

Mendez v Port Auth. of N.Y.

2010 NY Slip Op 32729(U)

September 30, 2010

Supreme Court, Queens County

Docket Number: 12415/2005

Judge: Peter Joseph Kelly

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

EVA MENDEZ,

INDEX NO. 12415/2005

Plaintiff,

MOTION

- against -

DATE April 13, 2010

THE PORT AUTHORITY OF NEW YORK, et al,

MOTION

CAL. NO. 14

Defendants.

MOT. SEQ.

NUMBER 4

The following papers numbered 1 to 20 read on this motion by the defendant Linc Facility Services, LLP for summary judgment dismissing the plaintiff's complaint and all cross-claims. The defendants Delta Air Lines, Inc. and The Port Authority of New York and New Jersey cross-move for summary judgment dismissing the plaintiff's complaint and for summary judgment on its cross-claims.

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Based upon the foregoing papers the motion and cross-motion are determined as follows:

This action arises out of an accident that occurred at an airline terminal at John F. Kennedy International Airport in Queens, New York. On August 13, 2004, the plaintiff arrived at JFK on a flight from Santo Domingo in the Dominican Republic at a terminal leased by the defendant Delta Air Lines, Inc. ("Delta") from the defendant Port Authority of New York and New Jersey ("Port Authority"). The accident occurred in the baggage area of the terminal near the baggage carousels.

The plaintiff testified at her deposition conducted on October 24, 2006 that at the time of the accident she was pushing a luggage cart that contained her two medium sized bags that she had just retrieved

from one of the luggage carousels. The plaintiff averred that the cart hit a defect in the floor and that she was caused to fall to her knees as a result. The plaintiff described the defect that caused her to fall as "a crack, an open crack". When asked to describe the shape of the crack she only stated that "[i]t was long". Although she could not offer a verbal response to an inquiry about the length of the crack, the plaintiff made a gesture during her deposition which her attorney characterized as indicating the crack was three to four feet long. Defense counsel at the deposition opined that the plaintiff indicated that the crack was two to three feet long.

At a deposition that was conducted on September 8, 2010, the plaintiff testified that she was caused to fall when the luggage cart got "stuck" and "stopped" in an "crack on the floor". Although she did not see the defect before the accident, the plaintiff testified that she "realized what had stopped the cart" after her fall. When asked to describe the crack verbally the plaintiff responded "I don't know how to". The plaintiff also could not offer verbal descriptions of the width length or depth of the crack. However, the plaintiff again gestured as to the length of the defect that counsel for the plaintiff opined to be two to two and one-half feet and defense counsel believed to be one foot. Later at her September 8th deposition, the plaintiff described the crack as having a little zig-zag, that it was not "flat", that it had "unfinished cement" placed on top and that the defect was "part cement, part crack".

In an affidavit submitted in opposition to the motions, the plaintiff averred that the defect that caused her to fall was "a line of concrete four feet in length and six inches wide". The plaintiff also stated that the concrete was "an inch and a half higher than the surrounding floor and had a sharp edge".

Silvia Carranza, a customer service representative for Delta testified at her deposition that she was working in the terminal on the day of the accident and responded to the plaintiff after the accident. Carranza stated she observed the plaintiff on the floor near carousel five. Carranza averred that she spoke to the plaintiff who stated that the luggage "cart got stuck and it flew over". Carranza testified that she asked the plaintiff where she fell and the plaintiff pointed to a "partition" in the floor which she observed was eight feet long, two inches wide and she thought was metal. Carranza also noticed the floor near the accident had chips in the floor that were "like little spots of the top of the brick missing". She guessed the chips were five to ten inches wide and acknowledged having reported the chips to her supervisor Paula DeLuca once prior to the accident.

At the time of the accident, Delta had a contract with the defendant Linc Facility Services, LLP to perform maintenance services at the terminal where the accident occurred. The contract in question, dated October 1, 2002, was entered into between Delta and Affiliated Building Services, Inc., a predecessor company to Linc.

While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (See, e.g., Zuckerman v City of New York, 49 NY2d 557).

