

Baez de Lora v Sunshine Capital LLC

2009 NY Slip Op 31053(U)

May 7, 2009

Supreme Court, New York County

Docket Number: 109739/06

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 109739/2006

DE LORA, LUZ S. BAEZ

VS.

SUNSHINE CAPITAL

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 *and all matters*
are decided for Plaintiff

FILED

MAY 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/7/09

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

LUZ S. BAEZ de LORA,

Plaintiff,

-against-

Index No. 109739/06

SUNSHINE CAPITAL LLC and EAST COAST
MANAGEMENT LLC,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

In this personal injury action, plaintiff, Luz Baez de Lora, alleges that, on May 24, 2006, she slipped and fell on an interior staircase at her apartment building located at 620 West 172nd Street, New York, New York (the premises). Defendants Sunshine Capital, LLC (Sunshine) and East Coast Management, LLC (East Coast) were the owner and managing agent of the premises, respectively. Sunshine now moves, pursuant to CPLR 3211 and/or 3212, for summary judgment dismissing the complaint.¹

Plaintiff testified at her deposition that, at about 2:15 P.M. on May 24, 2006, she slipped on the top step of an interior staircase which led to the exit door in the front of the building (Halbardier Affirm., Exh. E [Plaintiff Dep., at 21, 24, 26]). According to plaintiff, she slipped and fell because there was water and soap on the staircase (*id.* at 24). She fell to the floor, on top of her right foot (*id.* at 29, 30). She stated that it seemed that someone had mopped the floor of the lobby, but did not notice any signs warning of a wet floor (*id.* at 25). Plaintiff testified that

¹Plaintiff also cross-moved, pursuant to CPLR 3215, for entry of a default judgment as against East Coast, but subsequently stipulated to withdraw the cross motion provided that East Coast serve an answer. By e-mail dated May 5, 2009, plaintiff confirmed that the cross motion was withdrawn.

“it seem[ed] that they ha[d] passed the mop” (*id.* at 24). Plaintiff further testified that after she fell, she saw soap on the right side of the seat of her pants and smelled soap (*id.* at 31, 33).

However, she did not see anyone mopping the floor prior to her accident, nor did she see a mop (*id.* at 24, 25). It did not rain that day (*id.* at 22). When plaintiff saw the superintendent, she told him that she had fallen on the steps because they were wet (*id.* at 68). Plaintiff fractured her right ankle as a result of her fall (*id.* at 43).

In the bill of particulars, plaintiff alleges, among other things, that defendants created the wet condition on the stairs and stairway and had actual or constructive notice of the condition (Verified Bill of Particulars, ¶¶ 6, 7-9).

Sunshine moves for summary judgment, contending that plaintiff has failed to make out a *prima facie* case of negligence as against it. Specifically, Sunshine argues that it neither created nor knew of any wet floor in the building. In support, Sunshine submits the deposition testimony of plaintiff and Ramon Gualpa, the building superintendent.

Gualpa testified that he was employed by Sunshine, and was solely responsible for maintaining and cleaning the building on the accident date (Halbardier Affirm., Exh. D [Gualpa Dep., at 11, 19]). Gualpa mopped the building on that date before the time of the accident (*id.* at 45). He stated that he typically mops the building twice a week on Mondays and Wednesdays, starting at 10:00 A.M. and ending around 11:30 A.M. (*id.* at 40). He places yellow caution signs in the areas being mopped; when mopping the area near the lobby, he leaves two caution signs there for 45 minutes, although the floor usually dries in five minutes (*id.* at 19, 36). According to Gualpa, he mops the second floor of the building, and then mops the first floor, finishing the job by mopping the stairs in the vestibule area and lobby floor (*id.* at 35). Gualpa testified that he

uses a pinkish detergent mixed with cold water, which does not create any soap suds (*id.* at 24-25). According to Gualpa, he first learned of the accident when he saw plaintiff with a bandage on her foot (*id.* at 49). Plaintiff told him that she slipped while exiting the building and wearing sandals or similar footwear, and that it had been raining that day (*id.* at 50). She told him that she slipped in the front of the building, but did not mention the lobby or vestibule (*id.* at 51).

Plaintiff contends, in opposition to the motion, that Sunshine has failed to demonstrate that it did not create a dangerous condition. Furthermore, plaintiff contends that Sunshine can be charged with constructive notice of a recurring condition. To support this contention, plaintiff submits an affidavit from Yonara Betances, a tenant at the building for the past two years, in which she avers that the superintendent “never puts cones, mats, or caution signs up” when he mops. Betances further states that the superintendent leaves the stairs wet, soapy, and slippery, and never mops at the same times or on the same days. Finally, plaintiff submits weather records for May 2006, which show that there was no precipitation on the date of the accident (Shapiro Affirm., Exh. C, at 8).

It is well established that owners must keep premises in a “reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [citation and internal quotation marks omitted]). In a slip-and-fall case, the plaintiff has the burden of demonstrating that the defendant either created or had actual or constructive notice of the dangerous condition which caused the injury (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Matias v Rebecca’s Bakery Corp.*, 44 AD3d 429 [1st Dept 2007]). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a

sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (*Barrerra v New York City Tr. Auth.*, – AD3d –, 2009 WL 910758, *1, 2009 NY App Div LEXIS 2583, **1-**2 [1st Dept 2009]).

