

Bianco v Hamilton, Kane, Martin Enters., Inc.

2010 NY Slip Op 30866(U)

April 15, 2010

Supreme Court, New York County

Docket Number: 112146/2007

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____ **J.S.C.**

PART 2

Justice

Bianco

INDEX NO.

112146/07

MOTION DATE

- v -

MOTION SEQ. NO.

003

Kane, et al.

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 is

decided in accordance with the accompanying order.

FILED

APR 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/12/10

Luy

LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

LEAH BIANCO AND ANTHONY BIANCO, x

Plaintiffs,

Index No. 112146/2007

-against-

HAMILTON, KANE, MARTIN ENTERPRISES,
INC., BOB'S STORES CORP., THE TJX
COMPANIES, LLC AND BZL CLEANING
SOLUTION, INC.,

Defendants. x

LOUIS B. YORK, J.:

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Leah Bianco fell and allegedly sustained injuries while a customer at defendant Bob's Stores on Sunrise Highway ("Bob's"). The accident occurred on January 31, 2007. According to the complaint, there was a condition on the floor – in the complaint, this is broadly worded, to include a variety of possible conditions – which caused plaintiff Leah Bianco's ("plaintiff's") accident. Following the discovery which the parties conducted during the course of this litigation, plaintiffs determined that the condition at fault was a slippery floor, allegedly the result of negligent care in the waxing and buffing of the floors. Subsequently plaintiff commenced this action against Bob's , Hamilton, Kane, Martin Enterprises, Inc. and the TJX Companies (collectively, "Bob's"), which owned and/or operated the premises where the accident occurred; and BZL, which provided janitorial services to Bob's during the period in question. The complaint seeks damages on behalf of plaintiff Leah Bianco and her husband, co-plaintiff Anthony Bianco ("Mr. Bianco").

At plaintiff's deposition, plaintiff was asked whether – on the date of the accident, before she fell – she knew what caused the accident¹:

- A. It was slippery.
 Q. When you say, "it was slippery", what was slippery?
 A. The floor was slippery.
 Q. And you noticed that before your accident?
 A. As I went in, I just slipped and both my legs went out
 . . .
 Q. When did you first notice that the floor was slippery . . . ?
 A. When my feet went out from under me.
 Q. Do you know what caused your feet to go out from under you?
 A. The slippery floor.
 . . .
 Q. Do you recall anything on the floor that made the floor slippery?
 . . .
 A. Not that I know of. . . .
 . . .
 Q. Did you see any spilled liquid on the floor before your accident?
 A. No.
 . . .
 Q. Did you notice any slippery substances on the floor after your accident?
 A. I know it was shiny and slippery when I was on the floor like this waiting (indicating).

(Plaintiff EBT at p. 35 l. 9 - p. 37 l. 23).

On the date of the accident Mr. Bianco dropped his wife off at the store, then parked the car. By the time he walked toward the store his wife had fallen. At his deposition Mr. Bianco said that someone ran out of the store and told him that his wife may have broken her ankle:

- Q. What did you do after you were told about your wife's accident?

¹ At deposition, Ariel Zitrin questioned plaintiff and Mr. Bianco for BZL and Jensen Varghese questions them for Bob's. For the purpose of this motion, the Court does not indicate which of the two counsel asked the various questions.

- A. I went inside. As soon as I got in, I seen her laying on the floor with her left leg like this, this ankle leaning over, and blood and bone sticking out.

(Bianco EBT at p 8, ll. 15-20).

Mr. Bianco also was asked to describe the condition of the floors at the time of the accident:

- A. They didn't look wet, but they looked . . . real shiny
 . . .
 Q. Did you notice if there was any substance at all on the floor?
 A. I didn't see none.
 . . .

(Id. at p. 14, ll. 7-9). He also indicated that he did not notice debris, buckets and mops, or any other suspicious substances on the ground near the accident site. Later, the following questioning took place:

- Q. Did your wife tell you whether or not she slipped on anything?
 A. She said she slipped and fell. That's all she said. The floor was shiny. I mean, it had a high gloss on it, completely.
 Q. Did you observe a gloss on the floor in the area where your wife was lying after her accident?
 A. Yes.
 Q. Did you have an opportunity to touch the floor in the area where your wife was lying?
 A. No.

