Conway v American Airlines, Inc.
2009 NY Slip Op 30379(U)
February 18, 2009
Supreme Court, New York County
Docket Number: 106144/04
Judge: Carol R. Edmead
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SCANNED ON 2/23/2009

[* 1]

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

PRESENT: Judge Edmead **PART** 35

Index Number : 106144/2004

CONWAY, MARGARITA

vs.

AMERICAN AIRLINES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/16/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

iis 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

Based on the foregoing, it is hereby

ORDERED that defendant American Airlines' motion for an order, pursuant to CPLR §3212, dismissing plaintiff Margarita Conway's Complaint is denied; and it is further

ORDERED that American Airlines serve a copy of this order with notice of entry upon all parties within 20 days of entry. Plaintiff to file the note of issue by March 13, 2009.

That constitutes the decision and order of the Court.

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/18/09

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

---x

MARGARITA CONWAY,

Index No. 106144/04

Plaintiff,

-against-

DECISION/ORDER

AMERICAN AIRLINES, INC.,

Defendant.

---x

HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiff Margarita Conway ("plaintiff") seeks more than $1 million in damages resulting from a trip and fall in the American Airlines terminal at Las Vegas McCarran International Airport in Las Vegas, Nevada.

Defendant American Airlines ("American Airlines") now moves for summary judgment, pursuant to CPLR §3212, dismissing plaintiff's Complaint, on the grounds that there is no proof that plaintiff's claimed injuries were caused by any breach of duty of care owed by American Airlines to plaintiff.

Factual Background

On February 1, 2003, plaintiff was at the Las Vegas McCarran International Airport ("the airport") with her daughter, Natalie Conway ("Natalie"), preparing to board her scheduled flight, American Airlines Flight No. 1059. As plaintiff was walking in the corridor toward the seating area for Gate D, she was pushing a luggage cart. The cart struck something on the floor, causing plaintiff to fall and the cart to fall on top of her.

[* 3]

Plaintiff's Contentions[1]

Plaintiff contends that the luggage cart she was pushing struck wires or a metal rail left on the floor of the corridor[2], and that, as a result of the accident, she sustained serious permanent injuries. Specifically, plaintiff contends that the accident occurred within approximately two yards of a seating area located within the American Airlines gate corridor at its point closest to a women's restroom facility located nearest the accessway to the gateway corridor (Supplemental Verified Bill of Particulars, p. 1, ¶ 4). Plaintiff further contends that American Airlines owned, operated or controlled, in part or in whole, the gate area where the accident occurred and that the resulting serious injuries were caused by the negligence and carelessness of American Airlines.

Plaintiff alleges that American Airlines, *inter alia*, caused a hazardous and dangerous condition to exist in the common passageway in the terminal frequented by customers; failed to warn plaintiff and the public in general of the dangerous and hazardous condition; failed to safely secure and fence off the dangerous condition; failed to provide safe passageway for the plaintiff; failed to remove a foreseeable dangerous condition; and failed to properly inspect the area and ensure that it met the safety requirements provided by Nevada and federal law.

Defendant's Motion[3]

American Airlines states that it leased certain portions of the terminal building at the airport from Clark County, Nevada ("the County"). For plaintiff to hold American Airlines liable

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[1]*See* plaintiff's Complaint, Verified Bill of Particulars, Supplemental Verified Bill of Particulars, and deposition, American Airlines' motion, Exhs. A, C, D, and G, respectively.

[2]In plaintiff's Complaint she contended the luggage struck wires, but in her deposition, she contended that the cart struck a metal rail.

