

Diver v Port Auth. of N.Y. & N.J.

2013 NY Slip Op 33302(U)

April 10, 2013

Sup Ct, New York County

Docket Number: 107206-2009

Judge: Milton A. Tingling

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Milton A. Tingling
Justice

PART 44

Margaret Diver & James Diver

INDEX NO. 107206/09

-v-
The Port Authority of NY & NJ

MOTION DATE _____

MOTION SEQ. NO. 002

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 to reargue is granted
and upon reargument granted in accordance with the
attached amended deci'sion

FILED
APR 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/10/13

MAT, 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

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

PRESENT: Honorable Milton A. Tingling

PART 44

-----X
Margaret Diver and James Diver,

Index No.: 107206-2009

Plaintiffs,

-against-

Amended Decision

The Port Authority Of New York & New Jersey,
Phoenix Constructors JV, Schindler Elevator
Corporation and Modern Facilities Services, Inc.,

FILED

Defendants.

APR 12 2013

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**NEW YORK
COUNTY CLERKS OFFICE**

The Courts decision and judgment entered August 16, 2012, is hereby amended
as follows.

The decision denying summary judgment to Defendant, Schindler Elevator pursuant
to CPLR 3212 is adhered to.

The Cross motion of Plaintiffs denying summary judgment in their favor against
Schindler is adhered to.

The judgment granted to Defendant Phoenix Constructors J. V., pursuant to CPLR
3212, dismissing the case against them is hereby vacated.

The Defendant, the Port Authority of New York and New Jersey move for an order
pursuant to CPLR 3212 granting summary judgment against Plaintiffs, dismissing all claims.

The Defendant, Phoenix Constructors J. V., moves for an order, pursuant to CPLR
3212, granting summary judgment against Plaintiffs, dismissing all claims.

The Plaintiffs cross move for an order pursuant to CPLR 3212, granting summary
judgment against the Port Authority of New York and New Jersey and against Phoenix

Constructors J. V. plus sanctions.

The Port Authority motion is premised on the absence or lack of actual or constructive notice.

The case centers upon this set of alleged facts; Plaintiff Margaret Diver was descending on an escalator, which one remains an issue, at the World Trade Center on October 6, 2008 at approximately 6:50 a. m. Exhibit J, pp. 28:13-29:3.

After Plaintiff ("Diver") got to the bottom she took a few steps to the right where she tripped and fell.

In the area where she fell, there were several orange cones and a mat covering up plywood. After the fall, Port Authority Police Officer Higgins, responded to the scene and questioned "Diver" about the incident. "Diver" told Officer Higgins that "she did not know what she had fallen on" and saw a buckled mat covering wooden boards after the incident.

Salvatore Dragone Jr. appeared for deposition on behalf of Defendant Phoenix Constructors J. V. ("Phoenix"). He testified that "Phoenix" had no responsibility or duty regarding the maintenance of the escalator but was working on an expansion joint between the escalator and the concrete. "Phoenix" would place leveled-edge plywood over the joint and secure it to the concrete to prevent people from soiling their heels on the sticky caulking material. He testified that he was present when the plywood from the expansion joint was removed "but does not remember when". He stated definitely that the mat covering the plywood was not placed there by "Phoenix" and had no idea who would have done so.

The Port Authority avers summary judgment should be granted to them as they had neither actual or constructive notice of the alleged defective condition nor created it.

However, Exhibit #3 to the Plaintiffs cross motion for summary judgment is a co-defendant Schindler Elevator Corporation's memo which states there is a board loose at the base of the main escalator bank and people are tripping. It states that the condition was reported by Port Authority Police Officer Mollahan. The Port Authority's position that any consideration of a defective condition must be limited to a raised or buckled mat is unavailing.

It is not subject to valid dispute that there was not a plywood board or boards under the mat in question. Therefore, although Plaintiff testified that she saw the board and mat after she fell and that she fell on the mat, it is not speculation that the mat and board were present prior to her fall. At a minimum, it creates a genuine issue of disputed material fact precluding summary judgment.

In Goldfischer vs Great Atlantic & Pacific Tea Co. 63 A.D.3d 575 it was speculative as to whether or not a bump in the rubber floor mat caused the plaintiff to fall combined with lack of notice and the existence of a bump.

The Schindler Elevator Corporation report of Officer Mollahan creates a genuine issue of material disputed fact precluding summary judgment Alvarez vs. Prospect Hospital 68NY2d 320.

For these same reasons, the cross motion of Plaintiffs for summary judgment in their favor is also denied.

Defendant "Phoenix" bases its motion for summary judgment solely on the original statement of "Diver" that she tripped over the mat which was later discovered to cover the plywood board. There is no evidence that Phoenix had or used mats at the scene.

The Court rejects this contention. A genuine issue of material disputed material fact is present as to whether Diver tripped over the mat or boards which may have been covered or

obscured and only visible after the fall. Phoenix has not disputed that if such board was there it did not belong to them.

Therefore, the motion for an order pursuant to CPLR 3212 granting summary judgment to Phoenix is denied.

The cross motion for an order pursuant to CPLR 3212 for summary judgment against Phoenix is denied for the same reasons.

The Plaintiffs request for sanctions against the Port Authority and Phoenix are denied.

4/10/13

Dated: ~~March 1, 2013~~

Maq
J. S. C.

FILED
APR 12 2013
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