

**Ennis v Wells REIT II - 222 E. 41st St., LLC**

2010 NY Slip Op 32870(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 116579/08

Judge: Doris Ling-Cohan

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

Hon. Doris Ling-Cohan

Index Number : 116579/2008

PART 36

ENNIS, BARBARA

vs

WELLS REIT II-222 E 41ST ST.,

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

Sequence Number : 002

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

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

3

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

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *by defendant* for *Summary judgment* is denied in accordance with the attached memorandum decision.

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

**FILED**  
OCT 15 2010

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/8/10

*[Signature]*  
JUSTICE DORIS LING-COHAN <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
Barbara Ennis and Steven Ennis,  
Plaintiffs,

Index No. 116579/08

-against-

Wells REIT II - 222 East 41<sup>st</sup> Street, LLC,  
Wells Management and Pritchard Industries,  
Inc.,

Motion Seq. No. 002

Defendants.  
-----X

**FILED**  
**OCT 15 2010**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**

**Doris Ling-Cohan, J.:**

In this negligence action involving a slip and fall, defendants Wells REIT II - 222 East 41<sup>st</sup> Street, LLC (Wells), Wells Management (Wells Management) and Pritchard Industries, Inc. (Pritchard) move, pursuant to CPLR 3212, for an order granting them summary judgment.

On June 5, 2008, plaintiff Barbara Ennis (Ennis) entered the duplication room (the room) of her employer, Jones Day, where she subsequently slipped and fell onto the floor. It is alleged that she slipped on liquid that supposedly leaked from a garbage bag placed on the floor by a Pritchard employee, Judith Jones (Jones), who was a substitute for the regular cleaning woman. Wells Management managed Wells's building located at 222 East 41<sup>st</sup> Street (the building). Pritchard was the cleaning company that cleaned the Jones Day tenancy in the building. Vera Camaj (Camaj) was the Pritchard cleaning supervisor for the building. Camaj, who had an office in the building, was made aware of the incident soon after it happened and went up to the room and talked with Ennis before she left the building to go to the hospital. Ennis suffered a fractured humerus that required surgery.

The motion papers include, from the Jones Day employees, an August 12, 2009 transcript of Ennis's deposition (*see* Notice of Motion, Exhibit E); separate affidavits from Jones Day

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employees, Frank Navarro (Navarro) and Steven Hill (Hill) each dated April 22, 2010 (*see* April 23, 2010 Affirmation in Opposition, Exhibits A and B); the October 13, 2009 deposition transcript of Camaj (Notice of Motion., Exhibit F), plus a separate affidavit from Camaj dated March 2, 2010 (*id.*, Exhibit H), and two separate accident reports prepared by Camaj (*see* April 23, 2010 Affirmation in Opposition, Exhibit C and Exhibit D). Jones, who was a temporary employee and is no longer employed by Pritchard, was not deposed.

During her deposition, Camaj stated that she prepared the accident reports on the night of the accident. Both of the accident reports indicate that Ennis had allegedly slipped on water. Both refer to Frank Navarro as a witness. The typed accident report contained the statement that “an employee was told from [sic] Frank Navarro ... that Barbara Ennis slipped on the floor because there was water next to a garbage can ... when ... Jones ... picked up the garbage bag.” The other accident report on form “7/25/2005” contained a similar statement.

Camaj testified that if a cleaner is emptying the garbage pails or cans, they empty the pails into a “Brute Barrel” which is a garbage can on wheels (Notice of Motion, Exhibit F, at 19 to 21). Camaj reiterated that both Ennis and Navarro told her that Ennis slipped on water (*id.* at 26 and 28). However, contrary to her references of being told that there was water on the floor, she, herself, stated that she did not observe any water or plastic bags on the floor of the duplicating room when she was in the room, just after the accident (*id.* at 29 and 32). When asked if she inquired from Jones if she cleaned the floor after the incident, she stated that Jones had said that she did not (*id.* at 42). When Camaj asked Jones what happened, Jones told her that Ennis “was leaning to give someone something and slipped” (*id.* at 29-30). She related that Jones also indicated that a Jones Day employee had told her to wipe up the water, but she did not

\* 4]  
see any water (*id.* at 30).

In her affidavit, Camaj stated that Jones's sole duties on the date of the incident were to remove the plastic garbage liners from the bins in the duplicating room and to dust where she could reach (March 2, 2010 Camaj affidavit, paragraph 7). Camaj further stated that the rectangular garbage pails in the duplicating room were for paper trash only, not liquid garbage, and that Pritchard placed "clear, plastic non-absorbent liners in those pails" but used "absorbent plastic liners ... in other pails ... for the collection of wet and other garbage" (*id.*). She also stated that Pritchard had no notice that wet garbage had been put into the recycling pails in the duplicating room or that there was a wet condition at the accident site (*id.*). She reiterated in her affidavit that when she was at the accident site, she did not see any wet condition, and that the garbage pail in the area where plaintiff fell was empty and dry (*id.*).

Contrary to Camaj's claims, Ennis's deposition testimony reflects that when she entered the room, the garbage bins were empty and the plastic bags were on the floor (Notice of Motion, Exhibit E, at 32). Ennis was not present in the room when Jones allegedly placed the plastic bags on the floor. Nor did she personally notice any liquid having leaked from the bags before her accident. It was not until after she fell that she allegedly noticed a clear liquid on the floor coming from an open clear plastic bag which did not appear to her to have a hole in it, or any liquid in it, or a beverage container in it, but was only on top of a wet area (*id.* at 63-68). She did recall the presence of certain grey pails on wheels that were ordinarily not in the room (*id.* at 53-54), and stated that another female employee that came to help her also slipped on the liquid but did not fall (*id.* at 37-38).

