

Bresler v Museum Tower Corp.

2010 NY Slip Op 30118(U)

January 13, 2010

Supreme Court, New York County

Docket Number: 108143/07

Judge: Joan A. Madden

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SCANNED ON 1/22/2010

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

PRESENT: Hon. Judge A. Mitter

PART II

Index Number : 108143/2007
BRESLER, AKIKO
vs.
MUSEUM TOWER
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10-1-09
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 is decided in accordance with the annexed Memorandum Decision and order.

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

FILED
JAN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 13, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
AKIKO BRESLER,

Plaintiff,

-against-

Index No. 108143/07

MUSEUM TOWER CORPORATION, MUSEUM OF MODERN
ART, AND ABM INDUSTRIES, INC.,

Defendants.

-----X
MUSEUM OF MODERN ART,

Index No. 590815/08

Third-Party Plaintiff

-against-

ABM INDUSTRIES, INC.,

Third-Party Defendant

-----X
Joan A. Madden, J.

In this personal injury action, defendant ABM Industries, Inc. ("ABM") moves for summary judgment dismissing the complaint and all third party and cross claims against it (motion seq. no. 003) . Defendant The Museum of Modern Art ("MOMA") also moves for summary judgment dismissing the complaint against it or, in the alternative, for summary judgment with respect to its cross claim against ABM for contractual indemnification. (motion seq. no. 004).¹ Plaintiff Akiko Bresler ("Bresler") opposes the motions for summary judgment and cross moves for summary judgment as to liability. For the reasons stated below, the defendants' motions for summary judgment are granted and Bresler' s cross motion for summary judgment is denied.

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JAN 22 2010
NEW YORK
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¹Motion seq. nos. 003 and 004 are consolidated for disposition.

Background

Bresler alleges that she sustained personal injuries on November 12, 2005, at approximately 3:00 p.m. at MOMA located on 11 West 53rd Street, New York, New York (“the premises”), when she slipped and fell on the floor in the third floor corridor. Bresler contends that she fell due to the dangerous condition of the corridor and, in particular, that the defendants and/or their agents caused or permitted the corridor to become and remain in a dangerous and slippery condition and that this condition caused her to fall. At the time of the incident, ABM was under a contract with MOMA, which commenced on November 1, 2004, to perform cleaning and janitorial services on the premises, including the third floor corridor.

Bresler testified at her deposition that she fell when she was about halfway down the third floor corridor and that, following her fall, she observed that the floor was wooden and appeared polished (Bresler dep. at 31). She also stated that the floor was slippery (Bresler dep. at 94). However, Bresler also testified that she did not observe any polish, liquid, debris, other substance, or smudges, on the floor (Id. at 31). Bresler’s husband, Laurence Bresler, was present on the date of the accident and submits an affidavit in which he states that, prior to Bresler’s fall, he thought that his wife might slip on the floor because it appeared glossy and shiny (Laurence Bresler affidavit, 1-2). However, he did not state that he saw any polish, liquid, debris, other substance, or smudges, on the floor before or after plaintiff’s fall. William Maguire (“Maguire”), the security guard on duty in the vicinity of the third floor corridor, who came to assist Bresler following her fall, testified at his deposition that he did not observe anything unusual about the floor when he came to assist Bresler. (Maguire dep. at 32)

With respect to the maintenance of the third floor corridor, Roger Samuel, a project manager for ABM, testified that ABM dust mopped the floors every night and waxed or buffed

the floors periodically. (Samuel dep. 22-23). He also testified that ABM waxed the floors approximately once or twice per month, but the record does not indicate when the floors were last waxed prior to Bresler's fall. (Samuel dep. 22).

ABM moves for summary judgment on the grounds that (1) ABM owed no duty to Bresler, and (2) even if ABM owed a duty to Bresler, Bresler has not alleged facts sufficient to show that ABM improperly cleaned or maintained the floors or that the accident occurred as a result of ABM's negligence.

