

Berry v New York City Tr. Auth.
2013 NY Slip Op 31379(U)
June 25, 2013
Supreme Court, New York County
Docket Number: 115490/10
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 115490/2010
BERRY, JANE
vs.
NEW YORK CITY
SEQUENCE NUMBER : 001
DISMISS

FILED

JUN 28 2013

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 115490/10
MOTION DATE 3/21/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 8 were read on this motion for summary judgment

Notice of Motion— Affirmation; Affirmation— Exhibits A-N No(s). 1-2; 3
Affirmation in Opposition — Exhibits 1-5, 6 [Affidavit], 7-8 —Affidavit of Service No(s). 4-6
Reply Affirmation — Exhibits —Affidavit of Service No(s). 7-8

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment is denied.

In this action, plaintiff alleges that, on June 22, 2010, at or about 8:25 p.m., she slipped and fell on a puddle at the "first level entrance of the 125th Street and Lexington Avenue subway entrance S3, southeast corner . . ." (Feinstein Affirm., Ex B.) Plaintiff testified at her deposition that she descended the stairs into the subway station, and that when she reached the bottom of the stairs, there was water "covering the whole bottom as you make the last step covering the whole side." (Feinstein Affirm., Ex G [Berry EBT], at 13.) According to plaintiff, she could neither walk around the water nor jump over it, "so I stepped down real slow. Real slow still holding on. That's it. Then I fell." (*Id.* at 14.) Marlin Waller, who claims that he was with plaintiff and saw her fall, states in an affidavit that the puddle was large, and about "1 quarter to 1 half inch deep covering part of the landing." (Epstein Affirm., Ex 6 [Waller Aff.] ¶ 6.)

Weather reports from Central Park indicate that, on June 22, 2010, 0.26 inches of precipitation fell for the hour ending at 8 p.m., and no precipitation was recorded for the hour ending at 9 p.m. Weather reports from JFK airport indicate that, on June 22, 2010, 0.18 inches of precipitation fell for the hour

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

ending at 8 p.m., and trace precipitation was recorded for the hour ending at 9 p.m. (Feinstein Affirm., Ex N.) Plaintiff testified at her statutory hearing that “it was raining real hard, like buckets” on Wards Island, where plaintiff worked (Feinstein Affirm., Ex F, at 19). When asked, “Was it raining buckets when you came into Manhattan?” plaintiff answered, “No, but it was raining.” (*Id.* at 26.)

Plaintiff contends that the area did not drain properly, in that a drain in the landing was allegedly clogged. Waller avers, “Prior to this accident, when it rained, I noticed this puddling condition to exist on that landing between the drain and the staircase where the accident happened. I notice [*sic*] this several times (at least 10) over the course of my using that staircase.” (Waller Aff. ¶ 7.)

Defendants move for summary judgment on the grounds that a storm was in progress, and that they had no actual or constructive notice of the alleged condition. They submit a cleaning report from Lydia Roman, a cleaner, who states in the report that she inspected “S-3” at “2015 [8:15 p.m.] and left it clean, wet.” (Feinstein Affirm., Ex M.)

As a threshold matter, plaintiff objects to several exhibits that defendants offer in support of their motion, on the ground that defendants did not establish that they were business records. However, Roman’s deposition testimony establishes that her cleaning report was a business record. She testified that it was part of her usual and customary duties to make the report, and that the report was in the regular course of business of her job. (Feinstein Affirm., Ex I [Roman EBT], at 55-56.)

Plaintiff’s argument that Roman’s testimony casts doubt as to whether she actually inspected staircase S3 at 8:15 p.m. is unavailing.¹ Roman’s

¹ Roman was asked, “How do you know that you inspected that area at 2015 . . . ?” (Roman EBT, at 58.) She answered as follows:

“I don’t know.

Q Is it that you don’t know, is that your answer?

MR. COFFEY: I’ll object. She answered.

A. I must have looked at the time when I was doing the report. I’m trying to go back, I don’t know.

Q Did somebody tell you to put that time, 2015, in your report when you made that report out?

A I don’t remember sir.”

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testimony does not contradict her report. The assertion that the jury might disbelieve Roman's testimony is not a basis for denying summary judgment. (*Bachrach v Farbenfabriken Bayer, AG*, 36 NY2d 696, 697 [1975]; *Folson v Marrero*, 308 AD2d 399 [1st Dept 2003].)

There are disputed issues of fact as to whether defendants had actual notice of the puddle, viewing the evidence in light most favorable to plaintiff, the non-movant. According to the cleaning report, Roman inspected staircase S3 ten minutes prior to plaintiff's alleged slip and fall. Based on this cleaning report, Roman would have seen the landing at the bottom of the stairs before plaintiff's alleged slip and fall. Assuming for purposes of argument the accuracy of plaintiff's and Waller's testimony as to the size and depth of the puddle (as the Court must do on this motion), and given the weather reports that either no precipitation or that trace precipitation (i.e., less than 0.01 of an inch) fell between 8 p.m. and 9 p.m., a factual question is presented as to whether such a puddle with an estimated depth of $\frac{1}{4}$ to $\frac{1}{2}$ inch was present when Roman inspected the stairs, or could have formed 10 minutes after Roman inspected the area.

