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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 110122/2008
CHAFFEE, KEVIN
VS
HELLINGER/NEDERLANDER 46TH ST.
Sequence Number : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 3/17/10
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on 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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must go in person to the Judgment Clerk's Desk (Room 141B)

The instant motion (sequence 001) is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Defendant Hellinger/Nederlander 46th St. Corp. for an order granting summary judgment, pursuant to CPLR 3212 dismissing the complaint of plaintiff Kevin Chaffee is granted and the instant Complaint is dismissed. The Clerk of the Court is directed to enter judgment accordingly. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 3/24/10

HON. CAROL EDMEAD J.S.C.

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

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: PART 35

KEVIN CHAFFEE,

Index No. 110122/08

Plaintiff,

DECISION/ORDER

-against-

HELLINGER/NEDERLANDER 46th ST. CORP.,

Defendant.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Hellinger/Nederlander 46th St. Corp. (defendant) moves for an order granting summary judgment, pursuant to CPLR 3212 dismissing the complaint of plaintiff Kevin Chaffee (plaintiff).

Background

This action arises out of a slip and fall accident that occurred on May 13, 2006 in a theater owned and operated by the defendant. The accident occurred when the plaintiff exited the men's restroom in the lower level of the theater. Plaintiff alleges that while exiting the restroom, he slipped and/or tripped, causing him to sustain injuries including a fractured right ankle and left wrist.

Plaintiff's Deposition

Plaintiff entered and used the theater basement restroom without incident (pp. 23-24). The restroom was at the bottom of a staircase. The restroom is to the right of the stairs (p. 23). Plaintiff did not notice a wet condition when entering the bathroom (p. 56). Plaintiff remained in the restroom for approximately 3-4 minutes (p. 26). As plaintiff was leaving the restroom, he

slipped and/or tripped and fell onto either the step or the step and the floor (p. 27). He was leaving the men's room and the next thing he knew, he was on the floor (p. 28). After his fall, plaintiff noticed that "there was something very odd about [the stairs]." And, then he noticed that he might have slipped on something that was wet. However, plaintiff did not see a wet substance on the floor. Plaintiff does not recall looking at anything much but his injured leg. But he noticed that he had water on his coat (p. 32). The wetness on his coat was clear and it felt like water. And, the wetness was on his left sleeve of his jacket where his arm had landed on the step (p. 33). There might have been some water on the jacket left pocket (p. 38). Plaintiff did not immediately notify anyone of his accident. He went upstairs; took his seat in the front balcony in the theater; he left the theater in the first part of the first act, and went down to the first floor bathroom, and stayed in the stall for about 10 minutes. An usher knocked on the door to inquire is he was okay, and that is when he advised her abut the accident (pp. 32-38). Plaintiff informed defendant employees around him at that time that he tripped on the stairs coming out of the men's room in the downstairs (p. 46). When asked by theater personnel what caused him to fall, plaintiff told them that he tripped or slipped on the floor on the stairs leading to the men's room. Plaintiff could not say definitely what caused him to fall (pp. 47-48). When asked if he tripped on the lip of the stair of fell on something wet, plaintiff said it could be either or both, he did not really know (p. 109). When asked if the lip of the stair caused him to fall, plaintiff said he did not know; he suspected it could be. He reiterated that he could not say what caused him to fall (p. 109).

Deposition of Timothy Pettolina

He is the theater manager at the Richard Rogers theater (p. 6). His job is to oversee the day-to-day operations of the theater, payroll, customer relations (p.7). Prior to May 2006, there were no incidents or problems with leaks in the bathroom, either toilets or urinals or sinks overflowing (p. 26). After the show begins the porters clean the men's room and the lobbies, the main lobby and the mezzanine lobby. And, they do the same after intermission (p. 36). The porters do not keep logs or reports of what they do (p. 37). He learned of plaintiff's accident on the evening it occurred. He prepared a report that evening (p.48). He actually met with plaintiff. Plaintiff was in the lobby of the theater; plaintiff advised Pettolina that he had fallen (pp. 49-50). Pettolina checked the floor after plaintiff advised him of his fall, and this witness noted that the floor was dry (p. 59).

