

Menkin v M&T Real Estate, Inc.

2011 NY Slip Op 32497(U)

September 19, 2011

Sup Ct, NY County

Docket Number: 109931/2009

Judge: Jane S. Solomon

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

PRESENT

JANE S. SOLOMON

PART 55

Index Number : 109931/2009

MENKIN, ARKADY

vs
M&T REAL ESTATE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/29/11

MOTION SEQ. NO. _____

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

1-4

5-6

7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided by the annexed Memorandum Decision and Order.

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

FILED

SEP 21 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/19/11

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
ARKADY MENKIN,

Index No. 109931/2009

Plaintiff,

DECISION & ORDER

-against-

FILED

M&T REAL ESTATE, INC., ALLSTATE
MORTGAGE TRUST and AAA SUPERIOR
PEST CONTROL, LLC.,

SEP 21 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X

SOLOMON, J.:

This action arises from a slip and fall at the Harvard Club (the Club), located at 27 West 44th Street in Manhattan. On March 10, 2008, while in the electrical storage sub-basement of the Club, plaintiff Arkady Menkin (Menkin), a Club employee, slipped on 1/4 inch cylindrical yellow capsules that littered the walkway, injuring his ankle. He alleges that these cylinders were vermin poison, negligently placed by defendant AAA Superior Pest Control, LLC. (AAA).¹ With discovery complete, the note of issue was filed on March 30, 2011. AAA now moves for summary judgment on the grounds that it had no duty to Menkin and that there is no evidence that it created the complained of hazard.

AAA is an extermination company that services the Club on a weekly basis. On March 1, AAA's technician, Richard Cortez (Cortez), applied four pesticides in the Club. Three were gel or liquid based. The fourth, Propoxur, is yellow in color and

¹ Menkin has discontinued or abandoned this action against defendants Allstate Mortgage Trust and M&T Real Estate Inc.

granular; but is significantly smaller than 1/4 inch around (Propoxur photograph, attached to Cortez Affidavit, Ex. B). On March 8, Cortez again applied three pesticides. Two were gel or liquid based, and the third was Propoxur (Cortez Affidavit, ¶ 3). No other granular pesticide was placed at the Club by AAA. Cortez stated that he did not apply Propoxur in the walkway (*Id.*, ¶ 4).

At his deposition, Menkin was shown Defendant's Exhibit 22 (*Id.*, ex. B), a photograph of a bag of Propoxur. This testimony ensued:

Q. Mr. Menkin, I'm showing you Exhibit 22. Does that substance appear to be the yellow capsules that you mentioned?

A. (Reviewing document) No.

* * *

Q. The capsules that were on the floor, were they larger than this substance?

A. Yes.

Q. Was the color similar to the color of this substance?

A. They were more yellow.

(Menkin deposition, attached to Mevorach Affirmation, Ex. D, p. 14). Jeffrey Klein, a member of AAA, stated that AAA has never used any form of granular pesticide that corresponds to Menkin's description (Klein affidavit, ¶ 4).

Menkin was also shown a photograph identified as Defendant's Exhibit 15 (attached to Cortez affidavit, Ex. C), which depicts a corner of the room, strewn with various debris, including a granular material. When shown Exhibit 15, he testified that the material looked similar to what he slipped on

(Menkin deposition, p. 21). A former AAA employee, Jounel Rivera (Rivera), identified the material as "granular bait," but noted that the picture showed a corner of the room, well away from any walking path.

A service contractor does not owe a non-contracting third party a duty of care (*Hernandez v. Pace Elevator*, 69 AD3d 493, 495 [1st Dept., 2010]), except where the service provider, while discharging its contractual obligation, creates an unreasonable risk of harm to others (*Timmins v. Tishman Construction. Corp.*, 9 AD3d 62, 66 [1st Dept, 2004]).

AAA argues that there is no evidence that it created an unreasonable risk, because Menkin has not established that it placed in the walkway the substance on which he slipped. It emphasizes that when Menkin was shown Propoxur--the sole non-liquid or gel substance used by AAA at the Club--he specifically stated that it was not what he slipped on.

Menkin argues that Exhibit 15 is significant because Rivera identified the substance as "granular bait." He relies on Rivera's deposition testimony that AAA placed granular bait "in corners where nobody would come or would not basically step on it . . ." (Rivera deposition, attached to Prakhin Affirmation, Ex. A, p. 32). From this, Menkin extrapolates that his fall can be attributed to AAA's negligence, because there was a substance on the walkway which, if it was Propoxur, should not have been there had AAA applied it properly. This argument is logically flawed

and speculative. It does not create a triable issue of fact with regards to what the substance was or whether AAA put it there (see, *Weiner v. City of New York*, 60 AD3d 598 [1st dept., 2009])[the proffer of conjecture and speculation, without the support of admissible evidence, fails to raise a triable issue of fact]).

Menkin's one page expert affidavit (attached to Prakhin Affirmation in Opposition, Ex. B), submitted after filing the note of issue, does not change this outcome. The affidavit is unsworn, does not indicate the expert's training, generally lacks foundation, does not identify the industry standards which were purportedly breached, and is not affirmed within a reasonable degree of certainty.

There is no evidence that AAA placed 1/4 inch cylindrical granules on the walkway prior to the incident. Accordingly, it hereby is

ORDERED that the motion for summary judgment of defendant AAA Superior Pest Control, Inc. is granted and the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed.

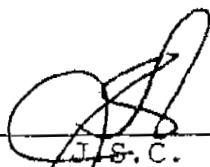
Dated: September 19, 2011

Enter:

FILED

SEP 21 2011

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J.S.C.
JANE S. SOLOMON