Ward v State of New York
2010 NY Slip Op 34125(U)
September 20, 2010
Court of Claims
Docket Number: Index No. 2010-038-107
Judge: W. Brooks DeBow

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WARD v. THE STATE OF NEW YORK, # 2010-038-107, Claim No. 113330-A

Synopsis

Case information

UID:	2010-038-107
Claimant(s):	KENNETH WARD
Claimant short name:	WARD
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	113330-A
Motion number(s):	
Cross-motion number(s):	
Judge:	W. BROOKS DeBOW
Claimant's attorney:	KENNETH WARD, Pro se
Defendant's attorney:	ANDREW M. CUOMO, Attorney General of the State of New York By: Glenn C. King, Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	September 20, 2010
City:	Albany
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

Claimant, an individual formerly incarcerated in a State correctional facility, is seeking compensation for injuries sustained when he allegedly slipped on loose floor tiles and fell in a shower room at Franklin Correctional Facility (CF) on October 9, 2006. The claim also seeks compensation for injuries allegedly sustained as a result of a correction officer allegedly inciting other inmates by informing them that the shower room had been closed because claimant had filed a grievance about defendant's failure to repair the tiles. The liability phase of the trial of this claim was conducted on March 9 and March 10, 2010 in Albany, New York. Claimant presented his testimony and the testimony of six employees of the New York State Department of Correctional Services (DOCS): Correction Officer (CO) Christopher Coty; Captain Daniel Phelix; CO Mark Dutil; CO John Frohm; Sergeant Richard Gates; and CO Todd Lamica. Defendant presented no witnesses at trial. Numerous documentary exhibits were received into evidence. After listening to the witnesses testify and observing their demeanor as they did so, and upon consideration of that evidence and all the other evidence received at trial and the applicable law, the Court concludes that defendant is not liable to claimant.

JURISDICTION

At trial, defendant moved to dismiss the claim on the ground that the claim is jurisdictionally defective because claimant failed to serve the claim by personal service or by certified mail return receipt requested. Claimant responded that while the claim was originally served by ordinary mail, he subsequently served a copy of the claim by certified mail return receipt requested. The Court entertained oral argument on defendant's motion, and reserved decision pending the parties' written submissions on the jurisdictional issue.

When a claim for personal injury caused by negligence arises and the claimant serves a notice of intention to file a claim upon the Attorney General within ninety days of the accrual of the claim, the claimant has two years from the accrual of the claim to file the claim with the clerk of the court and to serve it upon the Attorney General (Court of Claims Act § 10 [3]). If served by mail, a claim must be served upon the Attorney General by certified mail, return receipt requested (Court of Claims Act § 11[a][i]). The service requirements of the Court of Claims Act must be strictly construed (see Finnerty v New York State Thruway Auth., 75 NY2d 721, 722-723 [1989]), and the failure to effect mail service by certified mail, return receipt requested requires dismissal of the claim (see Turley v State of New York, 279 AD2d 819 [3d Dept 2001], lv denied 96 NY2d 708 [2001]; Philippe v State of New York, 248 AD2d 827 [3d Dept 1998]; Estrella v State of New York, UID #2008-018-634, Claim #114966, Motion No. M-75052, Fitzpatrick, J. [Sept. 3, 2008]; Desenclos v State of New York, UID #2007-042-514, Claim #113383, Motion No. M-73161, Siegel, J. [July 23, 2007]).(1)

The instant claim, which asserts that a notice of intention was served on the Attorney General on November 1, 2006, was filed with the Court of Claims on February 14, 2007 and assigned Claim Number 113330-A. The claim was served by regular mail on the Attorney General on February 13, 2007. At trial, defendant conceded that it was properly served with the notice of intention, but argued that it was not properly served with the claim because the claim was served only by regular mail. At trial, claimant conceded that he initially served the claim by regular mail, but stated that he realized his misstep and re-served the claim by certified mail, return receipt requested, in August 2007.

The Court's file contains a document that was filed on August 17, 2007 that makes reference to "Clm # 113330-A," along with copies of two receipts: (1) a certified mail receipt that indicates that claimant sent certified mail to the Attorney General on August 2, 2007; and (2) a certified mail return receipt that indicates that the Office of the Attorney General received that item of certified mail on August 6, 2007. Attached to these receipts is a verification sworn to by claimant on August 14, 2007 stating that the certified mail receipt is true to his knowledge. In his post-trial submission, claimant submitted additional copies of the certified mail receipts that are part of the Court's file, as well as DOCS paperwork that indicates that in late July and early August 2007, claimant was seeking a disbursement from his inmate account to pay for "Legal Postage for Claim" to be sent to the Attorney General (see Claimant's Opposition to Defendant's Post-Trial Memorandum, dated April 5, 2010, at Exhibit A). Defendant was given an opportunity to respond to claimant's assertion that he had cured his initially defective service with subsequent timely service by certified mail, return receipt requested, but defendant declined the opportunity to make any further argument.

