Mahai-Sharpe v Riverbay Corp.
2013 NY Slip Op 33708(U)
November 26, 2013
Sup Ct, Bronx County
Docket Number: 008694/06
Judge: Sharon A.M. Aarons

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

Lucille Mahai-Sharpe

Plaintiff,

-against-

Riverbay Corporation,

Defendant(s).

Index No. 008694/06

Present:
Hon. SHARON A.M. AARONS

DECISION AND ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	
Cross Motion	
Reply	

Upon the foregoing papers, the foregoing motion and cross-motion are decided as follows:

Defendant moves for summary judgment against the plaintiff on the grounds that the defendant did not create and/or have notice, either actual or constructive, of the alleged defective condition that caused plaintiff's fall. Defendant's motion is decided in accordance with the annexed Decision and Order of same date.

Dated: November 26, 2013

SHARON A.M. AARONS. J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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Lucille Mahai-Sharpe

Plaintiff,

-against-

Riverbay Corporation,

Defendant.

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Index No. 8694/06

DECISION and ORDER

Present:

Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion and Exhibits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers the Decision and Order on the motion are as follows:

Defendant's motion for summary judgment claiming that it did not create and/or have notice, either actual or constructive of the alleged defective condition that caused plaintiff's fall is granted. Plaintiff submitted opposition to the motion.

Plaintiff allegedly sustained personal injuries on January 23, 2005 when she slipped and fell on the laundry room floor, between the sitting bench and dryers, of her apartment building which is owned and managed by the defendant. Plaintiff claims that while she was using the dryers, she slipped on unobserved substance that she presumed was water since she noticed her pants were damp following the accident. In her complaint, plaintiff alleges that defendant was negligent in maintaining the laundry room by knowingly permitting an unsafe

condition to remain on the premises. After discovery was completed, defendant moved for summary judgment.

In support of the instant motion, defendant submits a copy of the pleadings, verified bill of particulars, the deposition transcript of the plaintiff, and the affidavits of defendant's employees James Sutter and Hasan Karim. In his affidavit dated October 19, 2012, James Sutter who is defendant's janitorial supervisor since January of 2005 stated that he is in charge of supervising the maintenance of the building where plaintiff resides. According to Sutter, the laundry room at issue was cleaned and mopped daily at least once in the morning and then on an as needed basis. On the day of the accident, he personally inspected the laundry room area at least on three occasions at 8:00 a.m., 10:45 a.m., and 2:00 p.m[1]., and he observed that the floor was clean and dry. He further stated that he did not observe water dripping on the floor and no complaints were made to him regarding wet floor or water leaks from ceiling, pipes or vents. Defendant also submits the affidavit of Hasan Karim who is responsible for searching records maintained by the defendant. He stated that after conducting a search for records concerning wet floor, water drips or water on the laundry room for the three months period preceding the accident, he did not find any such records. Defendant then points to plaintiff's deposition who testified that she has lived at defendant's building for 25 years and has never seen any water leaking from the laundry room ceiling

[1]According to plaintiff's bill of particulars, she fell approximately at 5:00 p.m. although at her deposition, she testified that she went to the laundry room between 7:00 p.m. to 7:30 p.m.

area except on the day of the accident. She uses the laundry room weekly and the week prior to the accident she used the laundry room and did not observe leaky pipe or water on the floor. Plaintiff testified that on the day of the accident she was in the laundry room proceeding to take her clothes to the dryer machine when she first noticed some water dripping from the laundry room ceiling specifically coming down the chute in the "middle to the back wall of the dryer area." This was the first time that she has ever seen leaks coming from the laundry room's ceiling. According to the plaintiff, when she first walked to the dryer area, she did not see water on the floor except the water that was by the wall. She stated that after she finished checking her clothing that was already on the dryer, she started to head back to the sitting bench when she slipped and fell. Although she did not see water on the floor or leaks from above the area of the accident, she "felt like I slipped on water. It was wet, 'cause what else' . . . . and "pants was kind of damp." Based on the foregoing, defendant argues that it had not created nor had actual or constructive notice of the defect in the laundry room and that the complaint should be dismissed accordingly.

In opposition to the motion, plaintiff proffers a copy of a color photograph depicting the accident location, verified pleadings, verified bill of particulars, discovery orders, certificate of trial readiness, photographs of the alleged dryers with overhead vent openings, photograph of alleged rust marks and corrosion on overhead pipes in the laundry area, photograph of floor moisture meter reading, plaintiff's deposition transcript, the affidavit of Dr. William Marletta dated December 17, 2012, and James Sutter's affidavit. Plaintiff first

argues that she filed the Note of Issue on June 25, 2012 and that defendant who served the instant motion for summary judgment on October 22, 2012 failed to comply with the 120-day statutory period prescribed under CPLR 3212 (a); thus, defendant motion should be denied as untimely. Plaintiff then contends that defendant created the alleged condition and through its employees had constructive notice of the same.