When a defendant moves for summary judgment in a slip-and-fall case, it has the burden of demonstrating that it neither created nor had notice of the allegedly dangerous condition (*see Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006] [on a motion for summary judgment, "defendant met its initial burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it"]; *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001] ["Contrary to defendant's suggestion, it is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law"]).

Even where there is no direct evidence that the defendant affirmatively created a dangerous condition, circumstantial evidence may be sufficient to create an issue of fact as to whether the defendant created such a condition (*see Healy v ARP Cable*, 299 AD2d 152, 154 [1st Dept 2002] ["(I)t is enough that (plaintiff) shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred"] [internal quotation marks and citation omitted]). For instance, in *Van Dina v St. Francis Hosp., Roslyn, N.Y.* (45 AD3d 673, 674 [2d Dept 2007]), the plaintiff allegedly slipped on a wet condition on a bathroom floor in a hospital. In that case, the Court found that summary judgment should have been denied to the hospital (*id.*). Specifically, the Court stated that "[t]he defendant failed to satisfy its initial burden of submitting evidence sufficient to refute the injured

plaintiff's deposition testimony, which gave rise to a reasonable inference that the defendant had created a dangerous condition on the bathroom floor by mopping" (*id.*).

In *Healy* (299 AD2d 152, *supra*), the circumstantial evidence was also sufficient to create an issue of fact as to whether the defendant created a dangerous condition by mopping. In that case, the plaintiff was allegedly injured in a fall on a wet staircase (*id.* at 153). Although no witness observed the defendant actually mopping, the terms of the defendant's contract required it to "[w]ash and wax or spray buff staircase landings" every other Sunday (*id.* at 155). The plaintiff also fell on a Monday morning before 8:00 A.M. (*id.*). Additionally, the plaintiff's co-workers testified that when they saw the plaintiff lying on the stairs after the fall, it appeared that the stairway looked wet, as if someone had just finished mopping, and that there were no warning signs on the stairs (*id.*).

In *Stone v KFC of Middletown* (5 AD3d 106 [1st Dept 2004]), the plaintiff also slipped and fell on a wet floor allegedly created by the defendant. In affirming the denial of summary judgment to the defendant, the Court stated that "[d]espite defendants' attempt to distinguish between the injured plaintiff's description of where the accident occurred and where his brother had observed the mopping, the evidence allowed for a reasonable inference that the slip and fall occurred where the mopping was observed, and was causally related" (*id.*).

In the instant case, although plaintiff did not observe anyone mopping before her accident, or see a mop, there is sufficient circumstantial evidence to raise an issue of fact as to whether the superintendent created a dangerous condition. Plaintiff testified that she slipped on water and soap on the stairs of the building at about 2:15 P.M. (Plaintiff Dep., at 21, 24). There were no caution signs present (*id.* at 25). After she fell, she noticed soap and water on her

clothes (*id.* at 32-33). And, the superintendent admitted at his deposition that he mopped the building that day, before the time of her fall (Gualpa Dep., at 45). A reasonable inference from the evidence is that the floor was wet from the mopping and that the superintendent failed to warn of the wet floor (*see Van Dina*, 45 AD3d at 674; *Stone*, 5 AD3d at 106). When a property owner creates a dangerous condition by his or her own affirmative act, the “usual questions of notice of the condition are irrelevant since the defendant created the condition” (*Cook v Rezende*, 32 NY2d 596, 599 [1973]; *see also Weingrad v Aguilar Gardens*, 227 AD2d 546 [2d Dept 1996] “[t]he plaintiffs need not demonstrate that the hazard was visible and apparent, or had existed for a particular length of time since there was evidence that the porter created the allegedly hazardous condition while cleaning the floor”).

While Sunshine relies on *Mercer v City of New York* (223 AD2d 688 [2d Dept], *affd* 88 NY2d 955 [1996]), that case can be distinguished. In that case, there was no evidence that the dangerous condition (a grease puddle) was created by the defendant’s affirmative acts (*see id.* at 690). Here, in contrast, there is such evidence – the superintendent testified that he mopped the floor that day before the accident (Gualpa Dep., at 45). Moreover, there are conflicting accounts as to the cause of plaintiff’s accident which may not be resolved on a motion for summary judgment (*see Glazer & Gottlieb v Nachman*, 233 AD2d 275, 275-276 [1st Dept 1996] [questions of credibility are not susceptible to summary disposition]).

Accordingly, it is

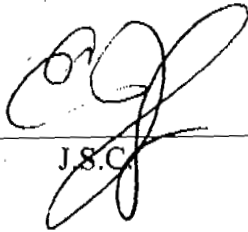
ORDERED that the motion of defendant Sunshine Capital, LLC for summary judgment

dismissing the complaint is denied.

This Constitutes the Decision and Order of the Court.

Dated: May 7, 2009

ENTER:



J.S.C.

FILED
MAY 13 2009
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