O'Gara v 101 Park Ave. Assoc.
2010 NY Slip Op 31715(U)
June 30, 2010
Sup Ct, New York County
Docket Number: 102065/06
Judge: Joan A. Madden
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SCANNED ON 7/8/2010

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 103065/2006
O'GARA, JAMES
vs.
101 PARK AVENUE ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE 3/4/10

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 and cross motion are decided in accordance with the annexed Memorandum ~~Decision~~ Decision and Order.

FILED
JUL 07 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: June 30, 2010

J.S.C.

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: PART 11

---X

JAMES O'GARA and ELIZABETH O'GARA,

Index No. 102065/06

Plaintiff,

-against-

101 PARK AVENUE ASSOCIATES, A New York Limited Liability Partnership, PSK OPERATING CORPORATION, a New York Corporation, ONESOURCE HOLDINGS INC, ONESOURCE FACILITY SERVICES NATIONAL CLEANING CONTRACTORS INC and ABC CO. 1-5, fictitious Names true identities not presently known

Defendant(s)

---X

PSK OPERATING CORPORATION and 101 PARK AVENUE ASSOCIATES LLC i/s/h/a 101 PARK AVENUE ASSOCIATES, a New York Limited Partnership,

Third Party Plaintiff(s)

-against-

ONESOURCE HOLDINGS, INC., ONESOURCE FACILITY SERVICES, INC. and NATIONAL CLEANING CONTRACTORS, INC.

Third-Party Defendant(s)

---X

FILED
JUL 07 2010
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J.

In this personal injury action, defendant One Source Holdings, Inc. ("One Source") moves, and defendant 101 Park Avenue Associates ("101 Park") cross moves, for summary judgment dismissing the complaint and all cross claims against them. Plaintiff James O'Gara ("O'Gara") opposes the motion and cross motion. For the reasons stated below, the motion and cross motion for are granted.

Background

O'Gara alleges that he sustained personal injuries on December 22, 2004, when he slipped and fell in the front lobby 101 Park Avenue, New York, New York ("the building"), where he worked for 26 years at the law firm of Kelley Drye & Warren LLP ("KDW"). The building is owned by defendant 101 Park which had contracted with One Source to perform cleaning and janitorial services on the premises, including the lobby. O'Gara contends that he fell as a result of the dangerous condition of the lobby floor, and in particular, that the defendants and/or their agents caused or permitted the floor to become and remain in a dangerous and slippery condition and that this condition caused him to fall.

O'Gara testified at his deposition that he fell in the lobby when exiting the building at around 7:00 pm. He testified that there were three carpeted runners leading from each elevator lobby to a corresponding revolving door. O'Gara stated that at around 6:00 pm every day, two doors are locked and only the middle revolving door remains open (O'Gara dep at 49). Following his fall, O'Gara observed that the floor was slippery and appeared polished (O'Gara dep. at 87). However, O'Gara also testified that he did not observe any substance on the floor before or after his fall (Id. at 88). He also admitted that he never complained about the condition of the lobby floor.

With respect to the maintenance of the lobby floor, One Source supervisor Ricardo Gomez testified that the lobby was mopped each night after 7:00 pm. Gomez stated that in addition to mopping the floor, it was also scrubbed on an as needed basis, usually once every two to four weeks with a solution of water and degreaser (Gomez dep at 19-21). In his deposition, Gomez explains that although One Source's contract with 101 Park stipulates that One Source shall sweep the lobby multiple times a day with a chemically treated cloth, One Source never swept the floor at all, nor was the floor ever waxed, sealed or finished (Id. at 26-27). Gomez testified that when One Source does mop the floor, it typically places four "wet

caution" signs, two in the front lobby and two in the back. According to Gomez, One Source leaves the "wet caution" signs out for two or three hours, even if the floor has already dried (Id. at 33-36).

101 Park cross moves for summary judgment on similar grounds as One Source and also argues that O'Gara failed to show that it caused the allegedly dangerous condition. Raffi Derhovanessian, the building manager of 101 Park testified that the lobby floor is never waxed, polished or chemically treated (Derhovanessian dep. at 31-34).

O'Gara opposes the motion and cross motion for summary judgment, arguing that summary judgment should be denied because 1) defendants created the dangerous condition, 2) the defendants had actual notice of the condition, and 3) the condition existed for a sufficient duration and was visible, thus establishing constructive knowledge. O'Gara contends that One Source acknowledged the existence of a slipping hazard when it laid down the runners and that when 101 Park locked the end doors, the dangerous condition was created because O'Gara then had to walk across an uncarpeted part of the slippery floor. O'Gara asserts that the slippery floor existed for several hours prior to his fall, and thus defendants knew or should have known of the dangerous situation. O'Gara also asserts that One Source only laid down runners when it knew there was a slipping hazard and since One Source laid the runners out on a completely dry day, it must have known there was a slipping hazard.

