

**Flechtner v Apple Computer**

2010 NY Slip Op 32053(U)

July 27, 2010

Sup Ct, NY County

Docket Number: 115009/07

Judge: Carol R. Edmead

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

PRESENT: Edmead  
Justice

PART 35

Index Number : 110073/2007  
FLECHTNER, LIANE  
vs.  
APPLE COMPUTER  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 6/16/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

NOTICE OF MOTION/ ORDER TO SHOW CAUSE

Exhibits ...

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

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

Cross-Motion:  Yes  No

**FILED**  
AUG 04 2010  
NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of defendant/third-party plaintiff Macklowe Properties, for an order, pursuant to CPLR §3212, granting it summary judgment against plaintiff Liane Flechtner is granted, and the Complaint against defendant/third-party plaintiff Macklowe Properties is severed and dismissed; and it is further

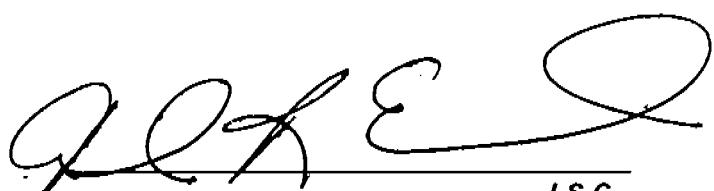
ORDERED that the branch of the motion of defendant/third-party plaintiff Macklowe Properties, for an order, pursuant to CPLR §3212, dismissing all cross and counterclaims is denied, without prejudice; and it is further

ORDERED that Macklowe Properties serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 7/27/10

  
J.S.C.

HON. CAROL EDMEAD

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 35

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LIANE FLECHTNER,

Plaintiff,

Index #115009/07

-against-

APPLE COMPUTER and MACKLOWE PROPERTIES,

Defendants,

-----x

MACKLOWE PROPERTIES,

Third-Party Plaintiff,

-against-

APPLE COMPUTER,

Third-Party Defendant.

Third-Party  
Index #590972/08

**FILED**

AUG 04 2010

NEW YORK  
COUNTY CLERK'S OFFICE

-----x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendant/third-party plaintiff Macklowe Properties (“defendant”), moves for an order, pursuant to CPLR §3212, granting it summary judgment against plaintiff Liane Flechtner (“plaintiff”), dismissing the Complaint and all cross- and counterclaims.

*Background*

This action against defendant and Apple Computer (“Apple”) (collectively, “defendants”) arises out of an accident that allegedly occurred on February 9, 2007, near the ledge and stair in front of the Apple Computer store located on the plaza area in front of the 767 Fifth Avenue (“the premises”). In her Complaint, plaintiff alleges that at the aforementioned date

and time, she was proceeding to the F.A.O. Schwarz toy store located at Fifth Avenue and 58<sup>th</sup> Street, when she fell “due to the improper maintenance and presence of debris on the ledge” (Complaint, ¶ 9). Plaintiff claims that defendants were responsible for creating the condition that allegedly caused plaintiff to sustain her injuries. In her Verified Bill of Particulars (“BOP”), plaintiff contends that defendant had “constructive notice” of the alleged dangerous condition, and “[u]pon information and belief, the condition existed one year prior to the occurrence” (BOP, ¶ 8). Plaintiff goes on to attribute the cause of the accident to a “slippery substance” and “papers and garbage” on the premises (*id.* at 18-20). Accordingly, she seeks to recover damages for the physical injuries (plaintiff’s first cause of action) and severe emotional distress (plaintiff’s second cause of action) she allegedly suffered due to defendants’ negligence.

Defendant now moves for summary judgment on the grounds that it neither created, nor had either actual or constructive notice of the alleged defective condition that led to plaintiff’s injury.<sup>1</sup> Defendant argues that the evidence fails to indicate that it was aware, or should have been aware of any accumulation of debris or other substance on the plaza area that allegedly caused plaintiff to slip and fall. Plaintiff’s BOP fails to set forth with any specificity the nature of the condition that caused plaintiff to slip and fall, other than it was some “slippery” condition, and plaintiff’s deposition testimony fails to resolve the issue (*see* “plaintiff’s EBT”). Plaintiff cannot describe the exact nature of the substance that allegedly caused her to fall, or how long that condition purportedly existed prior to her fall, defendant argues. Plaintiff did not recall going up any stairs; instead, she testified that she had started walking toward F.A.O. Schwarz,

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<sup>1</sup>On or about October 27, 2008 defendant commenced a third-party action against Apple. Those claims have since been discontinued (*see* the “March 30, 2009 Stipulation of Discontinuance”).

but had fallen (plaintiff's EBT, p. 28:6 -17). When asked whether she knew what caused her to slip, plaintiff replied, "No, I don't know" (plaintiff's EBT, p. 36:23). There is also no evidence indicating that defendant created the alleged condition that led to plaintiff's injury.

