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

PRESENT: Hon. Ling-Cohan PART 36

Index Number : 111293/2007
LEDDA, PATRICIA
vs.
YALE CLUB OF NYC
SEQUENCE NUMBER : 002
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 ...	1, 2
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No 3, 4

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment & cross-motion by plaintiff to preclude are denied in accordance with the attached memorandum decision

FILED
MAY 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/25/10

JUDGE DORIS LING-COHAN 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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PATRICIA LEDDA,

Plaintiff,

-against-

Index No.

THE YALE CLUB OF NEW YORK CITY,

111293/07

Defendant.

Motion Seq. No.: 002

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DORIS LING-COHAN, J. :

Defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for an order striking the answer due to spoliation of evidence, or, alternatively, for an order directing the jury to be instructed of an adverse influence. Plaintiff also cross-moves for an order precluding defendant's use of plaintiff's deposition for any purpose.

This is a personal injury action. On March 3, 2007, plaintiff slipped and fell, while walking upon a wooden floor in the second floor Main Lounge at defendant's premises, located at 50 Vanderbilt Avenue, New York, New York, allegedly as a result of defendant's negligence.

In bringing its motion, defendant argues the following: (1) the wooden floor did not constitute a dangerous condition at the time and place of the accident; (2) plaintiff cannot recover in a slip and fall suit based upon the mere allegation that the floor surface was slippery, nor by allegations that the floor is slippery because of its polish; (3) plaintiff cannot prevail where there is an absence of a negligent application of floor wax or polish; and (4) plaintiff cannot rely on expert opinion where the expert, among other things, references non-specific sections of the New York City Administrative Code (Code).

In support of its motion, defendant submits the deposition testimony from plaintiff. Plaintiff, who was attending a wedding ceremony on the premises, testified that she entered a

room described as a chapel area, where the floor surface was a polished wood. It was plaintiff's intention to get a seat to witness the wedding, and at the time of the accident, she was walking with her daughter and son-in-law. Plaintiff described the floor as very slippery, and claims that she had adjusted her walk by moving carefully. When she was close enough to reach out to a chair, she stated that she lost her footing and fell. Her son-in-law subsequently assisted her by placing her in a chair, where she remained during the ceremony.

Defendant also submits the deposition testimony of witnesses on behalf of defendant. Carlos Cabrera, defendant's Banquet Captain, testified. Cabrera, who was responsible for all private events occurring at the premises, recollected the particular event in which the accident occurred. He stated that, although he did not see plaintiff fall, he heard the noise of chairs moving. He ran over to witness plaintiff, who was on the floor on her knees. He had a brief conversation with plaintiff. Since the chairs in the immediate area of the accident were in disarray, he put the chairs back into place. Cabrera stated that he did not notice or experience any slipperiness on the floor surface at the time, and that he had received no complaints about the floor surface prior to the accident.

Defendant also refers to the testimony of Edward Diaz, a security employee of defendant, who was notified about the accident at a later time and prepared an accident report. Diaz testified that he had walked on the wooden floor on a number of occasions during the course of his work, and at no time did he have problems relating to the slipperiness of the floor. He stated that he was not aware of other people slipping and falling on the specific floor prior to March 3, 2007.

Defendant contends that the mere fact that a floor is slippery by reason of its polish, does not support a claim of negligence. Defendant avers that plaintiff has attempted to establish an

actionable defect by exchanging the report of an engineer, Rudi Sherbansky, who states that the accident was caused because the coefficiency of friction of the wooden floor did not meet industry standards. Sherbansky also asserts that defendant violated sections 27-127 and 27-128 of the Code. According to defendant, caselaw holds that these sections are non-specific and reflect only a general duty to maintain a premises in a safe condition.

Defendant submits a report from its expert engineer, Anthony Storace, who rebuts some of Sherbansky's conclusions. Sherbansky allegedly relied on the tape from a security camera which recorded the accident. According to Storace, a close inspection of the tape showed that movements were not smooth but jumped from one picture to the next because "a frame rate of 3 pictures per second is perceptible to the eye, whereas a TV frame rate of 30 pictures per second is not." Therefore, Storace argues that the resulting video from the security camera will show movements in a distorted, rapid fashion, resulting in a false appearance of a low frictional resistance to movement. Defendant argues that Sherbansky's report fails to raise issues of fact concerning liability to warrant a denial of defendant's motion for summary judgment.

Plaintiff opposes this motion, claiming that the expert evidence submitted by defendant is not in an admissible form, not being a sworn affidavit. Moreover, plaintiff claims that defendant did not exchange its expert response with plaintiff prior to the time the Note of Issue was filed. Plaintiff maintains that defendant has failed to demonstrate that it has met its common law duty to maintain the premises free of hazardous conditions.

Plaintiff submits an affidavit from a Joseph Guglielmo, an eyewitness to the accident. Guglielmo states that, approximately one hour before plaintiff fell, he was in the second floor lounge, where the accident occurred, and noted then that the wooden floor was slick and that he also slipped, but did not fall.