The presence of the puddle does not, in itself, establish that defendants had notice of the clogged drain. Contrary to plaintiff's argument, Roman's testimony does not raise a triable issue of fact as to notice. Plaintiff indicates that Roman testified at her deposition that, "When it's raining, I particularly always keep an eye on my staircases." (Roman EBT, at 34.) When asked what she would look for in particular, Roman answered,

"Maybe floods, like water floods, you know, puddles, some people throw broken umbrellas, I check around, I pick them up. As they come down, they throw stuff, so I pick it up. Then I focus a lot when it's raining."

(*Id.*) However, "[a] general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that

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(*Id.* at 58.)

caused plaintiff's fall. (See *Solazzo v New York City Tr. Auth.*, 6 NY3d 734, citing *Piacquadio v Recine Realty Corp.*, 84 NY2d 967.)

As indicated previously, Waller avers, "Prior to this accident, when it rained, I noticed this puddling condition to exist on that landing between the drain and the staircase where the accident happened. I notice [*sic*] this several times (at least 10) over the course of my using that staircase." (Waller Aff. ¶ 7.) Waller's sworn statement is sufficient to raise a triable issue of fact as to whether defendants had constructive notice of the clogged drain. (See *Talavera v New York City. Tr. Auth.*, 41 AD3d 135 [1st Dept 2007].)

In *Talavera*, the plaintiff slipped and fell while ascending a set of interior stairs inside a subway station. The plaintiff testified that "[i]t was raining like crazy that day," but asserted that the watery condition on the stairs was caused by a leaking pipe located in the area where the right-hand wall and ceiling met. The plaintiff further testified that he used the stairs regularly and had seen water on the stairs on many occasions. The Supreme Court granted the defendant's motion for summary judgment, on the ground that the Transit Authority had no notice of either the rainstorm or the specific wet condition on the stairwell to support an action in negligence.

On appeal, the decision was reversed. The Appellate Division, First Department reasoned,

"In light of plaintiff's testimony that he slipped on the stairwell that had become wet due to a leaking pipe, and that he had observed the same dangerous condition at that location on many prior occasions, a triable issue is raised as to whether the Transit Authority had constructive notice of the alleged hazard."

(*Talavera*, 41 AD3d at 136.)

Here, Waller's sworn statement that he noticed this puddling condition on the landing between the drain and the staircase on at least ten prior occasions is similar to the testimony of the plaintiff in *Talavera* as to the leaking pipe. Therefore, Waller's affidavit raises a triable issue of fact as to

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whether the defendants had constructive notice of the alleged clogged drain, which presented a hazard during rain.

Assuming, for the sake of argument, that defendants had notice of the clogged drain, the issue is whether defendants are entitled to summary judgment based on the storm in progress defense.

“Under the so-called ‘storm in progress’ rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. However, even if a storm is ongoing, once a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm.”

(*Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524 [2d Dept 2012] [internal citations and quotation marks omitted].) The storm in progress defense applies to trace precipitation. (See *Prince v New York City Hous. Auth.*, 302 AD2d 285, 286 [1st Dept 2003] [“There is no merit to plaintiff’s argument that the meteorological evidence, construed most favorably, raises issues of fact as to whether such “trace” precipitation constituted a storm in progress”].) In addition, the storm in progress defense applies to rain. (See *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-736 [1st Dept], *aff’d* 6 NY3d 734 [2005].)

In *Talavera*, the Appellate Division essentially rejected a rain defense, reasoning,

“because plaintiff specifically identified the source of the recurring wet condition as the leaky pipe, and, further, produced evidence that such dangerous condition was in a location spatially remote from an exterior stairwell that is exposed to the elements, this case is distinguishable from those cited by the Transit Authority holding that a landlord is not required to provide a constant, ongoing

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remedy when an alleged dangerous condition is caused by moisture tracked indoors during a storm.”

(Talavera, 41 AD3d at 136.)

Here, like Talavera, plaintiff argues that the cause, in part, of the puddle was a recurring condition, i.e., a clogged drain. Plaintiff’s attorney contends that the accident occurred in the landing of a covered entranceway (Epstein Opp. Affirm. ¶ 2), and submits photographs of the stairway and landing. (Epstein Affirm., Exs 2-3.) In the Court’s view, it is not apparent from the photographs that the landing is in a covered area. However, defendants do not apparently dispute this contention. Given Waller’s sworn statement and unrebutted indications that the accident occurred in a covered area, this case is similar to Talavera. Summary judgment is therefore denied.

Dated: 6/25/13
New York, New York


_____, J.S.C.
HON. MICHAEL D. STALEMAN

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
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