Defendant's Contentions

Since plaintiff cannot offer proof as to what actually caused his accident, he instead relies on conjecture and surmise. Such speculation cannot establish a *prima facie* case in negligence against the defendant. Not only is there a lack of notice of a dangerous condition, plaintiff cannot even show that a dangerous condition existed on the steps of the men's room. No evidence has been presented which would indicate that defendant was in any way negligent or had notice of any defective condition relating to the steps. Without such evidence, plaintiff's claim against defendant must fail.

Plaintiff's Opposition

Defendant has the burden of establishing when the area in question was last inspected. Defendant has not done so in this case. There is also no evidence submitted regarding the

conditions of the premises on the day of the accident or the cleaning and/or inspection of the area in question. Also there were no handrails in place, a clear violation of the Building Code. Also the tread height of the risers of the stairs is inconsistent, another violation of the Building Code.

Most importantly, plaintiff indicated that he noticed that the sleeve of his jacket was wet after he fell. This evidence itself raises questions of fact as to the defendant's negligence under the circumstances and once again shows that defendant failed to meet its initial burden.

Defendant's Reply

Contrary to plaintiff's counsel's assertions, plaintiff was repeatedly asked at his deposition what caused him to fall. On each occasion, plaintiff could not identify what caused him to fall, if he tripped or slipped or if there was even water. Plaintiff likewise cannot show that a dangerous condition existed.

Also the steps herein are not "Interior Stairs" within the meaning of the Building Code § 27-375. Therefore, the handrail requirement does not apply here.

Prior to plaintiff's accident, defendant had never received any complaints about the makeup or the layout of the steps in the men's room.

Discussion

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] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must

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.*, *supra*; *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]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *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, *supra* 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, supra* at 562). Opponent "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]).

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

Here, defendant established its *prima facie* entitlement to judgment as a matter of law by demonstrating that the plaintiff did not know what had caused him to fall (*see Hunt v Meyers,* 63 A.D.3d 685, 879 N.Y.S.2d 725; *Slattery v. O'Shea,* 46 A.D.3d 669, 847 N.Y.S.2d 595 [plaintiff, who was walking in the defendant's parking lot, and who allegedly slipped on ice and fell, was unable to identify the cause of her accident]; *Karwowski v New York City Tr. Auth.,* 44 A.D.3d 826, 844 N.Y.S.2d 96 [The plaintiff allegedly was injured when he fell while descending a stairway in the Nassau Avenue subway station in Brooklyn. At his statutory hearing pursuant to General Municipal Law § 50-h, and at his examination before trial, the plaintiff testified that he did not know what caused him to fall, although he noted that there was snow and rain falling at the time of the accident, and that the subway steps were wet.]).

As the Court of Appeals has opined, absent notice of a dangerous condition, a case should not be submitted to the jury and summary judgment should be granted. *See Gordon v American Museum of Natural History,* 67 NY2d 836, 837-38, 501 NYS2d 646, 647 (1986).

With respect to plaintiff's argument that defendant violated the Building Code § 27-375, that section provides, in relevant part:

> Stairs do not qualify as "interior stairs" within the meaning of the statute, where they do not serve as a required exit from the building. Schwartz v. Hersh, 50 AD3d 1011, 856 NYS2d 640 (App. Div. 2nd Dept. 2008.).

The steps at issue herein do not serve as an exit. As such, this section of the Building Code is inapplicable.

In the instant case, there is a lack of evidence regarding what is the offending condition. Plaintiff correctly points out that the defendant has the burden of showing when and how the condition in question was last maintained in order to obtain summary judgment. But, in this case, as the cause of plaintiff's alleged accident is unknown, even to plaintiff; defendant would be at a loss to know what to show.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Defendant Hellinger/Nederlander 46th St. Corp. for an order granting summary judgment, pursuant to CPLR 3212 dismissing the complaint of plaintiff Kevin Chaffee is granted and the instant Complaint is dismissed. The

Clerk of the Court is directed to enter judgment accordingly. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: March 24, 2010

Carol Robinson Edmead, J.S.C.
HON. CAROL EDMEAD