Regarding Jones's actions in the room, Navarro states in his affidavit:

At approximately 8:30 p.m., a cleaning woman was in the ... room cleaning. She was not the regular cleaning woman. ... I observed her remove the trash bags from the trash bins and place the bags on the floor. The cleaning woman had a garbage can on wheels, that the regular cleaning woman would place the bags of trash, but did not place the trash bags in the garbage can with wheels. ... Shortly after the cleaning woman placed the trash bags on the floor, Barbara Ennis came into the ... room to obtain staples. ... The cleaning woman was still in the room and the trash bags were still on the floor while walking, Ms. Ennis slipped on liquid that had leaked out of the trash bags on the floor.

Regarding Jones and the plastic bags, Hill states in his affidavit:

[A]t approximately 8:30 p.m., there was a cleaning woman cleaning the ... room. The cleaning woman was not the regular cleaning woman. I observed her empty various trash bins into plastic trash bags, place the plastic bags on the floor and drag them across the floor. The various trash bins that the cleaning woman emptied into the plastic bags that she placed and dragged on the floor contained ordinary garbage including liquids and food. As she dragged the bags on the floor, liquid leaked out of the bags. She did not place the garbage from the various trash bins in the wheeled garbage can that she had with her and that the regular cleaning woman would use to empty the various trash bins. ... At approximately 8:45 p.m., Barbara Ennis came into the copy room to obtain staples. ... I was in the process of getting staples ... when I heard a loud noise. When I looked ... I observed that Ms. Ennis had fallen on the ground. As I approached Ms. Ennis there was liquid on the floor. ... The liquid had clearly leaked from one of the garbage bags that the cleaning woman had placed on the floor.

Other facts gleaned from the depositions and affidavits reflect that Ennis and Jones were in the room at the same time for only a 5- to 10-minute period from 8:45 P.M. until the accident happened at 8:55 P.M.

On a motion for summary judgment, the issue for the court is that of issue finding not issue determination (*Pirrelli v Long Island R.R.*, 226 AD2d 166 [1<sup>st</sup> Dept 1996]). The court must view the evidence in a light most favorable to the party opposing the motion (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1<sup>st</sup> Dept 1989]). Here, defendants assert that they are entitled to summary judgment because they did not have notice of the condition and since the accident allegedly

occurred during the performance of Pritchard's duties, they did not have reasonable time in which to discover and cure the alleged condition (*see* June 10, 2010 Affirmation in Reply). More specifically, the three issues discussed by the parties are (1) the alleged creation of a dangerous condition, that being the wet area on the floor; (2) notice of the wet area, if any; and (3) a reasonable time to have discovered the wet area.

“To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on a floor, there must be evidence that the dangerous condition existed and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Davis v Rochdale Village*, 63 AD3d 870, 870-871 [2d Dept 2009]; *Brown v Johnson*, 241 AD2d 829, 829 [3d Dept 1997]; *Trujillo v Riverbay Corp.*, 153 AD2d 793, 794 [1<sup>st</sup> Dept 1989]). “Except in cases where the defendant created the condition, thus constituting actual notice, to establish a prima facie case [of negligence], a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence” (*see Lewis v Metropolitan Transportation Authority*, 99 AD2d 246, 249 [1<sup>st</sup> Dept 1984], *affd* 64 NY2d 670 [1984]). “It [is] the duty of the plaintiff ... to prove either that defendant had knowledge of the alleged dangerous condition, either actual or constructive, or that it caused the condition to be created by its own affirmative act” (*id.* at 250; *see also Knight v Certified Oils*, 239 AD2d 391 [2d Dept 1997]).

The source of the alleged water has been identified by Ennis, Navarro and Hill as coming from one of the plastic bags placed or dragged by Jones (*compare Moody v F.W. Woolworth Co.*, 288 AD2d 446, 447 [2d Dept 2001]; *Trujillo v Riverbay Corp.*, 153 AD2d at 794). Contrary to Navarro's, Hill's and Ennis's statements under oath as to the creation and existence of water on

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*Stasiak v Sears, Roebuck and Co.*, 281 AD2d 533, 534 [2d Dept 2001] [90 seconds not reasonable time to clean paint spill upon actual notice]; *Gaberman v Metropolitan Transp. Auth.*, 277 AD2d 350, 350 [2d Dept 2000], *affg Gaberman v Metropolitan Transp. Auth.* [Sup Ct, Queens County, Golia, J. November 16, 2009] [question of fact exists as to whether defendant acted reasonably within the 5-7 minutes from when it had constructive notice of spill]; *Brown v Johnson*, 241 AD2d at 830 [10-ten minute period insufficient to impute constructive notice]). Where “an issue of fact exists as to whether the defendant had a reasonable time to remedy the condition which caused the injured plaintiff’s fall after it received actual notice of the condition,” summary judgment must be denied (*Gaberman v Metropolitan Trans. Auth.*, 277 AD2d at 350).


Accordingly, as triable issues of fact have been raised, it is

ORDERED that the motion for summary judgment made by Wells REIT II - 222 East 41<sup>st</sup> Street, LLC, Wells Management and Pritchard Industries, Inc. is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties with notice of entry.

Dated:

10/8/10

  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Ennis.wells.wpd

**FILED**  
OCT 15 2010  
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