[3]*See* American Airlines's Motion, transcript of the deposition of Johnny Lee, Exh. F, and plaintiff's deposition, Exh. G.

for the alleged dangerous condition in the access corridor – wires on the floor or, as testified to by plaintiff at her deposition, a metal rail across the floor[1] – plaintiff first must establish that American Airlines owed plaintiff a common law or contractual duty to maintain the area where she fell. However, American Airlines does not owe plaintiff a duty of care to maintain or repair the corridor leading to the gate from which Flight 1059 was scheduled to depart. In support, American Airlines cites the deposition testimony of its representative, Johnny Lee ("Mr. Lee"), a Customer Service Agent:

> Q. Where does American's control of that [D Concourse level] area begin?
>
> [Objection omitted].
>
> A. The area that we control would be the gate itself, the D-8 area. We don't lease the ramps to D-8, D-10, and D-11, the hall, or the corridors leading to those gates. They are county owned or operated. We don't lease those areas.
>
> Q. And how is it that you know this information?
>
> A. It's common knowledge that McCarran is one of the unique airports where we have so many different carriers that the area, like I mentioned earlier, is on the CUTE system. And it allows each airline to go to – you can put your sign in – and you are allowed to use their gate for check-in.
>
> (Exh. F, p. 58).

Thus, the record establishes that American Airlines cannot be held liable for plaintiff's injuries because American Airlines was neither in control of the area where plaintiff claims she fell, nor

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[1] American Airlines points out that in plaintiff's deposition, she testified that only after the accident did plaintiff see a two-inch-wide metal rail on the ground with carpet on either side. Plaintiff does not know whether the wheels of the cart contacted the metal rail or if the metal rail was raised, broken or covering any wires (plaintiff's deposition at Exhibit G, pp. 48, 51, 55-58, 63, 74-77).

did it have any responsibility to maintain or repair the area or any unsafe condition in the area. In the absence of any duty to maintain or control the corridor area where plaintiff claims she fell, or to correct any unsafe condition, American Airlines owed no duty of care to plaintiff with regard to any unsafe condition on the floor in the corridor of Concourse D. Since the plaintiff cannot establish that American Airlines owed her a duty that was breached, she cannot make out a *prima facie* case of negligence against American Airlines. Accordingly, American Airlines must be granted summary judgment as a matter of law.

Second, American Airlines argues that it does not owe plaintiff a duty of care regarding any alternative accident location. Despite plaintiff's allegations that the accident occurred beyond the D Gate security checkpoint, business records prepared by American Airlines in its regular course of business in response to plaintiff's accident indicate that the accident occurred before the security checkpoint (*see* Exh. E, sub-exhibit 2, American Airlines' Event Summary Report). American Airlines contends that after the alleged accident, Mr. Lee was notified and responded to the incident. Mr. Lee testified that the area where plaintiff fell was located just before the D Gate security checkpoint (*see* Mr. Lee's deposition transcript, Exh. F, and the Event Summary Report). Thus, in the event plaintiff attempts to create an issue of fact regarding where the accident occurred, summary judgment must still be granted in American Airlines' favor because American Airlines did not owe plaintiff a duty of care as to this alternative location. American Airlines responded to the area only because it was notified that one of its passengers had been injured. Therefore, since American Airlines had no duty or lease obligation to maintain or control the area where plaintiff claims she fell, or the area before the security checkpoint where Mr. Lee responded, the Complaint must be dismissed (*see* affidavit of Steven R. Holt, American Airlines'

principal in corporate real estate, ("Holt affidavit") Exh. E).

Plaintiff's Opposition

Citing caselaw, plaintiff argues that American Airlines failed to eliminate all material issues of triable fact. A genuine issue of material fact exists as to where plaintiff fell in the airport. Therefore, American Airlines is not entitled to summary judgment as a matter of law.

First, the evidence submitted by American Airlines fails to demonstrate that plaintiff did not fall where she claims to have been injured. Plaintiff insists that she fell within only a few feet of American Airlines' ticketing booth in the D concourse of the airport. After she passed the security checkpoint with her daughter, she walked down the corridor that led to American Airlines' gateway until there was a restroom to her left and an American Airlines gate and ticketing booth to her right (Exh. G, p. 45, lines 10-12). Plaintiff then spotted a seat only a few feet in front of her (*id.*). With the bathroom to her left and the American Airlines ticketing booth to her right, plaintiff pushed the luggage cart forward to reach the seat. Plaintiff fell only two yards from the seat she was walking toward (*id.* at p. 52, lines 4-5), raising the strong inference that the seat was located in the waiting area for American Airlines' gateway and that plaintiff was only a few feet from American Airlines' ticketing booth on her right.

