

**Horn v Manhattan Embassy Co.**

2010 NY Slip Op 32929(U)

September 24, 2010

Sup Ct, NY County

Docket Number: 117878-2006

Judge: Joan A. Madden

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

PRESENT: Hon. Joakim A. Madup  
Justice

PART 11

Hon. Lawrence

INDEX NO. 117878/06

MOTION DATE 6/24/10

- v -

MOTION SEQ. NO. 02

Manhattan Embassy

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision Order.

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

**FILED**  
SEP 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: September 24, 2010

[Signature]  
J.S.C.

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 11

-----X  
LAWRENCE HORN and JUDITH MILLER,

Plaintiff,

-against-

Index No. 2006-117878

MANHATTAN EMBASSY CO., A LIMITED  
PARTNERSHIP, HELMSLEY-SPEAR, INC., and  
QUALITY CLEANING CORP.,  
Defendants.

**FILED**  
**SEP 29 2010**  
NEW YORK  
COUNTY CLERK'S OFFICE

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**Joan A. Madden, J.**

In this personal injury action, defendant Quality Cleaning Corp. ("Quality") moves for summary judgment dismissing the complaint against it (motion seq. no. 002). Plaintiffs Lawrence Horn ("Horn") and Judith Miller ("Miller")<sup>1</sup> (together, the "Horns") oppose the motion. For the reasons stated below, Quality's motion for summary judgment is denied.

Background

The Horns allege that Horn sustained personal injuries on May 17, 2006, at approximately 7:30 a.m., when he slipped and fell on the floor in the lobby (the "Lobby") of the residential building (the "Building") where the Horns resided, located on 301 East 47<sup>th</sup> Street, New York, New York. The Building is owned by Manhattan Embassy Co. ("Embassy") and the managing agent of the Building is Helmsley-Spear, Inc. ("Helmsley-Spear")(together with Embassy, the "Building Owners").

Horn testified at his deposition that, on the morning of the accident, he left his apartment and set off for work at approximately 7:30 a.m. He rode down to the Lobby in the Building's elevator, along with some of his neighbors. He allowed a woman, Lauren Albert ("Albert"),

<sup>1</sup> Miller seeks damages for loss of consortium.

another tenant of the Building, and her children to leave the elevator first and walk ahead of him as they arrived in the Lobby. At this time, Miguel Ortiz was mopping the floor in the Lobby. After walking part of the way through the Lobby, Horn's left leg slipped, and he fell on his left knee. Horn testified that "[a]s his foot slipped, [the floor] felt moist, like [he] had no traction." Horn dep. at 63. He further testified that he saw that the floor was damp from "water or something" as he was falling. Id. at 137-8. He also testified that he believed that there was a moisture stain on the left knee of his pants, which were black, after he fell. Id. at 141. Horn was taken to the hospital and was told that he fractured his patella and that part of the tendon on the patella had been torn.

During 2004, the Building Owners retained Quality to clean and polish the terrazzo floor in the Lobby. The surface of the terrazzo floor in the Lobby was made from a blend made with marble chippings. Quality was owned by Ralph Shepherd and Edith Shepherd until February or March 2007. From 2004 until at least the latter half of 2006, Quality, once a month, cleaned and polished, but did not wax the Lobby floor.

During the earlier part of 2005, Robert Shepherd ("Shepherd"), the son of Ralph and Edith Shepherd, and an employee of Quality for approximately 15 years, was in charge of Quality's account with the Building and was in charge of day-to-day operations and sales. Shepherd dep. at 9. Shepherd, who also had an apartment in the Building, was fired from Quality in May 2005, and Aaron Auster ("Auster"), the managing director of Quality was assigned to the Building's account after Shepherd left.