Defendant also cites the deposition testimony of William I. Unger ("Mr. Unger")<sup>2</sup>, arguing that the premises were washed and swept daily, and the stairs to the premises were kept clean (*see* the "Unger EBT"). Mr. Unger testified that his personal knowledge as to the frequency with which the premises were cleaned was based on his daily presence in the area, as well as his walking across the plaza area as he entered and exited the building. In addition, the "Incident Report," prepared shortly after the accident by an officer of the security company defendant hired to patrol the premises, makes no mention of any foreign substances involved in causing plaintiff's fall, defendant contends. Significantly, the Incident Report notes that there was no ice or water on the pavement. Thus, there is no evidence to support plaintiff's allegations that a slippery condition caused her to fall. As plaintiff cannot make a *prima facie* case of negligence against defendant, its motion should be granted in its entirety, defendant argues.<sup>3</sup>

In her opposition, plaintiff argues that defendant's motion is premature. Plaintiff maintains that she testified that she slipped on something, some sort of substance, probably ice, underneath some papers or fliers (plaintiff's EBT, pp. 56-57). Thus, it is clear that plaintiff fell on some sort of debris, ice or due to a crack in the ledge or stairs and suffered a substantial injury. The Unger EBT merely shows that the premises was managed and cleaned. Therefore,

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<sup>2</sup>Mr. Unger testified that he is the vice president/director of construction of McGraw Hudson Construction Corp. ("McGraw") (Unger EBT, pp. 5-7). He went on to explain that McGraw provides construction consulting to defendant, and organized such day-to-day services as cleaning the premises (*id.* at 8-10).

<sup>3</sup>The Court notes that, in its moving papers, defendant fails to cite or address any specific cross- or counterclaims.

an issue of fact or credibility exists, plaintiff argues.

Citing caselaw on constructive notice, plaintiff disputes defendant's contention that there is no showing of constructive notice here. This case is in its "incipient stage," plaintiff argues. It is a matter of credibility or literally one person's word or version of the events, against another. Summary judgment is too drastic of a remedy in this case. Since issues of fact and law exist here, defendant's motion should be dismissed, and plaintiff's case should be permitted to go to trial, plaintiff argues.

In reply, defendant argues that while it has met its burden of making a *prima facie* case entitling it to relief as a matter of law, plaintiff has failed to meet her burden of raising a triable issue of fact as to whether defendant had prior notice of the condition that allegedly led to her accident. Plaintiff presents no evidence to support her conclusion that defendant had constructive notice. Plaintiff also fails to submit any evidentiary proof to establish the exact nature of the condition that caused her to fall, or how long that condition existed prior to her fall. Such failures must result in the dismissal of the instant action, defendant argues. Defendant further contends that the cases plaintiff cites only serve to support its position. Finally, defendant argues that in the absence of any evidence from plaintiff tending to show either actual or constructive notice, a defendant is not required to prove lack of notice.

#### *Discussion*

#### *Summary Judgment*

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 its favor (*Bush v*

*St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). 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 (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1<sup>st</sup> Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material 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* at 560, 562). 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* at 562).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must demonstrate, *inter alia*, that the defendant created the dangerous condition that caused the accident, or that the defendant had actual or constructive notice of the dangerous condition and failed to remedy it within a reasonable time (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Segretti v Shorestein Co. East, LP*, 256 AD2d 234 [1<sup>st</sup> Dept 1998]; *Weiss v Gerard Owners Corp.*, 22 AD3d 406 [1<sup>st</sup> Dept 2005]). "To constitute constructive notice of a

dangerous condition, the defect or condition must be ‘visible and apparent, and . . . must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it’” (*Gibbs v Port Authority of New York*, 17 AD3d 252, 255 [1st Dept 2005], quoting *Gordon* at 837).

Thus, a defendant, as the proponent of a summary judgment motion, must submit evidence in admissible form that shows it did not create or have actual or constructive notice of the dangerous condition (*Colt v Great Atlantic & Pacific Tea Company, Inc.*, 209 AD2d 294 [1st Dept 1994]; see also *Giuffrida v Metro North Commuter Railroad Co.*, 279 AD2d 403, 404 [1st Dept 2001] [“Where the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed”]).

Here, as to defendant’s first argument, the Court first notes that plaintiff’s inability to identify the specific substance that caused her fall is not dispositive on a summary judgment motion. Plaintiff does not bear the burden of having to identify the substance that caused her to slip and fall (*Segretti, supra*, at 235, citing *Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 [1st Dept 1994]). Therefore, defendant’s reliance on plaintiff’s equivocal testimony, the Incident Report, and Unger’s EBT in support of such a argument is unavailing.

