

**Carroll v Cohen Brothers Realty Corp.**

2010 NY Slip Op 31652(U)

June 25, 2010

Supreme Court, New York County

Docket Number: 110396/07

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN  
Justice

PART 57

Joann Carroll

INDEX NO.

110396/07

MOTION DATE

8/24

MOTION SEQ. NO.

-v-  
Cohen Brothers Realty  
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 ...

1

Answering Affidavits — Exhibits \_\_\_\_\_

2, 3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is determined as per accompanying decision/order dated 6-25-10.*

**FILED**

JUL 01 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6-25-10

*M. Friedman*

MARCY S. FRIEDMAN

J.S.C.

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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

JOANN CARROLL,

*Plaintiff,*

- against -

COHEN BROTHERS REALTY CORPORATION,  
et al.,

*Defendants.*

\_\_\_\_\_ x

Index No.: 110396/07

DECISION/ORDER

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

In this personal injury action, defendant Rothmann's 54<sup>th</sup> Street, LLC (Rothmann's) moves for summary judgment dismissing plaintiff's complaint against it. By separate motion, defendants Cohen Brothers Realty Corp. (Cohen Brothers Realty) and Madison Third Building Companies, LLC (Madison) (collectively Madison defendants) move for the same relief.

The following material facts are undisputed: At the time of plaintiff's accident, Madison owned 3 East 54<sup>th</sup> Street, and Cohen Brothers Realty was the managing agent of the building. Under a lease with Madison, Rothmann's operated a restaurant in a portion of the ground floor and the basement of the building.

Plaintiff's accident occurred on November 28, 2006 at approximately 7:30 a.m. Plaintiff testified that she fell on a section of sidewalk in front of Rothmann's that was "wet and slippery." (P.'s Dep. [Ex. H to P.'s Motion] at 35, 39-40, 44-45, 54.) At approximately 7:00 a.m. on the same day, the sidewalk where plaintiff fell was washed down with a hose by an employee of Madison. A security guard who was employed at the building observed the sidewalk being

hosed, and saw plaintiff after her fall. (See Dep. of Allen Newson [Ex. I to P.'s Motion] at 112-113.) Madison acknowledges that the employee who washed the sidewalk was its employee. (Madison Aff. in Opp. to Rothmann's Motion, ¶ 8.)

Generally, liability in a slip and fall case requires proof that "the defendant created a dangerous condition or had actual or constructive notice of it." (Frank v Time Equities, Inc., 292 AD2d 186 [1<sup>st</sup> Dept 2002]; Arnold v New York City Hous. Auth., 296 AD2d 355 [1<sup>st</sup> Dept 2002]; Gordon v American Museum of Natural History, 67 NY2d 836 [1986].) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon, 67 NY2d at 837.)

As the proponent of the motion for summary judgment, defendant must make a prima facie showing that it neither created nor had actual or constructive notice of the condition that allegedly caused plaintiff's fall. (Britto v Great Atl. & Pac. Tea Co., Inc., 21 AD3d 436 [2d Dept 2005]; Van Steenburg v Great Atl. & Pac. Tea Co., Inc., 235 AD2d 1001 [3d Dept 1997].) While plaintiff has the ultimate burden of proof on the issue of notice, and while defendant need not definitively deny notice, defendant has the burden of coming forward with evidence sufficient to make a prima facie showing of its lack of notice. (See Strowman v Great Atl. & Pac. Tea Co., Inc., 252 AD2d 384 [1<sup>st</sup> Dept 1998].) "This burden cannot be satisfied by merely pointing out gaps in the plaintiff's case." (Valdez v Aramark Servs., Inc., 23 AD3d 639 [2<sup>nd</sup> Dept 2005].)

Here, Rothmann's makes a prima facie showing of its entitlement to summary judgment based on the undisputed evidence that the wet condition of the sidewalk on which plaintiff fell

was caused by a Madison employee. In opposition, none of the parties raises a triable issue of fact as to Rothmann's liability. While the Madison defendants argue that Rothmann's was required to keep the sidewalk clean, pursuant to paragraph 5.04 (i) of its lease with Madison, they fail to make any showing that plaintiff was a third-party beneficiary of the lease, and that Rothmann's may therefore be liable on that basis. To the extent that the parties argue that Rothmann's caused grease to be deposited on the sidewalk while removing garbage from its restaurant (see Newson Dep. at 65-67), their further suggestion that the grease was also a cause of plaintiff's accident is wholly speculative. Notably, plaintiff did not describe the sidewalk on which she fell as "greasy" but, rather, as noted above, consistently characterized the sidewalk as "wet and slippery." In addition, Madison's security guard testified that the grease was not on the location of the sidewalk where plaintiff fell. (See Newson Dep. at 79-80.)

Plaintiff's expert's affidavit is also insufficient to raise a triable issue of fact as to whether the sidewalk itself was defective when wet. Plaintiff's expert, Nicholas Bellizzi, a professional engineer, opines that the granite sidewalk, when wet, had an unacceptably low or dangerous coefficient of friction. (Bellizzi Aff., ¶ 8.) Defendants argue that the expert's opinion should not be considered because plaintiff failed to make a timely expert disclosure pursuant to CPLR 3101(d). Even if the opinion is considered, however, the court finds that the opinion does not raise a triable issue of fact because there is no showing that the sidewalk, when examined by the expert three years after the accident, was in the same condition as at the time of the accident. (See Santiago v United Artists Communications, Inc., 263 AD2d 407 [1<sup>st</sup> Dept 1999].) Nor was there any showing that the tests performed (i.e., amount of water sprayed onto the sidewalk) by the expert replicated the conditions at the time of the accident.

The court has considered the parties' remaining bases for opposition to Rothmann's motion, and finds them to be without merit. Rothmann's motion will accordingly be granted.

The Madison defendants' motion should be denied. As defendants correctly argue, the mere fact that a floor becomes slippery when wet does not serve to establish negligence. (See Wasserstrom v New York City Tr. Auth., 267 AD2d 36 [1<sup>st</sup> Dept 1999], lv denied 94 NY2d 761 [2000]; Kruimer v National Cleaning Contrs., Inc., 256 AD2d 1 [1<sup>st</sup> Dept 1998].) Here, however, it is undisputed that Madison's employee caused the wet condition of the sidewalk, and did not place caution signs on the sidewalk. Defendants' security guard also testified that he had he had seen people almost slip from the sidewalk hosing. (See Newson Dep. at 76-77.) Under these circumstances, there is a triable issue of fact as to whether defendants created or had notice of a dangerous condition.

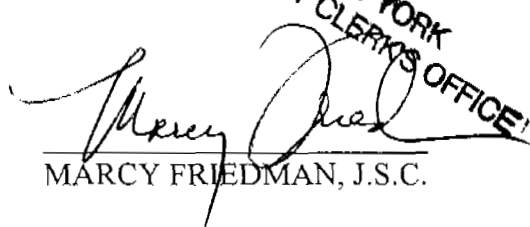
It is accordingly hereby ORDERED that the motion of defendant Rothmann's 54<sup>th</sup> Street, LLC for summary judgment is granted to the extent of dismissing plaintiff's complaint against said defendant; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the motion of defendants Cohen Brothers Realty Corp. and Madison Third Building Companies, LLC for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 25, 2010

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
  
MARCY FRIEDMAN, J.S.C.