Claimant's initial service of the claim by regular mail was jurisdictionally defective, but he has demonstrated that he subsequently effected service in the proper manner. The evidence of proper service on August 6, 2007 that was presented by claimant, along with the lack of a response by defendant to claimant's submissions establishes to the Court's satisfaction that claimant mailed the claim to the Attorney General by certified mail, return receipt requested within two years of the accrual of the claim. Accordingly, defendant's motion to dismiss the claim for failure to comply with the service requirements of Court of Claims Act § 11 (a) is denied.

MERITS

FACTS:

Claimant testified that he was housed in the B-2 dormitory at Franklin CF in mid-August 2006 when he noticed that the floor tiles in the rear part of the shower room in the B-2 bathroom "started coming apart."(2) The shower room was approximately ten feet by twelve feet in area, and was separated from the room containing the lavatories and the sinks by a threshold that was four to six inches high. The shower room floor was tiled with ceramic tiles that were one inch square and approximately one-eighth to one-quarter inch thick, and which were laid upon a rough concrete surface. The shower room had eight showerheads, two of which, according to claimant, had replacement nozzles that sprayed water with such a powerful stream that the water would get under the tiles and "work" the tiles loose, "tearing the floor up." Claimant testified that inmates were constantly taking showers, and that while only "about four inches" of the tiles toward the rear right hand side of the shower room had initially started to come loose, the condition of the floor progressively became worse.

Claimant testified that on numerous occasions prior to his accident, he and other inmates had reported to correction officers that the floor was coming apart. Indeed, CO Mark Dutil, a correction officer who worked the B-2 dormitory, testified that inmates had reported problems with loose and missing tiles on the shower room floor. On September 1, 2006, CO Christopher Coty completed a "Maintenance Work Order Request" (hereinafter

"Work Order") that noted "tiles coming up towards back of [B-2] shower room" (Claimant's Exhibit 15). In his testimony, CO Coty recalled that only "a couple of tiles" were missing when he made out the Work Order. On September 24, 2006, Captain Daniel Phelix inspected the shower room and noted that "floor tiles in shower need replacing" (Claimant's Exhibit 22). Captain Phelix testified that he did not recall how bad the floor was, but he testified that the shower room was not shut down because the floor was not an immediate threat to safety. Captain Phelix further testified that it would take a significant number of missing tiles - perhaps an area of four feet by eight feet - to close the shower for safety reasons, but that the shower room floor never became an immediate threat to inmate safety. Claimant testified that in September 2006, he had observed another inmate slip and fall on the shower room floor, but that the inmate did not suffer injury requiring medical attention. At the time of that inmate's fall, claimant estimated that the area of the missing tiles had grown to approximately four feet by five feet and that there were loose tiles all over the shower floor. Claimant testified that he was very careful when he used the shower because the floor was in an unsafe condition.

Claimant testified that in October 2006, many more tiles had come up, such that the area of missing tiles then measured approximately six feet by seven feet. On October 4, 2006, CO Dutil completed a Work Order in which he requested that the "missing floor tiles" be replaced in the shower room (Claimant's Exhibit 16). CO Dutil, however, testified that the area of the missing tiles was approximately eight inches by ten inches or perhaps slightly larger, i.e. approximately one foot square. CO Dutil testified that the floor was not a safety hazard because the depression caused by the missing tiles was only approximately an eighth of an inch thick, but he conceded that an inmate could slip on loose tile. However, CO Dutil testified that no inmate had ever reported slipping on loose tiles, and he did not testify as to the frequency of loose tiles found on the shower room floor.

At approximately 8:30 a.m. on October 9, 2006, claimant was about to take a shower in the B-2 dormitory. Claimant testified that the floor of the shower room was wet, indicating that someone had showered before him. Claimant testified that upon stepping over the threshold and entering the shower room, his foot slipped on three pieces of loose tile at the entrance of the shower room, causing him to fall. Claimant testified that after he fell, he retrieved the three pieces of tile and brought them to CO John Frohm, and that he told CO Frohm that he had slipped on the loose tiles in the shower room. Claimant was thereafter sent to the facility infirmary to treat injuries to his knee and finger.

