McGloin v Morgans Hotel Group Co.
2011 NY Slip Op 30987(U)
March 30, 2011
Supreme Court, New York County
Docket Number: 116469/2008
Judge: Paul Wooten
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SCANNED ON 4/15/2011

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

DANA BAXTER MCGLOIN and JACK MCGLOIN,

Plaintiffs,

- against-

MORGANS HOTEL GROUP CO. d/b/a MORGANS HOTEL,

Defendant.

INDEX NO. 116469/2008

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 5, were read on this motion by defendant for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5

FILED
APR 15 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Plaintiff Dana Baxter McGloin ("plaintiff") and her husband Jack McGloin ("Mr. McGloin") (collectively "plaintiffs") bring this action against defendant Morgans Hotel Group Co. d/b/a Morgans Hotel ("defendant" or "Morgans Hotel") to recover damages for injuries allegedly sustained when plaintiff tripped and fell on a duvet cover in a hotel room at Morgans Hotel. Plaintiff attributes the accident to the duvet cover being improperly draped on the floor by the hotel's staff, which she claims created a tripping hazard. Mr. McGloin brings a derivative claim for loss of services. The parties have completed discovery and the Note of Issue was filed on March 23, 2010. Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds that there are no triable issues of fact because plaintiff cannot establish a prima facie case of negligence.[1] Plaintiffs have responded in opposition to

[1] Defendant seeks to dismiss Mr. McGloin's cause of action on the basis that his claim cannot stand alone.

the motion, and defendant has filed a reply.

BACKGROUND

In support of its summary judgment motion, defendant submits, *inter alia*, depositions of plaintiff, Mr. McGloin, and Morgans Hotel employee Paul Kulakis ("Kulakis"). In opposition, plaintiffs submit the same three depositions; plaintiff's affidavit; and an incident report prepared by Kulakis on May 14, 2008. The following facts are undisputed.

On May 14, 2008, at around 6:00 a.m., plaintiff checked in as a guest at the Morgans Hotel located at 237 Madison Avenue, New York, New York. Plaintiff checked in at the bell desk and went straight to work without going up to the room. Her husband arrived separately later that evening at around 9:30 p.m. Upon entering the room, Mr. McGloin threw his bag on the floor, turned on the lights, and began reading the New York Times for about 20 to 30 minutes. He did not recall using the bed.

At approximately 10:00 p.m., plaintiff returned to the hotel after attending an industry dinner. Mr. McGloin was waiting for her in the hotel room and was still reading the newspaper in a chair. Plaintiff recalled that when she entered the room, the bed was made and there was a duvet cover on it. The bed appeared very low to the ground as if the bed frame was missing and the bed was sitting on the floor. Plaintiff noticed that there was very little lighting in the room, but she did not remember where any of the lighting fixtures were located and could not describe any of the other furniture in the room. She went to the bathroom and then undressed. She walked over to kiss her husband hello. She walked back towards the bathroom and allegedly tripped over the duvet cover, which she claims was touching the floor. She fell forward to the wall and floor resulting in alleged injuries.

Plaintiff did not notice the duvet cover before she tripped. However, when she looked back to see what caused her to fall she saw a portion of the duvet cover hanging off the bed and onto the floor. The portion of the duvet cover that was draped onto the floor was bunched

up and folded. Plaintiff believes that she tripped over the bunched up portion of the duvet cover because when she looked back directly after her fall, she could clearly see it and also felt that she did not drag the duvet cover off the bed when she fell.

Mr. McGloin saw plaintiff trip and fall, but he did not know what caused the accident. He saw her trip over the "bedding" but he did not know whether she tripped on the duvet cover, bed skirt or something else. Nor did he know if the duvet cover was touching the floor. He did not think that plaintiff tripped over the mattress or bed itself because he would have heard banging against the bed.

Kulakis, the Director of Housekeeping for Morgans Hotel, was called to plaintiff's room following the incident at around 10:15 p.m. Kulakis did not have a chance to thoroughly observe the bed, but he did not believe that the bed was made. Plaintiff reported that she had tripped over the bed skirt, and Kulakis filled out an incident report noting that Mr. McGloin had called to report that plaintiff tripped over the bed skirt.

Kulakis also testified that at the time of the incident, the beds in the hotel's guestrooms were metal bed frames with a box spring and a mattress on top that were of standard height, length and width. The hotel had very high standards and specific design elements, and made sure that its standards were adhered to. The rooms were inspected everyday throughout the day whenever a room was cleaned and after a room was cleaned. When Kulakis had the opportunity to inspect the way a bed was made in a particular room in May 2008, the sheets or covers did not touch the floor if the bed was made. If a bed had been made and a duvet cover was touching the floor, that would not have been up to the standards of the hotel. Prior to the date of plaintiff's accident, the hotel had never received any complaints from guests about bedding touching the floor, and no guest had ever tripped on bedding or sheets hanging on the floor.