Shepherd testified that, while he worked for Quality, different employees performed Quality's work at the Building; there was always a lead person present; and that Quality would either crystallize the floor or stone glow the floor, crystallize it, and impregnate it.<sup>2</sup> Id. at 21-22,

<sup>2</sup>According to Shepherd, "stone glowing is a generic term for using the marbling polishing compound or oxolic acid." Shepherd dep. at 43. Shepherd testified that the process of crystallizing is what actually polishes the marble. Id. at 41. He testified that crystallizing

34-35. Shepherd further testified that impregnating the floor reduces slippage and “seals the stone and prevents any kind of substances from entering because all marble is porous so it prevents any liquids from being absorbed into the stone.” Id. at 23. Shepherd testified that they would impregnate the floors every time stone glowing was performed, and that Quality impregnated the floors every two or three months , and that “[g]enerally impregnating should be [done] at least every two or three months no matter what.” Id. at 24.

Shepherd further testified that after he left Quality, as he lived in the Building, he observed Quality’s work and that Quality was no longer impregnating the floors. Id. at 28. Shepherd also testified that he saw people performing work at the Building who previously were used as helpers and, who, he stated, were not qualified to actually mix chemicals or lay them down on the floor. Id. at 36-37.

Quality concedes that after Shepherd left that it was no longer impregnating the floor and did not do anything to make the floor slip resistant. Auster dep. at 50. Auster testified that the technique that Quality used to clean and polish the Lobby floor when he was in charge of the Building’s account involved the use of exsolic acid and putty, and that crystallized products were not used. Auster dep. at 39. Auster explained that the procedure that Quality followed was to clean and scrub the floors using a nonacid detergent and a floor machine, rinse the floor, mix the exsolic acid and putty, and then take a floor machine with a pad and buff it into the floor. Id. at 40. Auster stated that the combination of the products with the heat from the machine polishes the marble and makes it look shiny. Id. at 40.

Auster admitted in his deposition that he believed that Quality did clean and polish the Lobby floor in the Building in May 2006, the month when the accident occurred; and Quality has provided bills from it to the Building Owners for services rendered in April, May, and June of 2006. However, no evidence has been produced which indicates the exact date when the  

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involves the use of an acid and heat which reacts with the marble. Id.

Lobby floor was last polished prior to Horn's accident; which Quality employees performed the polishing on that occasion; or what type of pad was being used by Quality on that occasion. Auster further testified that Quality was sold in February or March of 2007, but continues to do business under a different name, and he now holds the title of executive vice-president at the new business.

During discovery at Auster's deposition, it became apparent that Auster had not procured certain information and documents responsive to requests in the Horns' discovery notice, including bills that Quality may have submitted to the Building, a list of employees who were qualified to work on floors in 2006, records concerning the techniques and products Quality used to polish and clean terrazzo floors, and records concerning the substances of materials that Quality used at the Building. Auster dep. at 18-19, 35, 73-75, 76.

On January 21, 2009, a status conference took place and the parties discussed the Horns' outstanding discovery requests. Justice Marilyn Shafer issued an order which required Quality to produce certain discovery items, including discovery items from Auster. In accordance with Justice Shafer's order, the Horns faxed Quality a letter demand dated January 21, 2009 (the "Letter Demand") containing nine discovery requests for various documents and information demanded on page 102 of Auster's deposition transcript, which Quality was to provide by February 23, 2009. Quality did not provide all of the information and documents, and, at a subsequent status conference on April 8, 2009, Justice Shafer issued an order directing Quality to respond to the Letter Demand, and to certain other discovery requests, on or before April 22, 2009.

At a May 6, 2009 status conference it was determined, in part, that Quality did not respond to items #3 and #6 of the Letter Demand. Item #3 was a request that Auster "[c]heck payroll records for employees that were qualified to do the floors;" item #6 was a request for "brochures that manufacturers produce about their product." Justice Shafer issued another order

(the "May 6<sup>th</sup> Order") which directed Quality to respond by May 26, 2009, to specific discovery requests, including the items requested from Auster in the Letter Demand. The order directed Quality to provide an affidavit as to any items it claims that it does not have in its possession. The May 6<sup>th</sup> Order provided that, if Quality failed to respond to the discovery requests by May 26, 2009, it would be precluded from introducing evidence on summary judgment or at trial.