Further, plaintiff recalls that the first people to immediately respond to her injury were personnel working for American Airlines (*id.*, p. 140, lines 1-24 and p.196, lines 1-24). Plaintiff points out that Mr. Lee testified that if the incident had happened in an area before the security checkpoint, American Airlines personnel would not have been the first personnel to have been called to the scene (Exh. F, p. 65, lines, 5-6). Mr. Lee also testified that if American Airlines had officially responded to the incident through management, management would have called

personnel from "Prospect" to provide the wheelchair and that Prospect employees wore vests embroidered with the Prospect symbol (*id.* at 66-67). However, plaintiff remembers that American Airlines' personnel helped her into a wheelchair that American Airlines personnel provided; that at the scene, American Airlines personnel spoke directly to the clerks at the American Airlines ticketing desk to change plaintiff's ticket; and that American Airlines personnel then accompanied her to the infirmary (Exh. G, p.140, lines 1-24). Plaintiff argues that the immediacy and the extent of the response by American Airlines, and not airport personnel, support her assertion that she fell only within a few feet of the ticketing booth and waiting area of the American Airlines gate.

Although American Airlines cites to Mr. Lee's testimony to establish that plaintiff did not fall at the location she alleges, Mr. Lee was not at the location of the incident on the day of the injury (Exh. F, p.12, lines 13-25). Mr. Lee does not even recall the incident (*id.*, p. 22, lines 22-23). He did not speak to or interview any American Airlines personnel regarding the incident (*id.*, p.26, lines 9-12). He did not speak to any personnel from McCarran Airport who witnessed the incident (*id.*, p.27, lines 2-8). Mr. Lee does not even recall who reported the incident to him (*id.*, p.40, lines 15-20). Yet, it was Mr. Lee who submitted the incidence report to the corporate office of American Airlines (*id.*, p.14, lines 16-23). Mr. Lee can not confirm whether or not the Event Summary Report was generated immediately after the incident or whether it was made after the start of litigation (*id.*, p. 49). Therefore, the Event Summary Report's summary conclusion that "Margarita Conway tripped and fell just before entering D Gate security" (Exh. E, sub-exhibit 2) must be regarded with healthy skepticism. Further, the Event Summary Report does not contain any testimony or evidence to support its conclusion (*id.*).

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Mr. Lee describes the bathrooms in the D concourse as being located about 100 yards past Gate D-8 used by American Airlines (Exh. F, p. 11, line 3). Mr. Lee also contends that American Airlines used Gates D-8, D-10 and D-11 on a permanent basis (*id.*, p.10, lines 16-17) and used Gate D-6 on a regular basis (*id.*, p.30, line 24). However, Mr. Lee does not remember from which gate plaintiff was scheduled to leave (*id.*, p.73, lines 5-10). Thus, even if the Court were to assume that Mr. Lee's approximation, given in his testimony in defense of American Airlines, was reasonable, it cannot be asserted with any degree of certainty that 100 yards away from Gate D-8 would have placed plaintiff past either of the other gates controlled by American Airlines in the D concourse.

Further, the diagrams of the D concourse Mr. Holt provided do not reveal the location of any bathrooms, making it impossible for American Airlines to deny with certainty plaintiff's claim that she fell between the restrooms and an American Airlines ticketing booth (*see* Exh. E, sub-exhibit 1, Exh. B1). The diagrams also reveal security checkpoints on level 2, the same level as the D concourse (*id.*). Thus, the weight of the evidence submitted by American Airlines does not succeed in dispelling all doubt that plaintiff did not fall where she claims to have been injured.