(Id. at p. 31, ll. 10-23).

BZL also relies on the deposition of Bob's employee Valarie Saur, a department manager at the store when the incident occurred. The deposition addressed the maintenance of the floor:

- Q. . . . The floor . . . would you say that it appeared . . . as a matted look? . . . Was [the floor] highly shined in your opinion?
 A. Shined.
 Q. Would that be true of the entire path from the front of the store to the back . . . ?

A. Yes.

Q. In your time there from [] up until January 2007, did you ever observe the cleaning crew ever stripping down the floor or taking any materials off the floor?

A. No, I never observed that.

Q. As part of the equipment to do the work in cleaning up the store, were the floors ever polished?

A. They were buffed.

Q. Was that part of the every day clean-up? . . .

A. No.

Q. . . . How often would the floor be buffed?

A. Once a week.

(Saur EBT at p. 55, l. 8 - p. 58 l. 19). As to the condition of the floor on the accident date, she stated:

Q. After Ms. Bianco left the store . . . did you take a look at the area where she had allegedly slipped?

A. Yes.

Q. What did you see?

A. Nothing basically.

Q. Was the tile in the area shiny . . . ?

A. Yes.

Q. Do you know whether or not that had been buffed that day?

A. No.

Q. Do you know whether . . . [the floor] was wet at all . . . ?

A. Definitely not wet.

Q. What did you do to determine that?

A. I got on my hands and knees and pretty much looked at the entire area I ran my hand across the tile to see if anything was up or sticking up. I looked for hangars, anything.

(Id. at p. 85 l. 15 - p. 86 l. 20).

In their cross-motion the Bob's defendants also refer to Bob's company-generated accident report. In that report Peter Komicherd, the store's Asset Protection Supervisor, states

that the floor was not wet and there were no objects on the floor which might have caused plaintiff's fall.

Anthony Tamburri, , was also deposed. Mr. Tamburri, who

In opposing this motion, plaintiffs submit Mr. Bianco's affidavit, in which he states that – much as they do in their current papers – defendants asked whether the floor was wet and/or had debris nearby but did not discuss the slippery condition he and his wife described. He does not present himself as an expert but indicates that he has performed blue collar work, including floor waxing, during his adulthood, and noticed that the floor had an unusually high gloss condition.

They also submit the expert affidavit of Stanely Fein, P.E., an engineer with experience in risk management and safety engineering. He inspected the accident site approximately one month after its occurrence and compared the site to photographs which had been taken the day after the accident. He concluded that the floor was in essentially the same condition and in particular, that it had not been re-waxed or stripped. Moreover, he stated that the floor was Vinyl Composite Tile and stated that it “was highly glossy and slippery, as the result of a buildup of an unusually high number of layers of wax and dangerous wax residue on the floor in question. Fein Aff. at ¶ 4. Moreover, he stated that the minimum rating for safe co-efficient of friction was 0.5 and that the floor had levels below this minimum, ranging from 0.32 to 0.29. Finally, referencing the depositions of Anthony Tamburri and Hadler Zuniga, employees of defendants familiar with the waxing and cleaning procedures, he concluded:

[B]y only stripping the floor once per year in May or June, then negligently applying 5 coats of wax at that time, and 4 coats each on the three occasions when the floor was ‘scrubbed and waxed’, the defendants caused there to be between 13 and 17 coats of wax

built up on the floor, creating a very shiny and slippery condition of wax on the floor itself. Additionally, due to the negligent application of multiple coats of wax, excess hazardous wax residue was caused to exist, creating even more slippery areas which appeared slightly less shiny.

(Id. at ¶ 9). He opined that this constituted negligence.

Currently, BZL moves for summary judgment. First, it argues that because plaintiff stated that she could not identify the cause of her fall, her case must be dismissed. Bob's also cross-moves for summary judgment on this basis.

