

Shein v New York & Presbyt. Hosp.

2010 NY Slip Op 33375(U)

November 30, 2010

Supreme Court, New York County

Docket Number: 102132/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

FLORINA SHEIN and ALEX SHEIN,

INDEX NO. 102132/2007

Plaintiffs,

MOTION DATE _____

- against-

MOTION SEQ. NO. 001

THE NEW YORK AND PRESBYTERIAN HOSPITAL,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment, pursuant to CPLR 3212.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

FILED

2

Replying Affidavits (Reply Memo) _____

3

Cross-Motion: Yes No

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This is a negligence "slip-and-fall" action by plaintiff Florina Shein ("plaintiff") and her husband Alex Shein (collectively "plaintiffs"), to recover damages for injuries allegedly sustained when plaintiff slipped and fell while stepping off an escalator.¹ The parties have completed discovery and a Note of Issue was filed on November 25, 2009. Before the Court is defendant The New York and Presbyterian Hospital's ("defendant" or "Hospital") motion for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint on the basis that there are no triable issues of fact. Plaintiffs have responded in opposition to the motion.

BACKGROUND

In support of its summary judgment motion, defendant submits, *inter alia*, plaintiff's deposition; an affidavit of Juan Cordova ("Cordova"); and an affidavit of Lambert C. Davenport

¹Plaintiff's husband brings a derivative claim for loss of services.

("Davenport") with attached security reports. In opposition, plaintiffs submit plaintiff's affidavit; an affidavit of Madeline Mateo ("Mateo"); and photographs of the accident location.

This action arises out of an accident that occurred on October 18, 2006, when plaintiff, an employee of Columbia University who worked at the Hospital, was leaving the Hospital at the end of her work day. At approximately 4:15 p.m., plaintiff descended an escalator leading to the lobby of the Hospital's Energy Court building. She took a step or two off the escalator and slipped and fell. She alleges that the incident resulted in physical injuries.

Plaintiff testified at her deposition that she did not notice anything on the floor in front of the escalator when she was riding down it. She saw a skid mark when she fell, but she did not otherwise identify what she fell on or know if it was a liquid, and testified:

Q. Do you know whether or not it was a liquid?

A. I don't know.

* * *

Q. You can't give us anymore information, what was causing that slipping or skidding, can you? Other than what you have already told us? Are you able to give us any further description? Are you able to explain it more other than what you already told us?

[Plaintiffs' Counsel]: He just wants to know if you know what you fell on, not specifically, was it a liquid?

A. No.

Q. Can you tell us more about it?

A. No. (Not. of Mot., Ex. C at 41-42).

Plaintiff's co-worker, Mateo, was in front of her on the escalator at the time of the accident. Plaintiff testified that Mateo did not actually see her fall but heard her. Plaintiff also stated that earlier that day, she went to lunch through the Energy Court and saw a little puddle of water on the floor by the escalator. She did not, however, inform security about it because she was late coming from lunch.

Davenport, a Hospital security officer, responded to the incident. In his affidavit, he

states that he examined the floor and did not see anything unusual. The floor was dry, and if he had found a wet or slippery condition he would have written it down. He noted in the Incident Report that plaintiff told him that she slipped on something wet. In a Supplementary Report he indicated that he did not notice anything unusual on the floor, and in an Aided Report Worksheet he noted that the floor was dry.

Cordova, the Supervisor of Environmental Services for the Hospital, was in charge of daily inspection and cleaning of the Energy Court during the 3:00 p.m. through 11:00 p.m. shift. He stated in his affidavit that the floor around the escalator was routinely inspected on a 24 hour basis, and that he personally inspected the area on a regular basis for any spills, debris or dangerous conditions. On the date of the accident, the area was inspected at the start of the 3:00 p.m. shift, and had there been any liquid on the floor it would have been immediately cleaned.

In her affidavit in opposition to summary judgment, plaintiff admits that prior to the accident she did not see what caused her to fall. She claims that Mateo and another eyewitness observed that she had fallen due to a clear liquid on the floor, and that the "day of the accident was clear and dry, so the liquid observed by the 2 independent witnesses had to be the result of a spill" (Shein Affirmation). Plaintiff also claims that when she returned from lunch at around 1:00 p.m., she observed a clear liquid on the floor and complained to security about it and the security guard called maintenance while she was at the desk. There was a soda vending machine about five to ten feet away from the accident location, and plaintiff had previously observed spills on the floor in the area and complained about it on several occasions.

Mateo states in her affidavit that she had just gotten off the escalator and heard a scream and a loud bang. She looked back and saw that plaintiff had slipped and fallen on some liquid, either soda or water, that had spilled near the bottom of the escalator.

