to its being barred by Workers' Compensation Law §11. Accordingly, the complaint against defendant Albany Medical College is dismissed.

Albany Medical Center Hospital brings its summary judgment motion on the premise that the record contains insufficient evidence of its actual or constructive notice of the allegedly dangerous condition. Because defendant Albany Medical Center Hospital failed to affirmatively demonstrate its lack of constructive notice and that it maintained the premise in a reasonably safe condition, its motion is denied.

Defendant Albany Medical Center Hospital demonstrated its entitlement to judgment as a matter of law on the actual notice issue. The deposition testimony of Ms. Delmanzo, Cheville McKinnie and Daniel Madden (the supervisor and manager of the cleaning staff contractor, Aramark Healthcare Support Services, LLC), and employees of Albany Medical Center Hospital all established that prior to Ms. Delmanzo's fall no one had complained to Albany Medical Center Hospital about the slippery substance that caused her fall. Such testimony demonstrated, as a matter of law, that Albany Medical Center Hospital did not have actual notice of the cause of Ms. Delmanzo's injury. Plaintiff's opposition papers raise no issue of fact relative to this defendant's actual notice, and concede that Albany Medical Center Hospital's motion should be granted on this issue. Accordingly, Defendant Albany Medical Center Hospital's summary judgment motion is granted only to the extent set forth above.

Albany Medical Center Hospital, however, failed to establish their entitlement to judgment, as a matter of law, on the constructive notice and reasonably safe condition issues. “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.” (Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 [1986]). The uncontradicted deposition testimony of Albany Medical Center Hospital employees, established that there was a clear slippery film/powder that could be felt to the touch but difficult to see in the location of Ms. Delmanzo’s fall. Ms. Delmanzo’s deposition testimony established that she fell in a regularly used hospital hallway and had not seen the slippery substance prior to her fall. Importantly, both Ms. McKinnie and Mr. Madden testified that the area of Ms. Delmanzo’s fall had not been inspected by hospital cleaning staff since the day before the accident. Viewing all of the deposition testimony in a light most favorable to plaintiff, Albany Medical Center Hospital failed to establish, as a matter of law, that they maintained the premises, a regularly used hospital corridor, in a reasonably safe condition. They established the difficulty in observing the slippery substance that caused Ms. Delmanzo’s fall. However, they failed to establish that the substance did not exist for a “sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it”, because their last inspection was a little less than twenty four hours prior to Ms. Delmanzo’s fall. (Id.)

As Albany Medical Center Hospital has not established, as a matter of law, the lack of constructive notice or that they maintained the premises in a reasonably safe condition, their motion for summary judgment is denied.

All papers, including this Decision and Order, are being returned to the attorney for the

plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: September 17, 2008
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated July 11, 2008, Affidavit of Anne-Jo Pennock McTague, dated July 11, 2008, with Exhibits "A" - "L".
2. Attorney's Affidavit in Opposition to Motions for Summary Judgment of John F. Harwick, dated September 5, 2008, with Exhibits "A" - "C".
3. Reply Affidavit Affidavit of Anne-Jo Pennock McTague, dated September 11, 2008.