Second, a genuine issue of material fact exists as to whether American Airlines had a duty to maintain the premises where plaintiff contends that she fell. American Airline's lease with Clark County for the gates in the D concourse ("the Lease") does not dispel all doubt as to its duty to maintain the location where plaintiff fell, just in front of the American Airlines gateway (*see* the Lease, Exh. E, sub-exhibit 1). The Lease states in Article 9.01 (A)(2)(f) that American Airlines is responsible to "(i)mmediately repair any damage in any other space at the

Airport occasioned by the fault or negligence of AIRLINE, its servants, agents, employees, licensees, passengers, and invitees and not covered by insurance carried by COUNTY" (*id.*, p. 53). American Airlines has not produced any evidence to conclusively refute that the metal rail that plaintiff's luggage cart struck was not caused by American Airlines personnel. Further, the Lease holds that "(t)he AIRLINE's maintenance responsibilities are more particularly defined by Maintenance Matrix Exhibit E attached hereto" (*id.*, Article 9.01 (A)(4), p. 54). The Maintenance Matrix ("the Matrix") is not attached to the portions of the Lease provided by American Airlines and, so, raises an issue of material fact as to whether American Airlines was under an obligation to maintain and repair any defects in the space within the immediate vicinity of its gate in order to ensure safe passageway for its customers.

Third, as a common carrier, American Airlines owes a duty to its passengers as long the passenger/carrier relationship exists, and such duty extends beyond the "conveyance" to the location of plaintiff's injury. Citing caselaw, plaintiff argues that American Airlines owes a duty of care to the passengers in the immediate vicinity of its gate area. Plaintiff asserts unequivocally that she was injured at a distance not exceeding two yards from the American Airlines ticketing booth near the American Airlines gate. A simple queue to get to the gate would extend much farther than a couple of yards, extending the zone in which foreseeable harm could come to plaintiff from hazardous conditions to the area where plaintiff was injured.

Citing caselaw, plaintiff also argues that a common carrier has a duty to protect its passengers from third parties. Such a policy can be extended in this case to imply that even if American Airlines was not obligated to actually repair the immediate vicinity of its ticketing booth according to its contract with the county, it still had a duty to prevent harm to its

passengers caused by the County's failure to make repairs, especially when all it would have taken was a warning sign to be posted near the metal rail. The common law duty of care extends not only to the parts of the airport under American Airlines' exclusive possession, but also to any area American Airlines had a duty to maintain or clean. As mentioned above, American Airlines has not included a copy of the Matrix, and so it cannot be conclusively assessed whether or not American Airlines had a duty to maintain the site of the injury. The rail was two inches wide and spanned the hallway, and so was open and obvious to American Airlines' staff.

The New York Court of Appeals also has recognized that common carriers owe a duty to passengers to keep the passageways to their facilities free from hazardous conditions. Here, the metal rail extended from the gate area of American Airlines to across the hall, in an area where three to four adjacent gateways were being used by American Airlines. It is reasonable to assume that hundreds of American Airlines passengers a day would cross this rail on their way to and from the American Airlines gate. Further, courts have been reluctant to allow a contractual provision to dispel liability by a carrier where such duty would otherwise have existed. Thus, when the evidence is viewed in a light most favorable to plaintiff, and it is accepted that plaintiff fell within, at most, two yards from the American Airlines gate, it is clear that American Airlines had a duty to plaintiff to maintain the location of plaintiff's injury free of hazardous conditions. Thus, American Airlines is not entitled to summary judgment as a matter of law.

Defendant's Reply

American Airlines argues that plaintiff's contention that she fell beyond the D security checkpoint within a corridor leading toward the gate from which her flight was scheduled to

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depart is utterly false, either by design or poor recollection. Contrary to the "Statement of Fact" offered by plaintiff's counsel (plaintiff's opposition, p. 3) and plaintiff's "often-confused" deposition testimony, the place of the accident was located *before* the D security checkpoint in an area owned by Clark County, Nevada ("the County") and outside the control of American Airlines (Reply, ¶ 3).

American Airlines submits as further evidence an Incident Report that the County's Department of Aviation prepared in response to plaintiff's accident ("the County Report") (Reply, Exh. D)[5]. American Airlines argues that the well-documented County Report represents that plaintiff fell "before the D-security checkpoint . . . on the expansion joint which holds the carpet together . . . just past the W.H. Newsstand." American Airlines contends that the County Report is consistent with the Event Summary Report prepared by American Airlines and the deposition testimony of Mr. Lee.