In support of his position, O'Gara submits certified copies of weather reports showing that it did not snow or rain on the day of his accident or the day before. However, weather reports indicate that it did precipitate two days prior to his accident. O'Gara also submits the affirmation of William Escobar, who is O'Gara's colleague. Escobar states that he observed O'Gara fall and told him at the time that he "had noticed the lobby floor was very slippery earlier that day when he left the building" (Escobar Affirmation, at 2). He also stated that "[w]hile the building places mats and runners from the elevator banks to one of the revolving

doors, people have to walk over uncovered areas, depending on where they are heading and whether, as is customary, the two side doors are closed in the evening" (Id. at 2). He also states that "I recall clearly that uncovered portions of the lobby were slippery on the day Mr. O'Gara fell" (Id. at 4). In addition, O'Gara relies on the statement of Kathryn Diaz, who, according to the affirmation submitted by O'Gara's counsel, observed the lobby floor at the time of the accident and noticed that "it was like butter moving on a hot skillet" (Affirmation in Opposition to Defendant's Motion for Summary Judgment, at 3). O'Gara does not submit Diaz's affidavit but indicates she is willing to testify at trial.

In reply, One Source argues that the record does not show that it had actual or constructive notice of any defective condition with respect to the lobby floor. It notes that to establish constructive notice, it must be shown that One Source knew of the condition long enough in advance of O'Gara's injury to have corrected it. One Source also asserts that there is no evidence showing that One Source caused or created the alleged condition, by improperly waxing the floor or otherwise and that there is no evidence that anyone complained of the condition of the floor prior to the accident. They also argue that the record does not indicate that O'Gara or anyone else observed anything unusual or dangerous on the lobby floor and point to O'Gara's testimony that he did not observe any substance on the floor. Additionally, One Source points to Gomez's deposition testimony that it places runners down on dry days if there is snow on the ground, and notes that the weather reports show that it snowed 0.1 inch on December 19 and 0.5 inch on December 20 (Gomez dep. at 40-41)..

In reply, 101 Park asserts O'Gara's assertions regarding the purpose of the runners is unsupported conjecture. It also contend that since O'Gara did not see anything prior to his fall or find anything on his hands after his fall, nor had he nor anyone else complained about the condition of the floor, neither constructive nor actual notice existed.

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).

To demonstrate a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant either created the dangerous or defective condition or had actual or constructive notice of the condition which caused the accident. Piacquadio v. Recine Realty Corp., 84 NY2d 967 (1994); Acquino v. Kuczinski, Vila & Assocs., P.C., 39 AD3d 216 (1st Dept 2007).

Defendants have made a prima facie showing that they did not cause or create any condition that led to Mr. O'Gara's accident. The record indicates that the floor was cleaned with hot water and a degreaser, but was never waxed or sealed. Moreover, that One Source lacked records tracking the treatment of the floors is insufficient to raise an issue of fact as to the clearing procedures.[1] Furthermore, while O'Gara submits evidence that the floor was slippery, the record is devoid of any evidence supporting a finding that the floor was negligently maintained. Notably, it is well established 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

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[1]The cases relied on by O'Gara are not to the contrary since in those cases, unlike the instant one, defendants failed to offer any deposition testimony from employees with knowledge of the relevant cleaning procedures. In addition, in the cases cited by O'Gara there was evidence that the plaintiff fell as a result of a substance on the floor. See e.g., Porco v. Marshalls Dept. Stores, 30 AD3d 284 (1st Dept 2006); Ferrara v. Jet Blue Airways Corp., 27 AD3d 244 (1st Dept 2006).

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not give rise to a cause of action or inference of negligence." Thomas v. Caldor's, 224 AD2d 171 (1st Dept 1996); See also, 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). .

Next, defendants have also shown that they did not have notice of any dangerous condition. There is no evidence in the record that defendants received complaints about the floor being slippery or defective. In fact, O'Gara testified that he never complained about the condition of the floors in the 26 years he worked at 101 Park. While Escobar asserted that he noticed the floor was slippery earlier in the day, he does not state that he informed defendants of the condition or that there was any substance on the floor which would have arguably put defendants on notice of a dangerous condition. O'Gara also testified that there was no evidence of any excessive wetness or cleaning product on the floor when he felt it with his hands after falling. Finally, the placement of carpeted runners does not give rise to a factual question as there is no evidence to support O'Gara's hypothesis that the runners were placed to protect against the slippery floor, or that the placement of the runners caused O'Gara to fall.

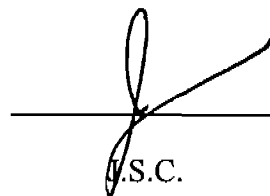
Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant One Source is granted and the claims against in the complaint is dismissed; and it is further

ORDERED that the cross motion for summary judgment by defendant 101 Park is granted.

Dated: June 29, 2010



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