

**Dabbagh v Newmark Knight Frank Global Mgt.
Servs., LLC**

2011 NY Slip Op 32611(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 111463/2009

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 111463/2009

DABBAGH, RAGHDA

vs

NEWMARK KNIGHT FRANK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided*

per attached

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/29/11

[Signature]

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
RAGHDA DABBAGH and AHMED ELFIKY,

Plaintiffs,

-against-

Index No. 111463/09

NEWMARK KNIGHT FRANK GLOBAL
MANAGEMENT SERVICES, LLC et al,

FILED

Defendants.

OCT 04 2011

-----X
EMILY JANE GOODMAN, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, plaintiff alleges that she slipped and fell on a wet substance on a floor in the Food Court in Roosevelt Field Mall. Defendants Newmark Knight Frank Global Management Services, LLC individually and doing business as Newmark Knight Frank Global Management Services, Newmark Knight Frank Global Management Services (Newmark), who provides janitorial services to co-defendant The Retail Property Trust d/b/a Roosevelt Field Mall (the Mall), moves for summary judgment on the basis that it, as matter of law, acted reasonably in cleaning a spill, citing Pomahaç v Trizec 1065 Ave of the Americas, 65 AD3d 462 [1st Dept 2009]) and Toner v National Railroad Passenger Corp., 71 AD3d 454 [1st Dept 2010]). Co-defendant the Mall moves for summary judgment on the basis that it hired Newmark to perform cleaning services, that it had no actual or constructive notice of the spill (citing the testimony of the assistant manager at the mall), that the condition was open and obvious and that Plaintiff caused her own injuries.

Newmark's motion is denied. Plaintiff maintains that Pomahaç is distinguishable because in this action, an issue of fact is raised as to whether the cones were properly placed. According to Plaintiff's affidavit, which clarifies and/or corrects her deposition testimony, she

saw one cone to the right of her (but did not see the wet area) and therefore she walked the other direction, to avoid what she believed was the area in question. Pomahac is not dispositive of this action, except to the extent that it reiterates the well known principal that a defendant cannot be liable for negligence, if that defendant acted reasonably. In Pomahac, the Court found that defendants made a prima facie showing that they “took reasonable precautions to remedy the wet condition on the lobby floor” (id. at 464). The “principal theory of plaintiff’s case is that defendants failed to place additional mats in the lobby” (id.). The First Department concluded that the “reasonable care standard does not require a defendant to cover all of its floors with mats.” (id. at 465). The plaintiff in that case fell right when “he walked past the man mopping the floor” after noticing a yellow caution warning sign about 15 feet away where he entered the lobby (id. at 463).

Here it has not been established, as a matter of law, where Plaintiff fell and where cone(s) were placed in relation to the spill. Inconsistencies, if any, between Plaintiff’s deposition testimony and her affidavit are credibility issues for the jury (see Glazer & Gottlieb v Nachman, 233 AD2d 275, 275-276 [1st Dept 1996] [questions of credibility are not susceptible to summary disposition]). Here, unlike in Pomahac where the plaintiff observed the mopping, it has not been established that Plaintiff fell in an area which she knew was wet. Mr Morgante, the non-party security guard who responded to the scene indicated that the floor did not seem to be wet at the time. It is for the jury to decide whether Newmark fulfilled its duty of reasonable care by placing the cones in a reasonable manner to alert Plaintiff to the wet floor such that she should walk around that area.

The Mall’s motion is granted. It is well established that owners must keep 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” (Peralta v Henriquez, 100 NY2d 139, 144 [2003] [citation and internal quotation marks omitted]). In a slip-and-fall case, the plaintiff has the burden of demonstrating that the defendant either created or had actual or constructive notice of the dangerous condition which caused the injury (Smith v Costco Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008]; Matias v Rebecca’s Bakery Corp., 44 AD3d 429 [1st Dept 2007]). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant’s employees to discover and remedy it” (Barrera v New York City Tr. Auth., – AD3d –, 2009 WL 910758, *1, 2009 NY App Div LEXIS 2583, **1-**2 [1st Dept 2009]).

When a defendant moves for summary judgment in a slip-and-fall case, it has the burden of demonstrating that it neither created nor had notice of the allegedly dangerous condition (see Manning v Americold Logistics, LLC, 33 AD3d 427 [1st Dept 2006] [on a motion for summary judgment, “defendant met its initial burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it”]; Giuffrida v Metro N. Commuter R.R. Co., 279 AD2d 403, 404 [1st Dept 2001] [“Contrary to defendant’s suggestion, it is not plaintiff’s burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants’ burden to establish the lack of notice as a matter of law”]). The Mall relies upon the testimony of the assistant manager and the fact that it hired Newmark, who it maintains acted properly.

Plaintiff opposes the Mall’s motion, maintaining that the Mall had constructive notice of the spill but was negligent in allowing the condition to exist and in failing to remedy it.

Plaintiff's argument of constructive notice is based on the fact that the mall manager has an office in the basement of the mall, admittedly walks around the food court area on a daily basis, and on the fact that the spill was reported to security personal and a representative of Newmark, who was on the scene to handle the spill. However, this does not translate into constructive notice to the Mall. Although it is true that the Mall bears the burden of proof, no reasonable inference exists that the Mall had notice because its assistant manager walks the premises or because others had notice. In fact, if there were to be any inference at all, in absence of evidence that the Mall was notified of the spill (as Newmark was), it would be that no constructive notice existed in light of the fact that the Roosevelt Field Mall is undoubtedly a large property. It is

ORDERED that the motion by Defendants Newmark Knight Frank Global Management Services, LLC individually and doing business as Newmark Knight Frank Global Management Services, Newmark Knight Frank Global Management Services is denied; and it is further

ORDERED that the motion by The Retail Property Trust d/b/a Roosevelt Field Mall is granted and the Clerk of the Court is directed to, upon receipt of a copy of this Decision and Order with Notice of Entry, sever said defendant and enter judgment in its favor, dismissing the complaint and any cross claims, without costs and disbursements; and it is further

ORDERED that the remaining parties appear for a pre-trial conference on 11/3/11 at 10:30am.

This Constitutes the Decision and Order of the Court.

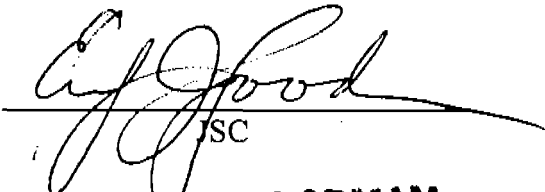
Dated: September 29, 2011

ENTER

FILED

OCT 04 2011

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COUNTY CLERK'S OFFICE


JSC
EMILY JANE GOODMAN