American Airlines reiterates its argument that it does not owe any duty of care to plaintiff with regard to any condition located before the D security checkpoint or beyond, within the corridor at the airport. Mr. Holt stated upon his personal knowledge, his review of the Lease, and his review of litigation documents that American Airlines was not obligated to control, maintain or repair the two possible areas where plaintiff fell. Accordingly, American Airlines has established a *prima facia* showing of its entitlement to summary judgment as a matter of law by demonstrating that there are no material issues of fact to be decided.

In order for plaintiff to have been in a position to view her departure gate at the time of her accident, as she alleges, she would have had to ride a passenger tram to the D Gates after

[5]Counsel for American Airlines first became privy to the Report on January 8, 2009.

clearing the D security checkpoint and then ascend to an upper level of the airport by elevator or escalator in a different airport building to reach the D Gate departure lounges. The D8 Gate was the second-to-last departure gate within the East Wing of the D Terminal. Airlines other than American Airlines used gate space within Terminal D on the date of accident, and notably, within the D Concourse (East Wing) where plaintiff claims her accident occurred *(see* Lee deposition, pp. 9 and 54 and the affidavit of Barbara L. Bolton ("Ms. Bolton"), Aviation Business Manager for the Clark County Department of Aviation, ("Bolton Affidavit"), American Airlines' Reply, Exh. L). Under no interpretation could the D8 Gate be deemed "within only a few feet" of the place of the accident, as counsel for the plaintiff contends. According to Diagram L-829 of the Lease, the D8 Gate lies between Gates D6 and D10, and D6 is located at the middle section of the D Terminal, East Wing. Moreover, a distance of at least 100 yards – a football field – separated the D8 Gate from the nearest women's restroom, according to Mr. Lee.

Regardless of where plaintiff was situated after the D security checkpoint at the time of her accident, the record is devoid of admissible proof establishing plaintiff was injured upon property under the exclusive control of American Airlines by contract or operation of law. Plaintiff had not yet reached an American Airlines departure gate at the time of her accident. As sworn to by plaintiff, the specific location of the happening of the accident was "in the gate corridor leading to the departure gate assigned to Flight #1059." That location was within a "Public Area," an area to which American Airlines had no duty or lease obligation to keep in good repair, operation and/or maintenance.

Counsel for American Airlines inadvertently neglected to include the Matrix with American Airlines' original motion papers. However, the Matrix further supports American

Airlines' argument that it was not obligated to control or maintain the area where plaintiff claims her accident occurred. The categories within the Matrix that apply to maintenance and/or repair responsibilities are located at numbers 11 and 12. However, since the area where plaintiff claims her accident occurred is located in a "Public Area corridor" within Terminal D, the Matrix responsibilities are not applicable. As defined in the Lease, Public Areas "shall mean those Terminal Building areas not leased on an exclusive, preferential or joint use basis, or otherwise, to any person, company, or corporation and which are opened to the general public" (p. 27). A second Affidavit by Mr. Holt confirms that American Airlines had no contractual obligation to maintain the area where plaintiff claims she fell or the area before the D security checkpoint identified in the County's Report and the Event Summary Report. The only areas for which American Airlines had any duty or lease obligation to control or maintain at Terminal D, Level 2, East Wing are noted at Diagram L-829 and marked by slanted lines, cross hatches and dots.

Further, American Airlines disputes that it owes a duty to plaintiff as a common carrier. Multiple airlines operated at the airport within Terminal D, Level 2, East Wing at the time of plaintiff's accident. The airport is a "common-use airport, where different carriers can use different gates. . . . If they wanted to use one of the American Airline gates, they have the possibility and capacities of doing so," according to Mr. Lee (*see* Lee deposition, pp. 56-57 and Reply). Hence, the corridor leading to and within Terminal D, Level 2, East Wing did not serve as a manner of ingress and egress "primarily" for American Airlines' business operations. Other airlines and concessionaires utilized this corridor within the "common use airport" where plaintiff claims she fell. As such, American Airlines did not owe plaintiff a duty of care as a common carrier to ensure the area where plaintiff claims she fell remained in a safe condition

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either through maintenance, repair, or by employing preventative measures such as warnings.