However, as to defendant’s second argument, defendant established that it did not have constructive notice of the alleged dangerous condition at the premises.<sup>4</sup>

The caselaw is clear regarding the absence of constructive notice. In *Perez v Bronx Park*

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<sup>4</sup>The record contains no evidence that defendant created or had actual notice of any dangerous condition.

*South Associates* (285 AD2d 402, 403 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]), the plaintiff claimed that he slipped and fell on supermarket flyers/leaflets and oil on the exterior front steps of the defendant's building. The plaintiff testified at his deposition that the accident occurred at 1:30 p.m.; yet he saw no hazard on the steps prior to the accident (*see Perez v Bronx Park South I Associates*, 1999 WL 34804728 [Trial Order] [Sup Ct Bronx County 1999] [noting that "there was no such hazard present on the steps at 5 A.M. of the day in question, and that there was similarly no hazard at 12 P.M. Plaintiff . . . offers mere conjecture that the hazard appeared sometime in this one and one-half hour period prior to his accident"]). The Supreme Court concluded that "[t]here is no evidence for the jury to reasonably infer that the condition existed for 90 minutes or 9 seconds prior to the accident, and as such, a verdict for plaintiff on the issue of constructive notice would be a matter of speculation" (*id.*). In affirming the Supreme Court's decision to grant the defendant's motion for summary judgment and dismiss the complaint, the First Department held: "plaintiff's own deposition testimony makes it clear that none of the criteria necessary to sustain a cause of action against the landowner has been met" (*Perez*, 285 AD2d 402, *supra*, at 404).

Similarly, in *Wellington v Manmall, LLC*, (894 NYS2d 396, 397 [1st Dept 2010]), the plaintiff alleged that she slipped and fell on a "drying, sticky brown substance on a staircase outside the food court of the Manhattan Mall." In affirming summary judgment in the defendant's favor, the First Department concluded that the "evidence was insufficient to show that defendants had actual notice of the allegedly dangerous condition of the stairway *or that the condition had been visible and apparent for long enough to permit defendants to discover and remedy it*, and, in opposing the motion, plaintiff did not identify any evidence tending to show

either actual or constructive notice” (*id.* at 397 [emphasis added]; *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008] [holding that the plaintiff failed to establish an issue of fact regarding the defendant’s liability because her “deposition testimony provides nothing more than mere speculation as to the cause of the accident and offers nothing to indicate that defendant created or had notice of the hazard. Indeed, plaintiff testified that she “assume[d]” and “think[s]” she fell because the floor was wet, *had no idea how long the water was on the floor* or how it got there, and did not notice any debris on the floor”] [emphasis added]).

Here, while plaintiff’s EBT indicates that plaintiff observed a dangerous condition on the premises (*i.e.*, ice, paper, or some other slippery substance), it fails to demonstrate that such condition had been present for some period of time, so as to give rise to constructive notice on defendant’s part. Plaintiff testified as follows:

Q. Before you fell, do you have a recollection of seeing anything on the ground in the area where you claim you slipped?

A. I think there were some fliers.

Q. Can you describe to me what they looked like?

A. I don’t know. I didn’t pay attention. I don’t know.

Q. You don’t know why you do things?

A. It was some papers. . . .

Q. *Do you know how long they were there?*

A. *Wouldn’t know. I’m just a passerby, how would I know?*

(Plaintiff’s EBT, p. 56-57) (emphasis added).

Based on plaintiff’s testimony, the substance that caused plaintiff’s fall “could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation,” which is insufficient to establish constructive notice (*Gordon* at 838). Nor does the record indicate how long the alleged dangerous condition existed at the premises.

As defendant has made a *prima facie* case demonstrating that it lacked constructive notice, the burden shifts to plaintiff to demonstrate the existence of an issue of material fact.

It is well settled that “the mere existence of a foreign substance, without more, is insufficient to support a claim of negligence” (*Segretti, supra*, at 235). Here, plaintiff failed to provide any evidence demonstrating how long the alleged dangerous condition existed at the premises.

Therefore, plaintiff failed to meet her burden.

Accordingly, defendant’s motion for summary judgment dismissing plaintiff’s Complaint is granted.<sup>5</sup>

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of defendant/third-party plaintiff Macklowe Properties, for an order, pursuant to CPLR §3212, granting it summary judgment against plaintiff Liane Flechtner is granted, and the Complaint against defendant/third-party plaintiff Macklowe Properties is severed and dismissed; and it is further

ORDERED that the branch of the motion of defendant/third-party plaintiff Macklowe Properties, for an order, pursuant to CPLR §3212, dismissing all cross and counterclaims is denied, without prejudice; and it is further

ORDERED that Macklowe Properties serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: July 27, 2010



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

AUG 04 2010

NEW YORK  
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<sup>5</sup>The Court notes that defendant fails to cite, or raise any arguments addressing any cross- or counterclaims herein.