Plaintiff submits Dr. William Marletta's affidavit, a certified safety professional with an expertise in slip resistance in residential, commercial and industrial buildings who performed an inspection of the laundry room at issue on November 1, 2005. He states that on the day of the inspection the humidity in the area of the accident measured at 98% and he used a moisture meter which is commonly used to determine presence of water in floors to record such finding. He stated that during his inspection, he touched the floor and found it wet and damp. He also noticed rust marks on pipes and other surfaces which demonstrated the continued and repeated effects of moisture drippings, mold and rust formation. He observed water droplets accumulated on the ceiling and walls with where the dryers vent were located. He noticed that the back room of the laundry room is "wall enclosed with vent openings over the dryers to permit the airflow back into the laundry room. Some of the overhead vents are now closed with cardboard, others remain open . . . This permits re-circulation of the dryer's warm moist air to reenter back inside the laundry room creating high humidity conditions." He opined that the laundry room dryers were improperly vented directly into the interior of the laundry room and that the design and construction of the

laundry room venting created a hazard of dangerous slippery condition as there is no proper venting directly to the exterior. Furthermore, he stated that "re-circulation of the machine dryers hot moist air vented into the laundry room is caused to cool, fall and collect as water/ moisture on the ceiling, floor . . . Cooler surfaces cause air moisture to condense and pressure the lighter warmer air. . . This will trap the warm air in the room from exiting the vent and cause condensation on the cooler ceiling surface where it will condense and fall to the floor." He concluded that the floor was wet with moisture and humidity due to the improper venting and that the ceramic glazed laundry room floor will be slippery when wet and that "the condition of the floor wetness and humidity is a long term condition, which was created through improper construction of a properly designed vent system . The hazard was created by the improper design. . . rust marks on pipes . . . showing the continued recurring long-term effects of moisture with water drippings and rust formation . . . this condition had been present for years."

With respect to plaintiff's claim that defendant's motion is untimely, this Court disagrees. A motion is "made" when the notice of motion is served (CPLR 2211; *Rivera v. Glen Oaks Village Owners, Inc.*, 29 A.D.3d 560, 561; *Russo v. Eveco Dev. Corp.*, 256 A.D.2d 566, 567). Accordingly, since the note of issue was filed on June 25, 2012, and defendant's motion was made on October 23, 2012, when it was served by mail, it was timely as it was made within the 120–day statutory period (CPLR 3212 [a]).

Now turning to the merits of the instant action, to establish a prima facie case of

negligence in a "slip-and-fall" action, a plaintiff must "demonstrate that the defendant either created the condition which caused the accident, or had actual or constructive notice of the dangerous condition and a reasonable time within which to correct it or warn about its existence (citations omitted)." *(Maguire v. Southland Corp.,* 245 A.D.2d 347, 348; *Nearchou v. Broadway Mall Properties, Inc.,* 270 A.D.2d 468 *lv denied* 95 N.Y.2d 763). "Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident." (*Atashi v. Fred–Doug 117 LLC,* 87 AD3d 455, citing *Lewis v. Metropolitan Transp. Auth.,* 99 A.D.2d 246, 249, *affd* 64 N.Y.2d 670.) "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." (*Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837; *Rivera v. 2160 Realty Co.,* 4 NY3d 837, 838.) Furthermore, evidence must show awareness of a specific recurring dangerous condition, which was more than intermittent, which had not been resolved, and which was in the same area where the accident occurred *(Love v. New York City Hous. Auth.,* 82 AD3d 588; *Meza v. 509 Owners LLC,* 82 AD3d 426; *Martinez v. Hunts Point Coop. Mkt., Inc.,*79 AD3d 569, 571). In the instant action based upon defendant's employees affidavits and plaintiff's deposition testimony, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the defective condition that allegedly caused the plaintiff to fall. Defendant's employee, James Sutter, inspected the

laundry room area on the day of the accident and observed that the floor was clean and dry and he did not observe water dripping on the floor and no complaints were made to him regarding wet floor or water leaks from ceiling, pipes or vents. Plaintiff testified that on the day of the accident she did not see any water in the area of the accident and speculates that she fell on water because " It was wet, 'cause what else' . . . . and "pants was kind of damp." In opposition, the plaintiff failed to raise a triable issue of fact. Plaintiff argues that defendant had actual notice or constructive notice of the defective condition-improper ventilation of the dryer vents- and relies upon her expert affidavit[2]'s opinion who concluded that the alleged defective design of the dryers' ventilation system caused high humidity in the laundry room area which in turn allowed the laundry floor to become wet and since the floor was of ceramic tiles it would become slippery when wet . However, the opinions of the plaintiffs' experts did not raise a triable issue of fact as to whether there was water on the floor where plaintiff fell. William Marletta did not demonstrate that the testing he performed sufficiently replicated the conditions on the laundry room on the day of the accident as the inspection was conducted five months subsequent to the accident. Also, this Court notes that plaintiff who routinely used the laundry room never saw water on the floor or leaks from the ceiling or pipes. Defendant's employees who were in charge of inspecting the laundry room

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[2]Defendant objected to plaintiff's expert report submitted in opposition to the summary judgment; however this Court will consider the same as there is no showing of willfulness in or prejudice caused by the failure to disclose earlier (*Downes v. American Monument Co.*, 283 A.D.2d 256). Defendant's remaining arguments regarding the submission of Marletta's affidavit will not be considered by this Court as the instant action is dismissed.

never saw water on the floor or leaks from ceiling or pipes and defendant had not received prior complaints regarding of water on the laundry room's floor or leaks in that area. Expert opinions based on speculative and conclusory assertions are insufficient to defeat a motion for summary judgment (*Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 129; *Hartman v. Mountain Val. Brew Pub,* 301 A.D.2d 570, 571).

Accordingly, defendants' motion seeking summary judgment dismissing plaintiff's claims is granted. It is hereby

ORDERED that the complaint against defendant Riverbay Corporation is dismissed.

Dated: 11/26/13

SHARON A.M. AARONS, J.S.C.