Finally, plaintiff failed to submit a responsive affidavit in opposition to American Airlines' motion. Plaintiff's unverified Memorandum of Law ("MOL") is wrought with attorney statements that mischaracterize otherwise admissible proof. Additionally, the factual arguments set forth in the MOL are self-serving characterizations, speculative, and constitute hearsay and conjecture. Moreover, the MOL is designed to evoke the Court's sympathy for the plaintiff, an "elderly mother" of "advanced age," rather than focus the Court's attention on the duty argument at hand. Absent an affidavit or other proof in admissible form offered in opposition, American Airlines' motion must be deemed unopposed.

Analysis

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] [Super 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]). 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*; *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* 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* at 562). The defendant "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]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan*

Assn., 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2D 347, 668 NYS2d 157 [1st Dept 1998]).

Negligence

To establish a negligence cause of action, a plaintiff must demonstrate (1) a duty of care owed to the plaintiff; (2) a breach of that duty; (3) that the breach is a proximate cause of plaintiff's injury or damages; and (4) that the plaintiff suffered a legally cognizable injury or damages (*see Akins v Glens Falls City School District*, 53 NY2d 325, 333 [1981]). The threshold issue here is whether American Airlines owed any duty to plaintiff to maintain the premises where plaintiff tripped and fell free of any dangerous conditions.

According to the First Department, "[i]t is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances" (*Waiters v Northern Trust Co. of New York*, 29 AD3d 325, 326, 2006 NY Slip Op 03500, *2 [1st Dept 2006], *citing Basso v Miller*, 40 NY2d 233, 241 [1976]). Specifically, in a trip and fall action against a common carrier, in order to establish a *prima facie* case of negligence, a plaintiff must demonstrate that the defendant created the dangerous condition which proximately caused the accident or that the defendant had actual or constructive notice of the injury-causing condition (*id.*). This duty extends to areas used as a means of primary access to and egress from the common carrier (*Bingham v New York City Transit Authority*, 8 NY3d 176, 180-181 [2007]). However, the duty does not extend to common areas (*Ruffino v New York City Transit Authority*, 55 AD3d 819, 821, 2008 NY Slip Op 08115, *2 [2d Dept 2008]). Whether an area is used exclusively by a common carrier is usually a question of fact (*see e.g. Bingham v New York City Transit Authority*, 8 NY3d 176, 180-181 [2007] [holding that the evidence at trial was sufficient

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to establish that the stairway in question was used exclusively by patrons of the common carrier defendant].

Here, the issue is whether American Airlines controlled the area of the airport where plaintiff fell. Citing its Lease and the affidavit of Mr. Holt, American Airlines concedes that it controls certain areas of the airport's D Concourse, where plaintiff's Flight #1059 was scheduled to depart. But American Airlines denies controlling the corridor leading to the gate from which Flight #1059 was scheduled to depart (motion, ¶ 13). American Airlines also denies controlling the area where plaintiff contends she fell, approximately two yards from a seating area located near the American Airlines gate (motion, p. 9). However, neither the documentation provided by American Airlines nor the Holt affidavit establishes that American Airlines did not control either location where plaintiff may have fell. Instead, the Court finds that issues of material fact exist as to exactly what areas of Concourse D American Airlines controlled and exactly where in Concourse D plaintiff fell on February 1, 2003.

Citing its Lease with the County and the Holt affidavit, American Airlines argues that it was responsible to maintain the floor coverings only within the "Exclusive Use Space" areas designated in the Lease. In his affidavit, Mr. Holt states: "Significantly, American was not responsible for the maintenance or repair of any areas outside of its Exclusive Use Space" (Holt affidavit ¶ 5, citing Section 9.01(A)(2)(a) and (c) of the Lease).

