

Sorbel v 78 W. 47th St. Corp.

2014 NY Slip Op 30230(U)

January 24, 2014

Sup Ct, New York County

Docket Number: 103823/2010

Judge: Cynthia S. Kern

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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: _____
Justice

PART _____

Index Number : 103823/2010
SOBEL, JERRY
vs.
78 WEST 47TH STREET
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
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

FILED
JAN 28 2014
NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

RECEIVED
JAN 27 2014
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/24/14

CR _____, 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: Part 55

-----X
JERRY SORBEL,

Plaintiff,

Index No. 103823/2010

-against-

DECISION/ORDER

78 WEST 47TH STREET CORP.,

Defendant.

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

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.....	1
Affirmations in Opposition to the Motion	2
Replying Affidavits.....	3
Exhibits.....	4

FILED
JAN 28 2014
NEW YORK
COUNTY CLERKS OFFICE

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained as a result of a slip and fall accident that occurred on March 27, 2009 in the building located at 78 West 47th Street, New York, New York, which is owned by defendant. Defendant now moves pursuant to CPLR § 3212 for an order granting it summary judgment and dismissing the complaint. For the reasons set forth below, defendant’s motion is granted.

The relevant facts are as follows. On March 27, 2009, plaintiff was caused to slip and fall while present in the building located at 78 West 47th Street, New York, New York (the “Building”), which is owned by defendant. Specifically, plaintiff alleges that he was caused to slip and fall while exiting the Building’s downstairs bathroom due to water that had accumulated

on the bathroom floor.

During his deposition, plaintiff testified that he entered the bathroom around 4 pm, first noticed the water on the floor while he was urinating and was caused to slip and fall while exiting the bathroom. He further testified that the water was coming from the bottom of the tank on the toilet and that he had never noticed water coming from the bottom of the tank in this bathroom prior to the day of his accident. However, he did testify that he was aware of prior problems with the toilet overflowing and that his father and others had previously complained about leaks in the bathroom but was not sure if they had in the three months prior to his accident.

After the accident, according to plaintiff's testimony, he went upstairs and spoke with Clifton Bharatram, the super for the building, and told him that he had fallen due to water on the bathroom floor. During his deposition, Mr. Bharatram testified that after plaintiff told him about the water he went downstairs to check and saw a hole in the toilet tank and water flowing all over the place. He further testified that he immediately turned the water off and cleaned up the bathroom. Mr. Bharatram further testified that on the day of the accident he had cleaned the bathroom in the morning and then had returned around 4 pm to take out the garbage and check if it needed toilet paper at which time he did not see any water on the floor. Additionally, Mr. Bharatram further testified that he had never received any complaints about water in the bathroom prior to plaintiff's 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). 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, defendant has established its prima facie right to summary judgment on the grounds that it did not cause, nor did it have actual or constructive notice of the condition that allegedly caused plaintiff to slip and fall. As an initial matter, it is undisputed that the water on the floor was caused by a broken tank on the toilet. Additionally, Clifton Bharatram, super for defendant, testified that on the day of plaintiff's accident, he not only cleaned the bathroom that morning but that he had gone into the bathroom in question around 4 pm, directly prior to plaintiff's accident, and did not see any water on the floor at that time. Additionally, Mr. Bharatram testified that he never received any complaints about water on the floor of the bathroom prior to plaintiff's accident. Thus, defendant has presented evidence demonstrating that it had neither actual or constructive notice of the specific condition causing plaintiff's accident.

In response, plaintiff has failed to raise an issue of fact as to whether defendant had caused the condition or whether it had actual or constructive notice of the condition. As an initial matter, plaintiff has offered no evidence establishing that defendant caused the condition as he has not alleged or shown that defendant deposited the water on the floor of the bathroom.

Indeed, it is undisputed that the water was the result of a broken tank on the toilet. Additionally, plaintiff has failed to raise an issue of fact as to whether defendant had actual or constructive notice of the condition. As an initial matter, plaintiff testified that he did not complain to anyone prior to his accident about the water that was present on the floor of the bathroom on the day of his accident. Plaintiff's testimony that he, his father and other individuals working in the Building had complained to the super about general water problems in the bathroom, specifically the toilet overflowing, on prior occasions is insufficient to constitute actual notice of the specific condition that caused plaintiff's accident at issue herein as the water on the floor was not caused by a toilet overflowing but due to a broken tank on the toilet. Thus, even assuming, there had been prior complaints about general water issues in the bathroom this would not be sufficient to constitute constructive notice of the particular condition that caused plaintiff herein to slip and fall.

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. Here, plaintiff has failed to raise an issue of fact as to whether the condition in the bathroom existed for a sufficient length of time prior to his accident to allow defendant to discover the condition and allow for time to remedy the condition. Indeed, the Building's super testified that he went into the bathroom around 4 pm and did not see any water and plaintiff has put forth no evidence to dispute this fact. Thus, as plaintiff's accident, according to his testimony, must have occurred within five to ten minutes of the super seeing the bathroom, at which time there was no water, the water could have only started to accumulate mere minutes