DISCUSSION

Defendant argues that it is entitled to summary judgment dismissing the complaint, as a matter of law, because plaintiff cannot show that defendant created the condition that caused the accident, or that it had actual or constructive notice of a dangerous condition. Plaintiffs argue that the motion should be denied as there are triable issues of fact regarding whether defendant created a dangerous condition by placing a soda vending machine within a few feet of the escalator, and whether defendant had constructive notice of a spill since plaintiff purportedly observed liquid on the floor a few hours earlier and had seen spills on several prior occasions which she reported to security.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). When deciding the motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that

can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the defendant to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). It is well-settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Defendant has met its initial burden of demonstrating that it neither created the purportedly dangerous condition that caused plaintiff to slip and fall, nor had actual or constructive notice of its existence. Cordova's affidavit indicates that the area around the escalator was regularly inspected for spills during the 3:00 p.m. shift, including inspections made by Cordova personally, and that no problems were noted prior to the accident. Davenport inspected the area after the accident and his affidavit and reports indicate that the floor was dry and that he saw nothing unusual. This evidence is sufficient to establish, prima facie, defendant's entitlement to judgment as a matter of law (*see Smith*, 50 AD3d at 500-01 [defendant met initial burden by providing evidence that bathrooms were cleaned and monitored regularly and no problems were noted during inspections prior to accident, and that post-

accident inspections indicated no hazardous conditions]; *Raghu v New York City Hous. Auth.*, 72 AD3d 480, 481-82 [1st Dept 2010] [janitor's testimony that his regular routine included cleaning accident location at the time when the accident occurred and that he did not observe any hazardous condition was sufficient to shift the burden of proof to plaintiff]; *Mantzoutsos v 150 St. Produce Corp.*, 76 AD3d 549 [2d Dept 2010]).

In opposition, plaintiffs have failed to raise a triable issue of fact. Their evidence, consisting of affidavits of plaintiff and Mateo, "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" (*Smith*, 50 AD3d at 501). Plaintiff has conceded that she does not know what caused her accident. She testified unequivocally at her deposition that she did not see anything on the floor when she was going down the escalator, or know if she slipped on a liquid. Her present assertions that the accident "had to be the result of a spill" because the day was clear and dry, or that the accident was caused by a spill from a drink obtained from the vending machine, are pure speculation (*see id.* [plaintiff failed to raise issue of fact where she testified that she "assumed" and "thought" 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"]; *Patrick v Costo Wholesale Corp.*, 77 AD3d 810 [2d Dept 2010] ["In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation"]).

Although Mateo claims that she observed liquid on the floor, it remains undisputed that Mateo did not see the actual slip-and-fall, and merely heard it after the fact (*see Raghu*, 72 AD3d at 482 [evidence of existence of powdery substance in area of accident did not, in isolation, support inference that defendant caused accident where the plaintiff did not testify that she actually slipped on powder, and "in the absence of such definitive testimony, the

expert's conclusion that the accumulation of powder led to her fall [was] purely speculative"). Nor would the mere existence of liquid on the floor, standing alone, raise a triable issue of fact (see *Kane v Human Serv. Ctr., Inc.*, 186 AD2d 539, 539 [2d Dept 1992] [mere existence of puddle on floor was insufficient to impute actual or constructive notice to defendant where plaintiff "never noticed the puddle until after the accident, nor did she show that the puddle had been on the floor for any length of time"]). Even assuming, *arguendo*, that the presence of liquid was a recurring condition, plaintiff has not presented sufficient evidence from which it may be inferred that the alleged recurring condition even existed at the time of her accident (see *Zanki v Cahill*, 2 AD3d 197, 198-99 [1st Dept 2003]). Indeed, she testified at her deposition that she did not report the alleged spill to security upon returning from lunch.

Moreover, to the extent that plaintiff and Mateo's affidavits now indicate that there was, in fact, liquid on the floor or that it was a recurring condition, such evidence contradicts plaintiff's prior testimony. The Court "can only consider such statements to have been tailored to avoid the consequences of her earlier testimony and [they] are, therefore, insufficient to raise a triable issue of fact" (*Smith*, 50 AD3d at 501; see also *Perez*, 285 AD2d at 404 [plaintiff's submission of one-page affidavit from alleged eyewitness to accident that consisted of "nothing more than two relevant sentences of conclusory allegations tailored to overcome plaintiff's testimony," was insufficient to warrant denial of summary judgment]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

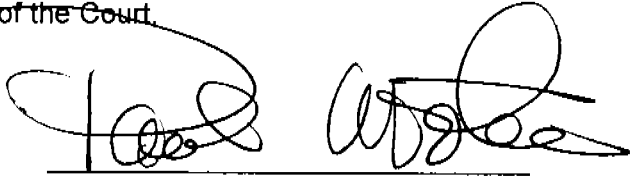
For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is

granted; and it is further,

ORDERED that defendant shall serve a copy of this Order, with Notice of Entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.



Dated: November 30, 2010

Paul Wooten J.S.C.

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