The Lease clearly states that the County has leased to American Airlines 9,599 square feet of "Exclusive Use Space," 17,160 square feet of "Preferential Use Space" and 190,143 square feet of "Joint Use Space" in Concourse D of the airport's terminal (*id.* p. 17). The Lease defines each of the categories of space American Airlines leases. Exclusive Use Space is defined simply

as "the premises leased by COUNTY to AIRLINE *as more fully set forth in Exhibit B or Exhibit Bl*, or as the same may be amended from time to time" (*id.* at 6) (*emphasis added*). Preferential Use Space is defined as "the non-exclusive preferential use space in the Terminal Building leased by COUNTY to AIRLINE for which AIRLINE *has primary use rights*"(*id.* at 7) (*emphasis added*). Joint Use Space is defined as "the premises leased by COUNTY to AIRLINE *and one or more other airlines*, as more particularly set forth in Exhibit B or Exhibit Bl, or as the same may be amended from time to time" (*id.* at 6) (*emphasis added*). The Court notes that Exhs. B and B1 comprise 25 individual diagrams depicting areas of Concourse D. However, these diagrams are not clearly marked in relation to plaintiff's accident. The diagrams do not indicate which areas are American Airlines' Exclusive Use Space or Preferential Use Space. (Some of the diagrams are marked "Joint-Use.") The diagrams do not indicate the location of the D Security Checkpoint or seating areas.

Article 9 of the Lease explains which entity – either the County or American Airlines – is responsible for the leased areas of Concourse D. The Lease clearly states that American Airlines is responsible for the maintenance and repair of "its Exclusive Use Space" (*id.* at 52), and the County is responsible for the maintenance and repair of the Public Areas and Joint Use Space of the terminal (*id.* at 55)[6] Significantly, the Lease does not explain which entity controls the

[6] According to the Lease, with regard to the Exclusive Use Space, American Airlines must:
e. Perform, at its sole expense, ordinary preventive maintenance and ordinary upkeep and nonstructural repair of all facilities, personal property, and equipment, including, but not limited to, fixtures, doors and windows, baggage conveyors and belts, floor coverings, ticket counters, and AIRLINE baggage and passenger examination and inspection facilities in the Public Areas of the Terminal Building and other facilities, including all electrical work, plumbing, appliances, and fixtures located within its Exclusive Use Space. AIRLINE shall provide repairs and maintenance for manual and overhead automatic doors. COUNTY, at its own expense, shall maintain the exterior portions of the walls and roof of the Exclusive Use Space and all central mechanical distribution systems in good repair and

Preferential Use Space, of which American Airlines has "primary use rights." The Lease does not explain what "primary use rights" mean, in terms of control. Further, the Lease goes on to say that American Airlines' maintenance responsibilities are "more particularly defined in the Maintenance Matrix Exhibit E attached" to the Lease (*id.* at 54). Yet, the Matrix is not attached to American Airlines' motion, but to its Reply. (Further, the Matrix also lacks sufficient relevant information.) So, the Court is unable to identify which areas of Concourse D are under American Airlines' exclusive control or primary control. Further, the Court is unable to identify which areas of Concourse D are under American Airlines' exclusive or primary control.

Further, Mr. Holt's affidavit fails to provide clarity on the issues of what areas of Concourse D American Airlines controlled on February 1, 2003, or where plaintiff fell on that day. Mr. Holt states: "As sworn by Margarita Conway, the place of accident was within a 'gate corridor' near a 'seating area' where her flight was scheduled to depart from McCarran on February 1, 2003. . . . As described by plaintiff, her accident occurred within a Public Area corridor beyond the D Gate security checkpoint, an area to which American had no duty or lease obligation to keep in good repair, operation and/or maintenance. The area where plaintiff claims she fell is depicted in Drawing L829 at Exhibit 1" (Holt affidavit, ¶¶ 3 and 6). However, Drawing L829 contains no marking or other indication of the D Gate Security checkpoint or the seating area, as points of reference. Further, Drawing L829 does not indicate whether the space is Exclusive Use or Preferential Use Space leased by American Airlines. (Drawing L829 clearly

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condition.
f. Immediately repair any damage in any other space at the Airport occasioned by the fault or negligence of AIRLINE, its servants, agents, employees, licensees, passengers, and invitees and not covered by insurance carried by COUNTY. (Lease, pp. 52-43)

[* 20]

is not labeled "Joint Use Space," which may indicate that American Airlines controls the area.) Finally, Drawing L829 does not contain any type of marking or other indication of where plaintiff allegedly fell. In essence, without explanatory details, neither the Lease nor the diagrams accompanying the Lease establish that American Airlines had no control over the areas where plaintiff possibly may have fallen.