MOMA separately moves for summary judgment on the grounds that plaintiff has not alleged facts sufficient to show that a dangerous condition existed on the third floor corridor or that MOMA had notice of it.²

Bresler opposes the defendants' motions for summary judgment, arguing that summary judgment should be denied because (1) ABM and MOMA "utterly failed to keep...the third floor corridor floor, in a safe and hazard free condition" (Affirmation in Opposition to Motion and In Support of Cross Motion, at ¶ 9), (2) the defendants have "failed to sustain their initial burden of lack of notice" (Id.), and (3) "there is an issue of fact as to whether the defendants negligently waxed the museum floors so as to become dangerous and a slipping hazard" (Id.). Bresler also cross moves for summary judgment on the issue of the defendants' liability asserting that "the defendants caused and created a defective floor by applying too much wax, thus making the floor excessively slippery and hazardous" (Affirmation in Opposition to Motion and In Support of Cross Motion, at ¶ 28).

²By order dated January 3, 2008, Justice Roland Acosta granted Bresler's motion for a default judgment against defendant Museum Tower Corporation, directed Bresler to file a note of issue and that an inquest be held at the time of trial. Bresler filed a note of issue on April 30, 2008.

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Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

With respect to ABM's motion, it does not appear that, based on the facts provided, that ABM owed a duty to Bresler based on its contract with MOMA. Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136, 138 (2002)(holding that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party"). However, even if Bresler owed ABM a duty, ABM has made a prima facie case that it is entitled to judgment as a matter of law. For a plaintiff to demonstrate a prima facie case of negligence in a slip and fall case, a plaintiff must show that the defendant had actual or constructive notice of the allegedly dangerous condition or that it caused the condition to be created by its own affirmative act. Mercer v. City of New York, 223 AD2d 688, 689 (2nd Dept), aff'd, 88 NY2d 955 (1996).

While Bresler asserts that ABM caused the floor to be slippery, the record is devoid of any evidence supporting a finding that the floor was negligently maintained. Moreover, it is well settled that "the fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of a negligent application of wax or polish, does not give rise to a cause of action or inference of negligence." Thomas v. Caldor's, 224 AD2d 171 (1st Dept 1996). In addition, Bresler's observation that the floor looked slippery because it appeared polished, shiny, and/or

glossy is not alone enough to support a finding of negligence. See Caran v. Hilton Hotels Corp., 299 AD2d 252 (1st Dept 2002), lv dismissed, 3 NY3d 693 (2004) (trial court properly granted summary judgment when plaintiff's assertion of excessive or improper waxing was "based on nothing more than the observation that the floor was shiny"); Davies v. City of New York, 39 AD3d 390 (1st Dept), lv denied, 9 NY3d 808 (2007)(same). Therefore, since Bresler has not made a prima facie showing of negligence against ABM, ABM's motion for summary judgment must be granted.

MOMA's motion for summary judgment should be granted on the same grounds, namely that Bresler has failed to provide evidence that a dangerous or defective condition existed in the third floor corridor or that the floor was negligently maintained at the time of the accident. In view of the foregoing, Bresler's cross motion for summary judgment on the issue of liability is denied.

Finally, since defendants are entitled to summary judgment dismissing the claim against them, the court need not reach MOMA's alterative request for summary judgment on its cross claim for contractual indemnification against ABM.

Conclusion

In view of the above, it is

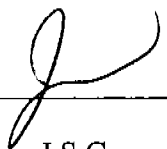
ORDERED that the motion for summary judgment by defendant ABM Industries, Inc. (motion seq. no. 003) is granted and the claims against in the complaint and third-party complaint are dismissed; and it is further

ORDERED that the motion for summary judgment by defendant The Museum of Modern Art (motion seq. no. 004) is granted and the claims against it in the complaint are dismissed; and it is further

ORDERED that the Clerk shall dismiss and sever the claims against ABM Industries, Inc. and The Museum of Modern Art and the third-party complaint; and it is further

ORDERED that with respect to its claims against the defaulting defendant Museum Tower Corporation, Bresler's counsel shall appear for a pretrial conference in Part 11, room 351, 60 Centre Street on February 4, 2010 at 2:30 pm.³

Dated: January 13, 2010



J.S.C.

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³In the event Bresler decides not to pursue the claims against Museum Tower Corporation, counsel for Bresler shall contact Part 11 at 646-386-3314.