In so arguing, however, defendants skew plaintiff's testimony and overstate the law on the issue. While it is true that a party must be able to identify the cause of an accident, see Fernandez v. VLA Realty, LLC, 45 A.D.3d 391, 391, 845 N.Y.S.2d 304, 305 (1st Dept. 2007), here plaintiff did identify the cause as an overly slippery floor. Plaintiff, who is not an expert, could not answer defendants when they asked her what made the floor so slippery, but this is not fatal to her case. Instead, she repeatedly explained that the floor was very shiny and was slippery. Not only did her husband also describe the floor in this fashion but plaintiffs have submitted expert testimony supporting their contention that the waxy condition of the floor rose to the level of a hazard. Pena v. Women's Outreach Network, Inc., 35 A.D.3d 104, 824 N.Y.S.2d 3 (1st Dept. 2006) is also distinguishable because there the plaintiff claimed that her shoe got stuck on a step but she did not point to any defect in the step causing this or her fall. Again, plaintiffs assert a theory about the condition of the floor and ground it in evidentiary support. Moreover, in Fernandez, the plaintiff's statement was insufficient to defeat the motion for summary judgment because it was inconsistent with his prior testimony and seemed crafted for the express purpose of avoiding dismissal. Fernandez, 45 A.D.3d at 391, 845 N.Y.S.2d at

305. Here on the other hand plaintiff's statements have been consistent throughout. This is sufficient, considered with her husband's deposition statements and the expert's testimony, to raise an issue of fact.

The motion and cross-motion also include statements by defendants' employees that there was no debris or liquid substance on the floor at the time of the fall. However, plaintiff does not claim that she slipped on debris or on any liquid. Instead by way of her expert she alleges that the floor was overly polished and presented a slipping hazard. Therefore, their statements are not relevant to plaintiff's argument. Finally, statements by employees of defendants relating to the level of slipperiness of the floor merely raise issues of fact and thus do not defeat plaintiff's claim.

BZL also claims that even if the floor was slippery or waxy, this is not a sufficient basis for liability. In so arguing, defendants misstate the law. The cases which BZL cites hold that "[a]bsent proof of the negligent application of wax or polish, the fact that a floor is slippery by reason of its smoothness or having been polished does not give rise to an inference of negligence." Kudrov v. Laro Services Systems, Inc., 41 A.D.3d 315, 316, 837 N.Y.S.2d 153, (1st Dept. 2007)(emphasis supplied); accord Aguilar v. Transworld Maintenance Serv., 267 A.D.2d 85, 86, 699 N.Y.S.2d 685 (1st Dept. 1999)(plaintiff's contention that she "felt" wax, without more, deemed insufficient to show negligence), ly denied, 94 N.Y.2d 762, 708 N.Y.S.2d 51 (2000). Also, though "mere speculation that the floor was not properly waxed [is] insufficient to raise a triable issue," Greenberg v. Garden Jewish Center of Flushing, Inc., 35 A.D.3d 536, 536, 828 N.Y.S.2d 406, 407 (2nd Dept. 2006), "a prima facie case of the negligent application of wax may be established by evidence that a dangerous residue of wax was present on the floor."

Gracchi v. Italiano, 290 A.D.2d 484, 485, 736 N.Y.S.2d 395, 396 (2nd Dept. 2002). Here, as already indicated, plaintiffs have submitted an expert report asserting that defendants allowed too many layers of wax to accumulate, causing the floor to be slippery. Thus, plaintiffs have raised a triable issue sufficient to withstand this motion. Defendants' arguments regarding the conclusory or faulty nature of the expert's opinion raise issues as to his credibility for the trier of fact but do not refute his affidavit as a matter of law.

BZL also states that Kudroy is dispositive because, as in Kudroy, the wax on the floor at Bob's was dry. In Kudroy, however, the plaintiffs argued that the wax had not yet dried and therefore the dryness of the floor contradicted their theory of liability. Here on the other hand, plaintiffs argue that the wax *was* dry but was overly slippery due to defendants' negligent failure to strip the wax regularly. Thus, the wetness or dryness of the floor is no more relevant to plaintiffs' particular negligence argument than the presence or absence of garbage on the floor – and, similarly, BZL's arguments relating to the absence of garbage also do not mandate summary judgment. BZL also relies on some cases which have to do with undried wax on the floors, and these are inapplicable for the same reason. In addition, plaintiffs are correct in their assessment of the law regarding notice; as defendants allegedly created the hazardous condition the absence of notice is not dispositive.

