Haigh v Metro North Commuter R.R.
2012 NY Slip Op 31135(U)
April 19, 2012
Sup Ct, NY County
Docket Number: 100195/09
Judge: Joan A. Madden
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SCANNED ON 4/27/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 100195/2009
HAIGH, OLGA
vs.
METRO NORTH COMMUTER
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 1-12-12
MOTION SEQ. NO. ____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ **No(s).** ____

Answering Affidavits — Exhibits ____ **No(s).** ____

Replying Affidavits ____ **No(s).** ____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision & order.

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

FILED

APR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 19, 2012

J.S.C.

1. **CHECK ONE:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

--X

OLGA HAIGH,

Plaintiff,

Index No. 100195/09

-against-

METRO NORTH COMMUTER RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY, (MTA) AND MASA SUSHI, TNT ASSOCIATES, LTD.,

Defendants.

--X

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Joan A. Madden, J.:

In this action to recover from a slip and fall accident, defendants Metro North Commuter Railroad and Metropolitan Transportation Authority (together, Metro North) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as to them (mot. seq. no. 002). Defendant TNT Associates, Ltd. d/b/a Masa's, s/h/a Masa Sushi, TNT Associates, Ltd. (Masa) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as well (mot. seq. no. 003).

Background

Plaintiff claims that she sustained significant injuries in a slip and fall accident which occurred in the lower floor Dining Concourse at Grand Central Terminal, at approximately 3:00 P.M., July 8, 2008, in front of a restaurant operated by Masa. Plaintiff claims that, as she fell, she saw a reddish substance on the floor which she describes as "salad dressing or dipping

sauce" (Metro North Not. of Motion, Ex. E, at 25), which ended up on her back after she fell. She describes the substance as several "gobs about the seize of a quarter." *Id.*

According to the complaint, Grand Central Terminal is owned and/or operated by Metro North. Metro North has provided the deposition testimony of Salvatore Vincent Lupi, Jr. (Lupi), who was general station master in Grand Central Terminal as of the date of the accident.

Lupi testifies that there is a cleaning staff of at least 110 custodians working in the Terminal, spread out over four work shifts. He claims that the Terminal was patrolled all day long by custodians to locate and eradicate dangerous conditions, such as foreign substances on the floor of the Dining Concourse. Lupi does not produce a cleaning log for the day in question, only testifying, in general, concerning the daily tasks of himself and the custodial staff. Lupi also testified that Masa was not responsible for cleaning the area where plaintiff fell.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case

by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

> In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition on the property, it must be established that ... the landowner affirmatively created the condition or had actual or constructive notice of its existence [internal quotation marks and citation omitted].

Spindell v Town of Hempstead, 92 AD3d 669, 2012 NY Slip Op 00951, *2 (2d Dept 2012); *see also Pintor v 122 Water Realty, LLC*, 90 AD3d 449 (1st Dept 2011). "'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 [the] defendant's employees to discover and remedy it.'" *Birnbaum v New York Racing Association, Inc.*, 57 AD3d 598, 598 (2d Dept 2008), quoting *Gorden v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

In the case of an alleged slip and fall on a foreign substance on the floor, the defendant meets its initial burden on

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a motion for summary judgment by offering "some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Birnbaum v New York Racing Association, Inc.*, 57 AD3d at 598-599; *see also Granillo v Toys "R" Us, Inc.*, 72 AD3d 1024 (2d Dept 2010); *Pryzywalny v New York City Transit Authority*, 69 AD3d 598 (2d Dept 2010). This burden can be met by evidence of "frequent inspections for debris and tripping hazards ... performed by store employees on the date of the accident, but prior to the accident." *Lee v Port Chester Costco Wholesale*, 82 AD3d 842, 842 (2d Dept 2011). However, a defendant's burden on summary judgment is not met by a showing of a "general practice" of inspections and cleaning. *Edwards v Wal-Mart Stores Inc.*, 243 AD2d 803, 803 (3d Dept 1997); *see also Porco v Marshalls Department Stores*, 30 AD3d 284, 285 (1st Dept 2006)(evidence that a store is "cleaned daily," and inspections made "on a regular basis" not proof of cleaning and inspections conducted on the date in question). There has to be evidence of "particularized or specific" inspections and cleaning in the area where the plaintiff fell on the date of the accident." *Birnbaum v New York Racing Association, Inc.*, 57 AD3d at 599.

In the present case, Metro North has produced evidence of general inspection and cleaning schedules, but nothing to show that, on the date of the accident, Metro North's employees had inspected the area in front of Masa's any time on the day prior

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to plaintiff's fall. Therefore, Metro North has failed to meet its initial burden on its motion for summary judgment to make a prima facie case that it had no actual or constructive notice of the alleged condition which caused plaintiff to fall.

As a result of the foregoing, plaintiff need not bring forth any evidence of negligence on Metro North's part at this time. *See Singer v Gae Limo Corp.*, 91 AD3d 526 (1st Dept 2012)(as defendant failed to meet burden on summary judgment motion, burden does not shift to plaintiff, and it is unnecessary to address the sufficiency of plaintiff's opposition). Metro North's motion is denied, and the court need not address whether the substance on which plaintiff fell can be characterized as a recurrent condition.

Masa's motion for summary judgment dismissing the complaint as to it is granted. Masa is not the owner of Grand Central Terminal, and had no obligation to keep the premises in front of its concession cleaned, and the record is devoid of any evidence that it had actual or constructive notice of the condition. Notably, the MTA defendants do not oppose Masa's motion and the plaintiff does not specifically address Masa's motion, including Masa's argument that it owed no duty to maintain the area where plaintiff fell.

Accordingly, it is

ORDERED that the motion brought by defendants Metro North

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Commuter Railroad and Metropolitan Transportation Authority for summary judgment dismissing the complaint (mot. seq. no. 002) is denied; and it is further

ORDERED that the motion brought by defendant TNT Associates, Ltd. d/b/a Masa's, s/h/a Masa Sushi, TNT Associates, Ltd. for summary judgment dismissing the complaint (mot. seq. no. 003), is granted, and the complaint is dismissed as to it with costs and disbursements to this defendant as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the status conference scheduled for April 26, 2012 is cancelled, and remaining parties shall be contacted regarding a date for mediation.

Dated: ~~March , 2012~~ April 19, 2012

FILED

APR 27 2012

NEW YORK
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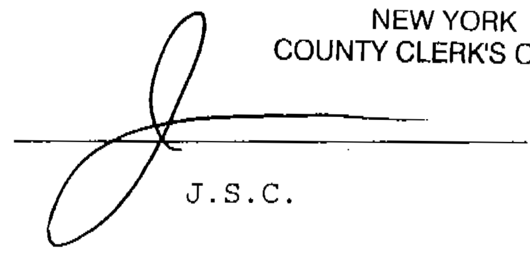

J.S.C.