DISCUSSION

Defendant argues that it is entitled to summary judgment dismissing the complaint in its entirety, as a matter of law, because plaintiff cannot establish that Morgans Hotel owed plaintiff a duty because it neither created the condition that caused the accident, nor had actual or constructive notice of a dangerous condition. Defendant also argues that plaintiff cannot establish that a defect even existed, since the allegedly defective condition was open and obvious and not inherently dangerous.

Plaintiff argues that summary judgment should be denied because there are triable issues of fact regarding whether defendant negligently caused and created a dangerous condition, consisting of a duvet cover that was permitted to hang off the bed and create a tripping hazard. Plaintiff asserts that the condition of the bed was entirely within defendant's control since only the hotel staff was responsible for cleaning the rooms, and that the hotel had exclusive possession of the room prior to plaintiff's arrival. Plaintiff also contends that the bed was not made fully or was made negligently, thus violating the hotel's own safety standards.

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 a summary judgment 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]).

It is well established that where, as here, a defendant moves for summary judgment in a trip-and-fall case, the defendant "has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition" (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *see also 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). However, "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]).

In the case at bar, assuming, *arguendo,* that the duvet cover constituted a dangerous and defective condition as alleged by plaintiff, the Court finds that defendant has met its initial

burden of demonstrating that it neither created nor had actual or constructive notice of any hazardous conditions prior to the accident. Defendant presents the deposition of Kulakis indicating that the hotel's rooms were inspected daily and throughout the day, and that if a bed was made with the duvet cover touching the floor it would not have been up to the hotel's standards. Kulakis' own inspections of the hotel's rooms revealed that the sheets or covers did not touch the floor if the bed was made. When Kulakis appeared in plaintiff's room following the accident, he recalled that the bed was unmade. Kulakis also testified that at no time prior to the accident had the hotel ever received any complaints from guests about bedding touching the floor, and that prior to this incident no guest had ever tripped on bedding or sheets hanging on the floor. Moreover, the testimony establishes that the room was in the sole and exclusive possession of Mr. McGloin for at least 30 minutes before the accident occurred. This evidence is sufficient to establish, prima facie, defendant's entitlement to judgment as a matter of law (*see Cintron v New York City Transit Auth.*, 77 AD3d 410, 411 [1st Dept 2010] [defendants established prima facie entitlement to judgment as a matter of law where they demonstrated that they neither created nor had notice of defect in staircase where slip-and-fall occurred since there was no evidence of any complaints received or any violations or citations issued, and their witness testified that he informally inspected the stairs on a weekly basis and did so formally once a month, and he never noticed any defect or dangerous condition]; *Castore*, 77 AD3d at 599; *Cohen v Leisure Time Recreation, Inc.*, 304 AD2d 333, 333 [1st Dept 2003]).

In opposition, plaintiff has failed to raise a triable issue of fact (*see Resto v 798 Realty, LLC*, 28 AD3d 388, 388 [1st Dept 2006]). Plaintiff's evidence indicates that prior to her trip-and-fall, plaintiff did not know whether or not the duvet cover was on the floor. Plaintiff expressly testified that she did not notice the duvet cover before she tripped on it, and only saw the portion of the duvet cover on the floor when she looked back after she fell. Mr. McGloin similarly did not know whether the duvet cover was touching the floor, or if plaintiff even tripped

over the duvet cover or something else. Plaintiff, therefore,"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; *see also Cohen*, 304 AD2d at 333 ["Plaintiff's purely speculative contention that defendant's maintenance employee may have created the hazard was insufficient to raise a triable issue."]; *Castore*, 77 AD3d at 599 ["it is well-settled 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"]; *Weiss v Gerard Owners Corp.*, 22 AD3d 406, 406 [1st Dept 2005]; *Jacobson, II v Delta Air Lines, Inc.*, 13 AD3d 126, 126 [1st Dept 2004]).

Furthermore, plaintiff's assertion that defendant had "exclusive possession" of the room prior to plaintiff's arrival is belied by the evidence, as it is undisputed that Mr. McGloin was present in the room alone for at least 30 minutes before plaintiff returned from her industry dinner. Nor can plaintiff establish constructive notice as there is no evidence establishing how long the condition complained of existed, or any testimony of any prior accidents (*see Ulu v ITT Sheraton Corp.*, 27 AD3d 554, 554 [2d Dept 2006] [plaintiff failed to raise issue of fact that defendant had constructive notice of defective condition where "plaintiff failed to come forward with any evidence suggesting that the alleged wet condition upon which she claimed to have fallen was present for any appreciable length of time prior to her accident"]; *Cintron*, 77 AD3d at 411; *Reagan v Saratoga Hotel Corp.*, 23 AD2d 642, 642 [1st Dept 1965]).

The Court has also considered plaintiff's remaining arguments in opposition to summary judgment, and finds them to lack merit. Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

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

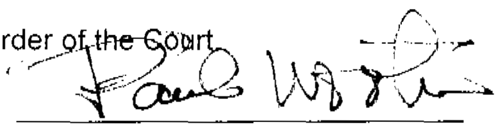
ORDERED that defendant's motion for summary judgment dismissing the complaint is

granted; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of defendant dismissing the complaint in its entirety; 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: March 30, 2011

Paul Wooten J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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