CO Frohm testified that he inspected the shower room after claimant fell and found that a "patch" of tile approximately ten inches by ten inches was missing "to the left in front of the showerhead on the far wall," and that there were no loose tiles on the floor. Sergeant Richard Gates conducted an investigation of the incident. He contacted the infirmary and was informed that claimant had sustained a minor injury that was consistent with claimant's account of the accident, so Sergeant Gates determined that an interview of claimant was unwarranted (Claimant's Exhibit 14). Sergeant Gates inspected the shower room and observed an area of missing tile that was approximately ten inches by ten inches. Sergeant Gates "observed that the surface of concrete the [missing] tiles [were] adhered to was rough in nature and the tile being approx. 1/16 to 1/8th of an inch thick [and he] determined that this did not warrant shutting down the shower area" (id.). Sergeant Gates offered no testimony about whether he observed or knew of loose tiles on the shower room floor on that day or any other.

On October 11, 2006, claimant filed two grievances. One alleged that the missing tile on the floor in the shower room constituted a safety hazard and requested that the floor be fixed. The other alleged that Sergeant Gates' failure to interview him after his accident was not in accordance with DOCS policy, and requested that procedures be followed (see Claimant's Exhibits 8 and 10). Claimant's grievances were heard on October 16, 2006, and the shower room was closed on October 17, 2006 to repair and replace the missing tiles.[(3)] According to claimant, when maintenance staff came to repair the shower room, CO Todd Lamica announced to the inmates in the B-2 dormitory at "count time" and repeatedly throughout the day that if they had a problem with the shower room being closed or being unable to use the bathroom while repairs were being done, they should talk to claimant because he filed a grievance that resulted in the shower room being shut down. Claimant testified that he was afraid that other inmates would harm him because he had filed the grievance that caused the closure of the shower room. CO Lamica testified that he announced to the B-2 dormitory only once at "count time" that the shower was closed, and he denied having told the inmates in the B-2 dormitory that the shower room was closed due to claimant's grievance. There was no evidence that claimant suffered any physical harm from other inmates as a result of the alleged actions of CO Lamica.

DISCUSSION:

Claimant's first cause of action asserts that defendant negligently maintained the shower room by allowing broken, loose tiles to remain on the shower room floor. It is well-established that the State has a duty to maintain

its premises "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (Basso v Miller, 40 NY2d 233, 241 [1976], quoting Smith v Arbaugh's Rest., 469 F2d 97, 100 [1973], cert denied 412 US 939 [1973]). In this "slip and fall" case, claimant must prove by a preponderance of the credible evidence: (1) that a dangerous condition existed; (2) that the State either created this dangerous condition or had actual or constructive notice of the condition and failed to correct the problem within a reasonable period of time; and (3) that the dangerous condition was a proximate cause of claimant's accident (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]; Dapp v Larson, 240 AD2d 918 [3d Dept 1997]; see also Goldman v Waldbaum, Inc., 297 AD2d 277 [2d Dept 2002]).

As an initial matter, the Court notes that while there was substantial testimony about the size and location of the hole created by the loosened tiles, and whether the hole itself was a dangerous condition, the condition that is the alleged cause of claimant's accident was the loose tiles themselves, and not the hole in the shower room floor. Assuming that claimant slipped on three loose floor tiles immediately upon entering the shower room, and assuming without deciding that the presence of those three tiles constituted a dangerous condition, the Court finds that claimant did not prove by a preponderance of the credible evidence that defendant created the condition or had actual or constructive notice of the three loose tiles that were on the shower room floor that morning.

To prove that defendant created the condition, claimant must prove that the hazard was "created by [defendant's] own affirmative act" (Mercer v City of New York, 223 AD2d 688, 689 [2d Dept 1996], affd 88 NY2d 955 [1996]), and there was no such evidence adduced at trial. Nor was there any evidence that "specific information about the [three loose tiles was] directly and explicitly brought to the attention of the defendant's responsible agents" (1B PJI 3d 2:225, at 1290 [2010]), and thus, there cannot be a finding that defendant had actual notice of the three loose tiles upon which claimant allegedly slipped.

"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 permit defendant's employees to discover and remedy it" (Gordon at 837). The evidence at trial failed to demonstrate the length of time that the three loose tiles had been present on the floor prior to claimant's fall. Claimant's testimony that the powerful streams of water from the replacement nozzles would loosen and work the tiles free and that the shower room was wet when claimant stepped into it permit the Court to draw an inference that the tiles had been loosened and worked free during someone's shower that morning, but there was no evidence as to how long before claimant's accident any other person had showered. Claimant testified that the shower room opened daily at 6:00 a.m., and thus it is possible that the tiles became loose and then remained in the shower room for 2 and 1/2 hours prior to claimant's fall, but it is equally plausible that the tiles were loosened by the shower spray of someone who showered immediately before claimant. Thus, the preponderance of the credible evidence does not support a finding that the loose tiles were on the floor for a sufficient period of time to be discovered and remedied, and defendant will not be charged with constructive notice of the loose tiles on this basis.