The defendant Linc's assertion that the plaintiff failed to identify the defect that caused her to fall is without merit. The plaintiff's testimony at her two depositions was more than adequately clear that the plaintiff was caused to fall when the luggage cart she was pushing became caught in an open crack in the floor that was part cement (See, Adams v Autumn Thoughts, Inc., 298 AD2d 945; Alvarez v NYCHA, 295 AD2d 225; Louniakov v MROD Realty Corp., 282 AD2d 657; see also, Polo v New York City Housing Authority, 303 AD2d 238; Hecker v New York City Housing Authority, 245 AD2d 131). The inconsistencies in the testimony given at the plaintiff's two depositions do not nullify the plaintiff's claims, but rather only raise credibility issues to be resolved at trial. With respect to the defendants' assertion that the plaintiff's affidavit raises feigned issues of fact, reference to the plaintiff's deposition testimony, in and of itself, was sufficient for the court to determine this issue.

Separately, the defendant Linc additionally argues that it did not owe a duty of care to the plaintiff. In particular, Linc asserts that since it was an independent contractor hired by Delta it was responsible to Delta, not a third-party like the plaintiff.

Generally, an independent contractor who provides services to a property owner or lessee pursuant to a contract does not owe a duty of care to a third party (See, Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 226-227). However, a contractor can be found to have assumed a duty of care "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [citations omitted]" (See, Espinal v Melville Snow Contrs., 98 NY2d 136, 140).

Here, Linc failed to establish, prima facie, that the agreement under which it provided services to Delta was not comprehensive and exclusive (See, Giarratani v We're Assoc., Inc., 29 AD3d 946; Riley v ISS Int'l Serv. Sys., 5 AD3d 754; see also, Palka v Servicemaster Management Servs. Corp., 83 NY2d 579). The controlling agreement expressly provides that it was the parties' intent "to place with the contractor the full and complete responsibility for performing the operation and maintenance functions of all Systems for the facilities", which included the area where the plaintiff's accident occurred. Philip Grieci, the facility and contracts manager for Delta at the time of the accident, acknowledged that Delta contracted with outside vendors, like

Linc, to fulfill its obligations for maintenance and cleaning at its JFK terminals. Linc's argument that this testimony from Grieci indicates that Linc did not displace Delta in this regard is incorrect. Grieci's testimony is simply a confirmation of Delta's non-delegable duty to keep its premises, into which the public is invited, reasonably safe (See e.g., Thomassen v J&K Diner, Inc., 152 AD2d 421). Grieci also averred that he was not responsible for the "organization of the employees of the outside contractors", but would merely oversee the administration of the contracts. Grieci further testified that Delta did not employ and was not responsible for performing inspections of the area where the plaintiff fell. Angelo Arfanis, Linc's facility manager, confirmed that no one at Delta was responsible for inspecting the terminals for defects.

Contrary to Linc's assertions, the existence of a Delta owned computer system, called Maximo, and the contractual provisions cited by Linc concerning Delta's maintenance role at the terminal did not diminish Linc's sole and exclusive authority to perform its maintenance functions since these provisions did not give Delta a substantial amount of control over maintenance at the premises (Cf., Roveccio v Ry Management Company, Inc., 29 AD3d 562). Furthermore, there is no proof that Delta had its own maintenance staff or that Linc's employees took orders from Delta employees concerning performance of its maintenance functions (See, Lawson v OneSource Facility Services, 51 AD3d 983).

Concerning whether Linc launched an instrument of harm by creating the condition that the plaintiff claimed caused her to fall, there is also sufficient proof in the record to raise an issue of fact. The plaintiff testified at her second deposition that the crack that caused her accident was "part cement, part crack". It is also apparent from all the deposition testimony herein that the general composition of the floor in the area where she fell was tile, not cement. Antonio Irizarry, who was employed by Linc as a mechanic at the time of the accident, testified that he would use a substance called "Quickcrete" in the area where the plaintiff fell to fill in areas where tiles were missing. Although Irizarry claimed he did not see Quickcrete used in expansion joints and Arfanis stated that it was not Linc's responsibility to maintain expansion joints, Grieci testified that Linc was responsible for filling in expansion joints when surrounding material became loose or dislodged.

Additionally, based upon the foregoing, there are issues of fact as to whether Linc was actually or constructively aware of the condition that caused the plaintiff to fall as well as whether Linc created that condition.

Accordingly, after considering the evidence in a light most favorable to the plaintiff (See, Kelly v Media Services Corp., 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the defendant Linc's motion for summary judgment dismissing the plaintiff's summons and complaint is denied.

The defendant Port Authority of New York and New Jersey's cross-motion for summary judgment is denied as untimely since it was made than 120 days after the filing of the note of issue and the movants did not proffer any explanation for the delay making this motions (See, Brill v City of New York, 2 NY3d 648; Thompson v Leben Home for Adults, et al, 17 AD3d 347).

Dated: September 30, 2010

Peter J. Kelly, J.S.C.