Plaintiff's expert stated that defendant's failure to maintain a slip-resistant surface, and its effort to allow the public to use the premises as a place of assembly resulted in unsafe conditions. Plaintiff claims that Sherbansky has set forth in great detail the Code violations committed by defendant. As a result, there allegedly are issues of fact, including: whether defendant violated its common-law duty to plaintiff when it had notice of the slippery condition of the floor, but created an aisle in a place of public assembly, as defined by Code section 27-232; whether defendant violated its duty to plaintiff when it created a hazardous condition in violation of Code sections 27-1018 (a), 27-531 and 27-2005; and whether the aisle defendant created was obstructed and a proximate cause of the accident in violation of Code sections 27-370 and /or 27-530.

Plaintiff also cross-moves for an order striking the answer. Plaintiff states that he served certain discovery demands on defendant, requesting photographs, surveillance tapes and accident reports. These items were not produced prior to the commencement of plaintiff's deposition. Near the end of plaintiff's deposition, defendant's counsel marked as an exhibit an accident report and revealed the existence of a surveillance tape. Plaintiff asserts that the accident report and the tape were intentionally held back by counsel, depriving plaintiff of the opportunity to review and respond to it. Therefore, plaintiff requests that, due to such allegedly willful conduct, defendant should be precluded from using plaintiff's deposition for any and all purposes.

Plaintiff also accuses defendant of spoliation of evidence; specifically destroying the unedited videotape of the set-up of the premises, the use of the premises up to the time of the accident, and of the accident. Plaintiff claims to have received a belated edited CD of the tape, but insists that defendant has failed to preserve and provide, as requested previously by plaintiff, an unedited version of the events leading up to and including the accident. Plaintiff seeks the

striking of the answer, or alternatively, a directive to the jury that an adverse inference was created by reason of the "missing" tape.

In reply, defendant contends that there is no missing tape, referring to a court order, dated August 28, 2009. In this order, the court states that, while the video of the entire day was not saved by defendant, it was noted that the portion of the tape that recorded plaintiff's fall was supplied. Defendant argues that the crucial and relevant part of the tape has been preserved and provided, and that there was no spoliation involved.

Defendant asserts that the accident report was prepared hours following the accident by a security employee who was not present during the fall and indicates an incorrect account of the accident, namely that plaintiff tripped on a rug. Defendant states that the report does not diminish the fact that it is uncontested that plaintiff sustained a fall while attempting to obtain a seat in that portion of the lounge being used for a wedding ceremony.

Defendant dismisses the Guglielmo affidavit on the ground that there is no indication that he walked the same area of the floor that plaintiff walked on when she fell. Defendant argues that a general comment by him as to the slickness of the floor fails to create a factual issue in this case.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). While the moving party has the initial burden of providing entitlement to summary judgment, once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial on any issue of fact." CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence. *DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181, 182 (1st Dept 2007); *Mroz v Ella Corp.*, 262 AD2d 465, 466 (2d Dept 1999). Here, plaintiff's affidavit and the affidavit of Guglielmo provide a conclusory assertion of a defective condition. However, plaintiff's submission of her expert's affidavit, raises factual issues warranting a denial of defendant's motion for summary judgment.

The affidavit from Sherbansky is an opinion based on the observation of the premises, as well as an examination of the accident report, the deposition testimony and the video tape provided by defendant. Sherbansky states that he finds the subject floor to be in violation of section 28-1003.4 and 28-1024.11 of the Code, which provides that walking surfaces shall have a slip- resistant surface. He notes that the area is a place of public assembly. He also states that the floor has a less than a 0.5 coefficient of friction, which violates industry standards. He asserts that the fact that the chairs were loosely placed in the proximate location of the accident is contrary to section 27-531 of the Code, which requires assembly spaces to be provided with chairs that are rigidly anchored to the construction, attached together in rows or fixed in place by devices that prevent movement in any direction. In addition, Sherbansky asserts that the existence of a slippery floor is contrary to section 27-1018 (a) of the Code, which provides that all public area be free of any substance or condition that may constitute a slipping, tripping or other hazard.

Plaintiff's expert's opinion raises an issue of fact as to whether defendant created a defective condition. While some of Code violations provide a general liability, other violations provide a specific liability that applies to those who maintain a place of public assembly. *See*

section 27-531. Moreover, expert opinion which demonstrates a deviation from relevant industry standards can create an issue of fact. *See Murphy v Conner*, 84 NY2d 969, 972 (1994).

As to plaintiff's cross-motion, "spoliation sanctions are appropriate where the litigant, intentionally or negligently, disposes of critical items of evidence involved in an accident before the adversary has an opportunity to inspect them." *Kirkland v New York City Housing Authority*, 236 AD2d 170, 173 (1st Dept 1997). Here, there was no act of spoliation, whether intentional or negligent. The parties both agree that the duration of plaintiff's accident was recorded on the video. The parts of the tape that were edited by defendant's agents were not particularly relevant, nor significant, to this case. Therefore, defendant's answer shall not be stricken and no other spoliation sanctions issued.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for an order, *inter alia*, striking the answer is denied in its entirety; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

DATED: May 25, 2010

Hon. Doris Ling-Cohan

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