Mr. Holt's affidavit is equally unenlightening. Rather than explain the diagrams attached to the Lease, Mr. Holt focuses on American Airlines' Event Summary Report and the testimony of Mr. Lee. Based on the documentation American Airlines has provided, the Court is unable to identify the area "just before" the D Gate security checkpoint, because the D Gate Security Checkpoint is not marked on the diagrams accompanying the Lease. Mr. Holt fails to point to the Lease or the accompanying diagrams to support his argument. Mr. Holt fails to address plaintiff's contention that plaintiff fell *after* passing D Gate security or in the corridor adjacent to the D8 gate. Mr. Holt even fails to state whether the area past D Gate security is controlled either exclusively or primarily by American Airlines. Beyond Mr. Holt's conclusory statements, his affidavit is not persuasive in establishing that American Airlines had no duty to maintain the possible areas where plaintiff could have fallen on February 1, 2003.

Further, the Event Summary Report and Mr. Lee's deposition testimony are not persuasive in establishing that American Airlines owed no duty to plaintiff. The Event Summary Report and Mr. Lee focus on whether plaintiff fell *before* she went through the D Security Checkpoint or *after* she passed the D Security checkpoint. As discussed above, American Airlines has not established what areas of Concourse D, including the areas before and after the D Security Checkpoint, that American Airlines exclusively or primarily controlled. In addition,

[* 21]

American Airlines has not established that it did not control the premises "near the gate area from which [American Airlines] #1059 was scheduled to depart," as testified to by plaintiff.

American Airlines' Reply provides more detailed information and additional documentation in support of its motion. However, it is well settled that a reply affidavit may not be considered for the purpose of showing *prima facie* entitlement to summary judgment (*Batista v Santiago*, 25 AD3d 326 [1st Dept 2006]). Further, arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion (*Clearwater Realty Co. v Hernandez*, 256 AD2D 100 [1st Dept. 1998]). In any event, the submissions are unavailing. According to American Airlines, Drawing L-829 purports to show that the "only areas for which American Airlines had any duty or lease obligation to control or maintain at Terminal D, Level 2, East Wing are noted at drawing L-829 and marked by slanted lines, cross hatches and dots." However, again, American Airlines does not provide any reference point for where plaintiff fell in relation to the marked areas on Drawing L-829. Further, the Matrix, like the diagrams attached to the Lease, falls short of establishing what areas of the D Concourse American Airlines controlled in relation to plaintiff's accident.

Finally, whether plaintiff's Memorandum of Law sufficiently defeats summary judgment is inconsequential. Here, American Airlines has failed to meet its burden, pursuant to CPLR §3212, in establishing that no issue of genuine fact exists as to whether American Airlines breached a duty of care owed to plaintiff. It is well settled that in order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The failure to make such a showing will result

in the denial of the motion, regardless of the sufficiency of the opposing papers (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134 [1st Dept 2000] *citing Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The failure of American Airlines to establish its right to summary judgment as a matter of law on the ground that it did not control any of the possible areas where plaintiff may have slipped and fell requires denial of its motion, regardless of the sufficiency of the opposing papers (*see Diaz v Nunez*, 5 AD3d 302 [1st Dept 2004] [motion for summary judgment should have been denied regardless of the sufficiency of plaintiff's opposing papers]). Therefore, the Court does not reach the merits of plaintiffs' opposing contentions.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant American Airlines' motion for an order, pursuant to CPLR §3212, dismissing plaintiff Margarita Conway's Complaint is denied; and it is further

ORDERED that American Airlines serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/18/09

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD