

Hudson v Washington Mut. Bank FSB

2009 NY Slip Op 30108(U)

January 16, 2009

Supreme Court, New York County

Docket Number: 113661/2006

Judge: Paul G. Feinman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

Wanda Hudson

INDEX NO. 113661/2006

- v -

MOTION DATE 10-20-2008

MOTION SEQ. NO. 001

Washington Mutual Bank FSB, a/k/a Washington Mutual,
Fairfax, LLC, and "XYZ Management Co.," said name being
fictitious and unknwn

MOTION CAL. NO. 59

The following papers, numbered 1 to _____ were read on this motion to/for _____.

Notice of Motion/Petition — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is

ORDERED that this motion is decided in accordance with the annexed decision and order.

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/16/09

Paul G. Feinman
J.S.C.

Check one: FINAL DISPOSITION
 DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

WANDA HUDSON,
Plaintiff,

against

WASHINGTON MUTUAL BANK FSB, a/k/a
WASHINGTON MUTUAL, FAIRFAX L.L.C. and
"XYZ MANAGEMENT CO.," said name
Fictitious and unknown,
Defendants.

Index Number 113661/2006
Mot. Seq. No. 001
Submission Date 10-30-08
Cal. No. 59

DECISION AND ORDER

-----X

For the Plaintiff:
Kerner & Kerner
By: Kenneth T. Kerner, Esq.
74 Trinity Place, Suite 1402
New York NY 10006
(212) 964-1098

For the Defendant:
Cullen and Dykman LLP
By: Wendy Tobias, Esq.
177 Montague Street
Brooklyn NY 11201-3602
(718) 855-9000

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of this motion for summary judgment and dismissal:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

PAUL G. FEINMAN, J.:

The named defendants move for summary judgment and dismissal of the complaint and cross-claims as against them pursuant to CPLR 3212. For the reasons which follow, the motion is granted in its entirety and upon a search of the record, the complaint is dismissed as against the non-moving defendant.

On June 8, 2006, plaintiff slipped and fell on a floor mat in the ATM vestibule of defendant Washington Mutual Bank located at 201 East 69th Street, New York, New York, and

suffered injury to her right leg and knee, ultimately requiring surgery.¹ On the day in question, it was raining heavily, and it had rained continuously for several days immediately preceding.² The weather according to plaintiff, was “horrible,” with “rain like we never had before” (Not. of Mot. Ex. E, Wanda Hudson EBT [hereinafter Hudson EBT] 14: 23-25). She testified that after taking a couple of steps into the bank entrance area which house the ATM machines, she slipped and fell (Hudson EBT 25: 10-17).³ She fell when her foot slipped from the mat that was laid on the floor (Hudson EBT 29: 2-3). She only really observed the floor mat after landing on the floor, and she described its as worn and used, and that it had water on it (Hudson EBT 29: 8-12; 25: 17-25; 27: 15-16).

The bank’s financial center manager testified that on the day in question, it had been raining all morning although it was not a “down pour,” and that there “was water on the floors outside” (Mot. Ex. F, Dawn Van Bramer EBT [hereinafter Bramer EBT] 18: 17-18; 19: 1-2, 4). The manager testified that there were two black rugs in the entry area, one in front of the doors leading to the outside, and one in front of the ATM machines (Bramer EBT 34:18-25). The mat in front of the ATM machines is no longer there (Bramer EBT 10: 12-17).⁴ She did not observe

¹On the date of plaintiff’s accident, Fairfax LLC owned the premises that was leased by the bank (Mot. Ex. B, Fairfax Answer & Cross-Complaint ¶ 2).

²Plaintiff attaches copies of the weather report for the day of the incident, as recorded by the National Oceanic and Atmospheric Administration (Pl. Aff. in Opp. Ex. B).

³Defendants have attached three sets of photocopies of the still shots taken from the security cameras in the vestibule area, one set of which includes the sequence of plaintiff slipping and then sprawled to the floor (Mot. Ex. H).

⁴The manager was not questioned about the continued existence of the second mat, which apparently is the one referred to by plaintiff in her testimony (see Bramer EBT 10; Hudson EBT 29; see also Mot. Ex. H, still shots of plaintiff’s fall).

their condition that day and did not know if there were ever inspected (Bramer EBT 35). She stated that the bank hired an outside company to maintain the facility (Bramer EBT 46: 5-8). She did not see plaintiff fall, but spoke to her afterwards and was told by plaintiff that she had fallen, and that she had slipped on the wet floor, specifically the portion in front of the internal doors (Bramer EBT 17:1-3; 32: 24-25; 34: 12-17). She also testified that there had been no previous complaints concerning the safety of the entryway floor, and that warning signs had never previously been used in that area of the bank (Bramer EBT 21:1-12). She stated that directly following plaintiff's accident, a standing yellow warning sign was placed in the entryway to alert people of the wet floor (Bramer EBT 20).

Defendants bank and premises owner move for summary judgment and dismissal of the complaint and all cross claims against them. They argue that they were under no obligation to keep the floor entry free from water during the course of the rain storm, during the time of which plaintiff fell, and that they had no actual or constructive notice of any hazardous condition of the floor, that any suggestion that the floor mat was defective in some manner is purely speculative, and that accordingly they cannot be held liable for plaintiff's injuries.

Plaintiff argues that there are questions of fact as to whether the bank had in fact constructive notice of the dangerous condition. She notes the longevity and severity of the storm, and suggests that the bank should have taken remedies to protect its customers from the accumulation of water dripping from umbrellas and off clothing. She notes that two mats were placed on the tiled floor, but covered only a portion of the floor, and that no warning sign was posted, nor was there evidence showing an attempt to remove the build-up of water. She also attempts to suggest that the floor mat may have been deficient, pointing to the photographs taken

from the security camera which appear to show different textures that could be a sign of wearing. She contends that a jury could reasonably infer that a dangerous and hazardous condition existed of which the bank had constructive notice, but for which it failed to take sufficient precautions.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, it shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

To establish a prima facie case of negligence, a plaintiff must demonstrate that the defendant owed him a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002)). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]).

"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 " (*Friedman v Gannett Satellite Info. Network, Inc.*, 302 AD2d 491,

492 [2d Dept. 2003], citing *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). When a defendant has actual or constructive notice of a dangerous condition, then within a “reasonable time” the defendant is obligated to undertake such remedial actions as are reasonable and appropriate for the circumstances (*Friedman*, at 491-492). In *Friedman*, there was testimony that it had been snowing for at least two hours at the time plaintiff slipped on an accumulation of snow, ice, and moisture at the entrance to the building vestibule, and evidence that the defendant had not placed an additional mat in the vestibule as was its usual practice during inclement weather, and therefore summary judgment was denied as there were questions of fact as to whether the defendant had constructive notice of the dangerous condition and had taken reasonable and appropriate remedial actions under the circumstances. In comparison, in *Ford v Citibank, N.A.*, 11 AD3d 508, 508-509 (2d Dept. 2004), summary judgment was appropriate where the bank showed that it had no actual notice of the particular water accumulation on the premises caused by a lengthy rainstorm, and there was no proof as to how long the specific condition existed so that an inference could be drawn that there was constructive knowledge, and the bank moreover showed that it had taken reasonable precautions to remedy the wet conditions, including providing two mats and mopping the lobby floor within the hour before plaintiff fell.

A “general awareness” of the possible presence of a dangerous condition is not legally sufficient to constitute notice of the particular condition which caused the accident at issue, and liability can be predicated only where the defendants fail to remedy the danger after actual or constructive notice (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]). In addition, the law is clear that in general, a property owner will not be held liable in negligence for injuries

sustained as the result of a wet or icy condition occurring during an ongoing storm or for a reasonable time thereafter, even if the defendant has a general awareness of a recurring hazardous condition (*Solazzo v New York City Trans. Auth.*, 6 NY3d 734, 735, *affirming* 21 AD3d 735 [1st Dept. 2005] [holding that summary judgment was appropriate where it had been snowing, sleeting and raining throughout the day, and the steps down into the subway where the plaintiff slipped were exposed to the weather conditions; the argument that the injury was caused by a recurring hazardous condition known to the defendant, was unavailing, as a general awareness that the stairs and platforms become wet during inclement weather did not establish constructive notice of the specific condition causing plaintiff's injury]; *but see, Padula v Big V Supermarkets, Inc.*, 173 AD2d 1094 [3d Dept. 1991] [recurring hazard as a result of inclement weather allows inference to be drawn of actual knowledge of recurring dangerous condition, in particular once storm has ended]). Thus, in *Garcia v Delgado Travel Agency, Inc.*, the facts that it was raining and water was being tracked into the lobby and that defendant put down floor mats, did not constitute notice of a dangerous condition, and because there was no proof as to how long the wet floor possibly existed, there could not be found constructive notice of a dangerous condition (4 AD3d 204 [1st Dept. 2004]). In *Gonzalez-Jarrin v The New York City Dept. of Educ.*, where it had been raining or snowing for several hours at the time of the accident, and defendant had placed a mat on the vestibule floor but had no actual or constructive notice of the particular wet condition on which plaintiff slipped, the defendant had no obligation to cover the entire floor or continuously mop up the water (50 AD3d 334, 335 [1st Dept. 2008]).

Even assuming the truth of plaintiff's factual allegations, she fails to establish that defendants were negligent. The fact that the bank had placed two floor mats inside the ATM

entry way is a sufficient response to the rain. As noted, case law holds that while a storm is underway, a defendant is not required to keep the floor dry. There had been no complaints received by the bank about the floor's condition on the day in question, or indeed ever. Thus, it cannot be found that the bank had actual notice of a hazardous condition or that it had constructive notice of a particular puddle or slippery spot on the floor. At best, plaintiff shows that the bank had a generalized knowledge that the floor was wet, but no specific knowledge that there was a hazardous condition. Plaintiff's attempt to suggest that one of the floor mats was defective is purely speculative. Accordingly, the motion for summary judgment brought by Washington Mutual Bank must be granted.

Plaintiff's claims against the building owner must also be dismissed. She has cited two sections of the New York City Building Code, sections 27-127 and 27-128, which concern an owner's responsibility not for transient conditions such as rain water, but for structural conditions, and are inapplicable to the facts herein (*see Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24 [1st Dept. 1993]; *Kilimnik v Mirage Rest., Inc.*, 223 AD2d 530 [2d Dept. 1996]). Moreover, after searching the record pursuant to CPLR 3212 (b), the court also grants summary judgment and dismissal, without prejudice, as to the XYZ Management Company, the unknown company hired by the bank to clean and make repairs, based on the law that a contract will generally not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, *supra*). It is

ORDERED that the motion for summary judgment (CPLR 3212) by defendants Washington Mutual Bank FSB, a/k/a Washington Mutual, and Fairfax LLC, is granted and the complaint is dismissed with prejudice, with costs and disbursements to defendant as taxed by the

Clerk of the Court upon the submission of an appropriate bill of costs; and it is further


ORDERED that the complaint is dismissed without prejudice as against XYZ

Management Co., upon searching the record pursuant to CPLR 3212 (b), and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: January 16, 2009
New York, New York



J.S.C.
HON. PAUL G. FEINMAN

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK