

Tompa v 767 Fifth Partners, LLC

2012 NY Slip Op 31361(U)

May 17, 2012

Sup Ct, New York County

Docket Number: 104287/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 104287/2010
TOMPA, CASSANDRA
vs.
767 FIFTH PARTNERS
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

5/21/12

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

is decided in accordance with the annexed decision.

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

RECEIVED
MAY 18 2012
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED

MAY 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/17/12

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

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

-----X
CASSANDRA TOMPA,

Plaintiff,

Index No. 104287/10

-against-

DECISION/ORDER

767 FIFTH PARTNERS, LLC,

Defendant.

-----X
767 FIFTH PARTNERS, LLC,

Third-Party Plaintiff,

-against-

FILED

TEMCO SERVICE INDUSTRIES, INC.

MAY 22 2012

Third-Party Defendant

-----X
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>3</u>
Answering Affidavits to Cross-Motion.....	<u>4</u>
Replying Affidavits.....	<u>5</u>
Exhibits.....	<u>6</u>

Plaintiff Cassandra Tompa commenced the instant action to recover damages for personal injuries she allegedly sustained when she slipped and fell on ice in the plaza outside of the General Motors Building, located at 767 Fifth Avenue, New York, New York on February 6,

2010. Defendant 767 Fifth Partners, LLC ("767") now moves for an order pursuant to CPLR § 3212 granting it summary judgment on the grounds that it neither caused the condition nor had actual or constructive notice of the condition. Plaintiff cross-moves for summary judgment on the grounds that 767 both created the condition and had actual and constructive notice of the condition. For the reasons set forth below, 767's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

The relevant facts are as follows. Plaintiff alleges that on February 6, 2010 at around 9:30 a.m., she was walking in the plaza area outside of the General Motors Building, located at 767 Fifth Avenue, New York, New York (the "building") when she slipped and fell on a patch of ice located on the surface of the plaza. Specifically, plaintiff alleges that she slipped and fell while she was walking from the steps facing 58th Street to the front entrance facing Fifth Avenue. Plaintiff testified at her deposition that she fell while walking approximately ten feet from one of two fountains located in the plaza. Plaintiff described the ice as covering the whole area near the fountain, four to six squares in the plaza running two rows wide, and as being very thin and not dirty. She testified that she was not sure whether the fountain was on at the time of her accident but that there was water in its base. Further, she did not see any water coming out of the fountain when her accident occurred. Plaintiff stated that the ice on which she slipped "wasn't noticeable enough for [her] to see it before [she] fell." She also testified that she did not know how long the alleged condition had been present prior to her accident or what exactly caused it to be present and that she did not complain to anyone at the premises regarding the condition prior to her accident. Finally, plaintiff testified that on the date of her accident, it was not snowing or raining and she alleged that it had not snowed or rained within the 24 hours prior to her accident.

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not cause the condition and that it did not have actual or constructive notice of the condition. See *Branham v. Loews Orpheum Cinemas*, 31 A.D.3d 319 (1st Dept 2006). “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 v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). Further, “when a landowner has actual knowledge of the tendency of a particular dangerous condition to reoccur, he is charged with constructive notice of each specific reoccurrence of that condition.” *Weisenthal v Pickman*, 153 A.D.2d 849, 851 (2d Dept 1989). However, a “general awareness” is insufficient to constitute constructive notice. See *Gordon*, 67 N.Y.2d at 837-838. Plaintiff is “required to show by specific factual references that the defendant had knowledge of the allegedly recurring condition.” *Stone v Long Is. Jewish Med. Ctr.*, 302 A.D.2d 376, 377 (2d Dept 2003). Moreover, “a *prima facie* case of negligence must be based on something more than conjecture; mere speculation regarding causation is inadequate to sustain the cause of action. Conclusory allegations unsupported by evidence are insufficient to establish the requisite notice for imposition of liability.” See *Mandel v 370 Lexington Ave., LLC*, 32 A.D.3d 302, 303 (1st Dept 2006).

In the instant action, 767 has established its *prima facie* right to summary judgment on the ground that it did not cause the condition on which plaintiff slipped and fell. Kevin Buell, an employee of Boston Properties, a part-owner of the building and the company charged with maintaining the fountains, testified at his deposition that icy conditions sometimes formed on the plaza due to weather but that he had never observed water from the fountains freeze, causing ice

to form on the surface of the plaza. Further, John Ortega, the operations manager of Temco Service Industries, Inc. (“Temco”), the company contracted by 767 to provide cleaning and janitorial services for the building, testified at his deposition that he was at the building the day before plaintiff’s accident and that he did not see any ice conditions from water from the fountain on the plaza nor did he ever observe the fountains malfunction. Additionally, both plaintiff and defendant affirmed that the fountain was either shut off or very low at the time of plaintiff’s accident therefore demonstrating that wind did not cause the water in the fountain to be sprayed onto the plaza ten feet away.

In response, plaintiff has failed to raise an issue of fact as to whether 767 caused the condition. Plaintiff’s assertion that 767 created the condition by the “improper design, construction and maintenance of the fountains and pools near the entrance of the building, which created wet walking surfaces and icy conditions in the presence of freezing temperatures” is insufficient to defeat 767’s motion as it is merely conclusory and speculative. Plaintiff has failed to put forth any evidence demonstrating that the icy patch on which she slipped was caused by the fountain or by a malfunction of the fountain and she has not submitted any expert testimony attesting to the improper design of the fountain. Plaintiff’s theory that because there was no precipitation on the day of the accident and that it was freezing and windy that the water must have come from the fountain is, again, speculative. Plaintiff’s theory does not account for the possibility that the icy patch was a result of some other circumstance or event. As previously stated, mere speculation as to causation of a condition which is unsupported by evidence is insufficient to sustain a cause of action. *See Mandel*, 32 A.D.3d at 303; *see also O’Neal v. Servicemaster Co./Servicemaster, Inc.*, 22 A.D.3d 356 (1st Dept 2005) (summary judgment was

properly granted to defendant as plaintiff's claim that soapy condition on which she slipped was created by defendant's improper maintenance of floor was entirely speculative as plaintiff offered no evidence to support such theory). Thus, 767's motion for summary judgment on the ground that it did not create the condition is granted.

Additionally, 767 has established its prima facie right to summary judgment on the ground that it did not have actual or constructive notice of the condition. Mr. Buell testified that he did not recall receiving complaints about ice forming in the plaza due to water from the fountains prior to February 2010 and was unaware of anyone else slipping and falling near the fountain where plaintiff's accident occurred prior to plaintiff's accident. Mr. Ortega also testified that he never received any complaints of water having gone from either of the two fountains onto the plaza prior to plaintiff's accident. He further testified that he was at the building the day before plaintiff's accident and that he did not see any ice conditions on the plaza. He also testified that he had personally seen ice on the plaza on prior occasions following a storm but that once it was observed, Temco employees would place ice melt on the ground and sweep the area. Finally, Mr. Ortega testified that the plaza was "continuously patrolled by the employees working that day...or any day" so that the employees would be aware of any icy conditions.

Additionally, 767 has established its lack of notice with the building's "Security Log" which contains information including "post assignments for the security officers, routine patrols, any conditions that might warrant attention." According to the Security Log, it did not snow the day before plaintiff's accident and there were no reports of ice on the plaza. The Security Log further reports that plaza/perimeter patrols were conducted at 11:55 p.m. on February 4, 2010, 12:50 a.m., 1:44 a.m. and 2:13 a.m. on February 5, 2010 and all conditions were secure and

normal. The plaza/perimeter was also patrolled on February 5, 2010 at 10:30 a.m., 11:40 a.m., 12:45 p.m. and 1:45 p.m. and it was noted that all activities remained normal. The plaza/perimeter was again inspected from 4:00 p.m. through 9:50 p.m. and all conditions were reported as normal. Finally, a plaza/perimeter patrol was conducted on February 6, 2010, the date of plaintiff's accident, at 1:00 a.m., 2:40 a.m., 3:45 a.m. and 5:10 a.m. and all conditions were reported to be normal. At 6:55 a.m., it was noted in the Security Log that it had started snowing. At 7:00 a.m., the weather conditions were listed as "28° feels like 17°, overcast, wind gusted 28 mph." At 8:00 a.m., it was noted that all posts were safe and secure and Temco's employee Frankie was working on the plaza. According to the Log, a plaza/perimeter check was again conducted at 8:35 a.m. and everything was reported as secure and normal. There were no entries regarding icy conditions on the plaza prior to 9:30 a.m., the approximate time of plaintiff's fall.

In response, plaintiff has failed to raise an issue of fact as to whether 767 had actual or constructive notice of the condition. Plaintiff testified that she did not complain to anyone about ice on the plaza prior to her accident and that she did not know if anyone else had complained about the icy condition. Further, plaintiff has failed to show that 767 knew about the icy condition after it surveilled the plaza in the hours prior to her accident. Therefore, plaintiff has not demonstrated that 767 had actual notice of the condition prior to her accident.

Moreover, in order to establish constructive notice of an alleged defect, the alleged defect must (1) be visible and apparent and, (2) exist for a sufficient length of time prior to the accident to permit (a) discovery of the defect and (b) time to remedy the defect. *See Gordon*, 67 N.Y.2d at 837-38. As an initial matter, plaintiff has failed to raise an issue of fact as to whether the defect

was visible and apparent. Plaintiff's own testimony demonstrates that the icy patch was clearly not visible as she could not even see it herself. Further, plaintiff has failed to raise an issue of fact as to whether the icy patch existed for a sufficient length of time prior to her accident to allow 767 to discover the condition and allow for time to remedy the condition. Any finding as to when the ice patch developed would be based solely on speculation which is not enough to support an allegation of constructive notice. *See Penny v. Pembroke Mgmt.*, 280 A.D.2d 590 (2d Dept 2001)(holding that because injured plaintiff testified that she did not see patch of ice in parking lot anytime before her accident, any finding as to when the ice patch formed is pure speculation, and thus insufficient to support allegation of constructive notice of the ice patch.)

Moreover, plaintiff's assertion that 767 had constructive notice of the ice patch because it had knowledge of a recurrent defective condition in inclement weather is without merit. As discussed above, in order to find a defendant liable for constructive notice under this theory, plaintiff is required to show by specific factual references that the defendant had knowledge of the allegedly recurring condition. A general knowledge that the plaza became wet or icy during inclement weather is insufficient to impute constructive notice of the patch of ice on which plaintiff fell as a general knowledge that a condition may occur is insufficient. *See Gordon*, 67 N.Y.2d at 837-838. Thus, any evidence that icy conditions were noted and remedied on the southern side of the fountain in one instance prior to the accident does not constitute constructive notice of the icy patch on which plaintiff fell. Thus, 767's motion for summary judgment on the ground that it lacked actual or constructive notice of the condition is granted.

Finally, plaintiff's assertion that defendant's placement of salt on the plaza after plaintiff's accident, as evidenced by the Security Log, is evidence of 767's negligence and should

defeat summary judgment, is without merit. Evidence of subsequent measures taken by a defendant to remedy a defective condition complained of by a plaintiff is inadmissible to prove negligence. *See Hualde v. Otis El. Co.*, 235 A.D.2d 269 (1st Dept 1997)(“evidence of subsequent repairs is not discoverable or admissible in a negligence case”). Thus, the court will not consider any entries in the Security Log made after plaintiff’s accident as evidence of 767’s negligence.

The court now turns to plaintiff’s cross-motion for summary judgment. Plaintiff’s cross-motion is untimely as it was filed more than sixty days after the filing of the Note of Issue. The Note of Issue in this action was filed on or about November 28, 2011. 767’s motion for summary judgment was filed within the sixty day time limit on January 27, 2012. Plaintiff’s cross-motion, however, was not filed until April 5, 2012, over 70 days late. However, as the cross-motion was filed while the underlying motion for summary judgment was still pending, and the issues involving potential liability of the parties are already properly before the court, the court will consider the cross-motion. *See Grande v. Peteroy*, 39 A.D.3d 590, 591-92 (2d Dept 2007)(“an untimely motion or cross motion for summary judgment may be considered by the court where...a timely motion for summary judgment was made on nearly identical grounds”); *see also Bressingham v. Jamaica Hospital Medical Center*, 17 A.D.3d 496 (2d Dept 2005). However, as this court has already granted 767’s motion for summary judgment dismissing plaintiff’s complaint in its entirety, plaintiff’s cross-motion for summary judgment is denied.

Finally, plaintiff’s request to amend the caption to reflect plaintiff’s name change from Cassandra Tompa to Cassandra Ekure is granted without opposition.

Accordingly, 767’s motion for summary judgment is granted and plaintiff’s cross-motion for summary judgment is denied. The Clerk is directed to enter judgment in favor of 767 and