On June 3, 2009, another status conference took place and Justice Shafer issued another conference order (the "June 3<sup>rd</sup> Order"). The June 3<sup>rd</sup> Order again directed Quality to either produce certain enumerated discovery items on or before July 3, 2009, or provide affidavits explaining why such items could not be produced. The June 3<sup>rd</sup> Order specifically required Quality to produce all items, by July 3, 2009, which are responsive to the Letter Demand, or provide a sworn affidavit that Auster has "no possession, custody or control of any item requested." The June 3<sup>rd</sup> Order also provided that Quality may subpoena the new owners of Quality to produce documents.

The June 3<sup>rd</sup> Order states that if Quality fails to comply by the appointed time, then Quality "will be precluded, without further order and without further notice, from introducing any evidence on summary judgment or at trial of this action." In response to the June 3<sup>rd</sup> Order, Quality still did not produce all the documentation and information that was requested from Auster, or a sworn affidavit that Auster was not in the possession, custody, or control of the missing items requested by the appointed deadline.

On July 16, 2009, after the deadline for compliance with the June 3<sup>rd</sup> Order, Quality moved, by order to show cause, to vacate the May 6<sup>th</sup> Order and the June 3<sup>rd</sup> Order (the "Motion to Vacate"). Some time after the motion was made, Justice Shafer retired and the case was assigned to Justice Joan Kenney ("Justice Kenney"). Quality wrote to Justice Kenney and asked

Court's orders." Quality further states that it responded to each demand and court order in full, through affidavits from Ralph and Edith Shepherd, which it submitted following the June 3<sup>rd</sup> Order. Quality also asserts that the Motion to Vacate was wrongly decided and is being appealed. Furthermore, Quality argues that none of the items which provide the basis for the preclusion order are sufficient to enable the Horns to establish a prima facie case, and that Shepherd has no expert qualifications and that his testimony is conclusory, raises no triable issues, and has no probative value.

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).

Here, as Quality is barred by the preclusion orders issued by Justice Shafer and Justice Kenney's January 21, 2010, Decision and Order from introducing any evidence in support of a motion for summary judgment, it cannot make a prima facie showing that the Horns' complaint should be dismissed as a matter of law. Moreover, to the extent that Quality challenges Justice Shafer's and Justice Kenney's orders, this court is not an appellate court and the issues are not properly raised herein. In addition, these issues have already been considered by two justices, and Quality's repeated failure to produce the evidence requested during Auster's deposition or to provide an affidavit stating that such evidence did not exist remains unexplained.

[\* 8]

As Quality cannot make a prima facie showing, the burden does not shift to the Horns to provide admissible evidence controverting this showing. See Gerbi v. Tri-Mac Enterprises of Stony Brook, 34 AD3d 732 (2d Dept 2006)(defendant in slip and fall action who moves for summary judgment has initial burden of showing that it neither created or had notice of a hazardous condition and only after the movant has met this burden will the court examine the sufficient of plaintiff's opposition). This court makes no determination as to whether the evidence relied on by the Horns, including any inferences that could be drawn from Shepherd's testimony that Quality used inexperienced employees to polish the floor and inadequate equipment and techniques, would be sufficient to raise a triable issue of fact as to Quality's negligence in the context of a motion where the movant established a prima facie case entitling it to summary judgment. Furthermore, the court is not required to accept Quality's position that the evidence it failed to timely produce would not have been probative of the issues raised on this motion.

Finally, as the court is denying summary judgment, it need not reach the Horns' remaining arguments, including that the motion is untimely.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Quality Clean Corp. (motion seq. no. 2) is denied; and it is further

ORDERED that a pretrial conference shall be held on October 28, 2010, at 3:00 p.m., in Part 11, Room 351, 60 Centre Street, New York, NY.

Dated: September 24, 2010

**FILED**  
SEP 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

  
J.S.C.