BZL's alternative argument in favor of dismissal is that plaintiff is not a third-party beneficiary of the contract between itself and Horizon. Eaves-Brooks Costume Co., Inc. V. Y.B.H. Realty Corp., 76 N.Y.2d 220, 226, 557 N.Y.S.2d 286, 289 (1990). However, BZL acknowledges that an exception exists where the defendant is negligent. In particular, "when a party contracts to inspect and repair and possesses the exclusive management and control of real

or personal property which results in negligent infliction of injury, its assumed duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended safety services.” Palka v. Servicemaster Management Services Corp., 83 N.Y.2d 579, 589-590, 611 N.Y.S.2d 817, 823 (1994). Here, the crux of plaintiffs’ case is that the floors were negligently maintained. If plaintiffs prevail, they fall within the rule in Palka. Thus, for the same reasons as above, the Court denies summary judgment on this argument.

In Bob’s cross-motion, Hamilton Kane and TJX seek an order severing and dismissing the claims asserted against them. TJX argues that although it held a controlling share in Bob’s it did not exercise dominion or control over Bob’s. It notes that TJX is not a party to the lease for the property in question. The Court finds that TJX has articulated the law properly and, if true, the asserted facts would support summary judgment dismissing the complaint as against it. Unfortunately TJX does not annex a copy of the lease or provide any evidence to substantiate its statements about its relationship to Bob’s. Counsel’s statements as to the parties’ relationship do not constitute evidence. Therefore, the Court must deny this prong of the motion as well, without prejudice to its right to bring a new motion for this relief, supporting its contentions.

Next, in support of its request for dismissal, building owner Hamilton Kane argues that as an out of possession landlord it had no duty to maintain the premises and should incur no liability relating to negligent maintenance. It is correct that an out-of-possession landlord is not liable unless there is a contractual obligation to make repairs or maintain the premises, or there is a right of reentry. See Burgos v. 205 E.D. Food Corp., 61 A.D.3d 403, 876 N.Y.S.2d 381, 382 (1st Dept. 2009); Reyes v. Morton Williams Associated Supermarkets, Inc., 50 A.D.3d 496, 497, 858 N.Y.S.2d 107, 108 (1st Dept. 2008). However, Hamilton Kane also does not appear to have

provided the contract upon which it relies, and the statements of counsel as to the landlord-lessee relationship are insufficient as a matter of law to support this motion for summary judgment.

In opposition to Hamilton Kane's motion, plaintiffs cite a string of cases which state that an owner or employer cannot avoid liability by pointing to a subcontractor's liability and control. Because of the lack of evidentiary support mentioned above, the Court does not reach the issue at this time. However, for the sake of judicial economy it notes that the cases plaintiff cites are distinguishable in several respects. In many of these cases the owner actually contracted for the work in question, and in one the landlord owned the restaurant where the accident occurred. Several of the cases also, or alternatively, relate to an employer's ability to avoid liability when it hires an independent contractor to perform work. Kleeman v. Rheingold, 81 N.Y.2d 270, 598 N.Y.S.2d 149 (1993), is a legal malpractice case which deals with the nondelegable duties of the employer law firm, which could not evade responsibility for a negligent process server; therefore, that case is completely irrelevant. It appears, in fact, that none of the cited cases involve out of possession landlords and therefore none of them refute Hamilton Kane's legal argument.

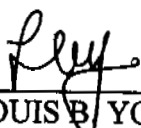
Finally, the Court notes that a portion of the cross-motion seeks summary judgment for the same reasons as BZL. The Court denies this part of the cross-motion for the same reasons as above. The arguments relating to proximate cause are unpersuasive as they also rely on the absence of debris and the dry condition of the floor and do not take plaintiffs' allegations into account.

The Court has considered all of the other arguments in the papers and they do not alter its determination. Therefore it is

ORDERED that the motion and the cross-motion are denied.

Dated: April 12, 2010

Enter:



LOUIS B. YORK, J.S.C.

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