In the alternative, constructive notice may be established by evidence "demonstrating a recurring dangerous condition in the area of the slip and fall that was routinely left unaddressed" (Solazzo v New York City Tr. Auth., 21 AD3d 735, 736 [1st Dept 2005], affd 6 NY3d 734 [2005]). Although claimant testified that there were loose tiles "all over the floor every day," this uncorroborated testimony fails to persuade the Court that loose tiles were routinely left on the shower room floor, for the following reasons. First, claimant's self-serving testimony that the patch of missing tiles grew from four inches in mid-August 2006 to approximately forty-two square feet in October 2006 - which would permit an inference that tiles were routinely coming unaffixed - was directly contradicted by the testimony of Sergeant Gates and CO Frohm, both of whom credibly testified that the patch was only approximately one square foot in size on the date of claimant's fall. Claimant offered no documentary evidence that would demonstrate that the hole was as large as he testified, nor was there any testimonial or documentary evidence supporting claimant's contention that loose tiles were all over the place on a daily basis. Second, there was no documentary evidence demonstrating that any inmates had fallen on loose tiles in the shower room. To the contrary, CO Dutil credibly testified that no inmates had reported slipping on loose tiles. To be sure, claimant did testify that he saw another inmate slip and fall in the shower, but claimant's testimony did not indicate whether the other inmate's fall was caused by loose tiles on the floor. Moreover, even if it were shown that the inmate slipped on loose tiles, a single incident demonstrating the presence of loose tiles would not provide sufficient evidence of a recurrent condition. In sum, the evidence at trial does not demonstrate that loose tiles on the shower room floor was a condition that was routinely left unaddressed, and thus there is a lack of evidentiary support to charge defendant with constructive notice of the presence of loose tiles on the shower room floor at the time of claimant's accident.

At trial, claimant endeavored to prove the second cause of action asserted in his claim, that CO Lamica allegedly incited other inmates in the B-2 dormitory to harm claimant by telling them that claimant was responsible for the closure of the shower room. However, there was no evidence adduced at trial that claimant suffered any physical injuries from CO Lamica's alleged behavior. Rather, claimant's testimony demonstrates that he was in fear of being attacked by other inmates, so his alleged injuries were in the nature of emotional distress. Inasmuch as CO Lamica's alleged actions were intentional, and claimant allegedly suffered emotional injuries, the Court construes this second cause of action as a claim for intentional infliction of emotional distress.[(4)] It is well-settled that "public policy prohibits the maintenance of a suit against the State for intentional infliction of emotional distress" (Brown v State of New York, 125 AD2d 750, 752 [3d Dept 1986]; Mosely v State of New York, UID #2002-013-031, Claim No. 104862, Motion Nos. M-65056, M-65057, M-65103, M-65304, CM-65354, Patti, J. [Sept. 19, 2002]). Accordingly, claimant's second cause of action will be dismissed.

CONCLUSION

It is the conclusion of this Court that defendant is not liable to claimant for damages arising from his physical injuries, as the evidence fails to prove that defendant affirmatively created or had notice of the dangerous condition alleged to have caused claimant's injuries. Further, claimant's second cause of action is dismissed as against public policy.

The Chief Clerk is directed to enter judgment in favor of defendant, dismissing the claim. Any motions or objections not previously ruled upon are hereby DENIED.

September 20, 2010

Albany, New York

W. BROOKS DeBOW

Judge of the Court of Claims

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1. The Court of Claims Act requires that defendant's objection to the manner of service be raised with particularity in the answer or in a pre-answer motion to dismiss (Court of Claims Act § 11[c]). Here, defendant's verified answer satisfied that requirement (see Verified Answer, filed March 21, 2007, ¶ Fifth). Thus, defendant's motion to dismiss on the grounds of improper service is properly before the Court.

2. All quotations in this decision are to the Court's trial notes or the digital audio recording of the trial, unless otherwise indicated.

3. The Court is considering this evidence for the sole purpose of claimant's second cause of action for harassment, as discussed in greater detail infra.

4. "The [intentional] tort [of intentional infliction of emotional distress] has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (Howell v New York Post Co., 81 NY2d 115, 121 [1993]).

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