

Mena v MF Associates
2014 NY Slip Op 31083(U)
March 6, 2014
Sup Ct, Bronx County
Docket Number: 309080/2011
Judge: Mary Ann Brigantti-Hughes
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MAR 12 2014

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti-Hughes

-----X
EVELYN MENA,

Plaintiff,

-against-

DECISION / ORDER
Index No. 309080/2011

MF ASSOCIATES, et als.,

Defendants.

-----X

The following papers numbered 1 to 6 read on the below motion noticed on November 22, 2013 and duly submitted on the Part IA15 Motion calendar of **December 13, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs' Notice of Motion, Memo of Law, Exhibits	1,2,3
Pl. Opp., Exhibits	4,5
Defs.' Reply Aff.	6

Upon the foregoing papers, the defendants MF Associates, n/k/a MF Associates of New York LLC, Yorkville Land Associates n/k/a Yorkville Associates LLC, Ogden Cap Properties, LLC. (collectively "MF Associates"), and Health Insurance Plan of Greater New York ("HIP") move for summary judgment, dismissing the complaint of the plaintiff Evelyn Mena ("Plaintiff") pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This matter arises from an alleged slip-and-fall accident that occurred at the premises located at 215 East 95th Street, New York, New York. The building is owned and managed by MF Associates. MF Associates leased the premises to defendant-tenant HIP. At the time, Plaintiff was employed as an office manager for Manhattan Physicians Group ("MPG"), a medical office located within the ground-floor commercial space of the property. Plaintiff alleges that she slipped and fell as a result of a dangerous, hazardous, slippery, wet condition located on the interior floor of the premises. Specifically, Plaintiff testified that the accident occurred in a hallway leading to the building's two public exits and entrances. Plaintiff had

exited her employer's office suite and turned right, leading to a 25-foot hallway, with suites on either side. Plaintiff testified that the accident occurred at the entrance of the "administration" section of the premises. There was a runner or mat on a portion of the hallway, but it stopped just before the doorway. Plaintiff noted that the runner was placed down by maintenance personnel from MPG. Plaintiff testified that she would see water in the area on other days and would report it.

At her deposition, Plaintiff testified that it was wet outside with some type of snow mixture/wetness at the time of her alleged accident. She admitted that she did not see the water that allegedly caused her to slip at any time before her fall. She further admitted that she did not know how long the water was there. Plaintiff claimed that she had previously seen and complained to the security guard or porters about water on the floor, she could not recall how long before her fall she made these complaints. Plaintiff never made any complaints to building management, the tenant HIP, or its successors. She testified that she did not know how the water got there but assumed it was from wet boots from people entering or exiting the premises.

Robert Ammiano appeared for deposition for defendant MF Associates. He testified that MF Associates, the owner and management company for the building, had no duty to maintain the medical offices or their hallways, since the medical offices had their own cleaning people. Further, none of the maintenance or security staff report to, or are employed by MF Associates. According to the lease, Section 6.01, the tenant was responsible for maintaining the demised premises, and at 6.02, the landlord was to make all repairs, restorations, and replacements only to the exterior of the building and its common areas. Tenant was to make ordinary repairs to all building systems.

Peter Jungkunst testified on behalf of HIP as the facilities manager of medical offices for Emblem Health, defendant HIP's successor. He testified that the medical offices occupied the ground floor of the premises. Mr. Jungkunst asserted that HIP was not responsible for cleaning/sweeping the accident location, and that general maintenance was left to the medical offices.

Plaintiff opposes the motion. With respect to MF Associates, Plaintiff argues *inter alia* that they reserved the right to re-enter the premises according to the Lease Agreement, and had a

presence on the property on a regular basis. MF Associates was also responsible for snow removal activities for the building's abutting sidewalks and entranceways near where the accident took place. Accordingly, there is a factual issue as to whether they were truly an "out of possession" landlord that is entitled to summary judgment. With respect to HIP, Plaintiff argues that the lease conferred upon the tenant an obligation to maintain the premises and to keep it in good order. Moreover, Plaintiff testified that she reported water on previous occasions. There is therefore a factual issue as to whether HIP had actual or constructive notice of this hazardous condition.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

(1) MF Associates [landlord] Defendants

It is well established that owners must keep premises in a “reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk”. *Peralta v. Henriquez*, 100 N.Y.2d 139, 144 (2003) (citation and internal quotation marks omitted). Liability against a defendant landowner may be predicated only upon the owner's possession and control of the premises (see *Butler v. Rafferty*, 100 N.Y.2d 265, 270, 762 N.Y.S.2d 567, 792 N.E.2d 1055 [2003]) An out-of-possession owner can be held liable for subsequent injury resulting from a dangerous condition under a theory of constructive notice only where it has reserved the right to enter the premises to perform inspection, maintenance, and repairs at the tenant's expense and the injury was caused by “a significant structural or design defect that is contrary to a specific statutory safety provision” (*Davis v. HSS Props. Corp.*, 1 A.D.3d 153 [1st Dept. 2003][emphasis added]).

When a landowner and one in actual possession have committed their rights and obligations with regard to the property in writing, the court looks not only to the terms of the agreement but to the parties' course of conduct, including, but not limited to, the landowner's ability to access the premises, to determine whether the landowner surrendered control over the property such that the landowner's duty of care is extinguished as a matter of law (*Gronski v. County of Monroe*, 18 N.Y.3d 374 [2011]).

Here, sections 6.01 and 6.02 of the Lease Agreement provide that the tenant would maintain the demised premises, and make all non-structural repairs. The landlord was obligated to maintain the exterior of the premises and common areas and facilities of the building, as well as its structural elements. The MF Associates superintendent testified that none of the maintenance or security staff at the accident premises were employed by the landlord, and MF Associates does not supply any carpeting, padding, or mops to the medical office or advise any of the medical office staff regarding placement of mats or runners. Plaintiff herself testified that MPG maintenance staff placed the runners near her accident location. Accordingly, MF Associates has established their status as an “out of possession” landlord regarding the accident location. MF Associates further established that it did not create the allegedly hazardous condition and is entitled to summary judgment.

In opposition with respect to this issue, Plaintiff fails to raise a triable issue of fact. The

fact that MF Associates staff maintains the exterior sidewalk and performs snow removal thereon did not in turn obligate the landlord to perform interior maintenance. The superintendent of the building, Mr. Amiano, simply confirmed at deposition that he would respond to the premises as needed to make repairs. While it is true, as Plaintiff asserts, that the landlord reserved the right to re-enter the premises to make repairs, it is further undisputed that this accident did not occur as a result of a significant structural or design defect contrary to a specific statutory safety provision (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]), and therefore cannot be deemed to have any constructive notice of this snow/water condition.

(2) HIP [tenant] Defendants

The subject Lease Agreement is between MF Associates entities and "HIP." Emblem Health is HIP's successor. As noted above paragraph 6.01 of the Agreement obligates the tenant to maintain the interior of the premises and to make any non-structural repairs. Accordingly, the tenant Emblem Health had a contractual obligation to maintain the interior of the premises. While the Defendants present testimony that the individual medical offices undertook their own maintenance efforts, upon this record, it cannot be conclusively established that Emblem Health delegated their contractual obligations to these third parties. This is especially so since Peter Jungkunst, Emblem Health's Facilities manager, testified that the medical offices would report to Emblem Health any complaints concerning wet or slippery conditions inside the premises. Mr. Jungkunst was also unsure of the existence of any formal maintenance agreements between Emblem Health and the medical offices.

Still, to impose liability in a slip-and-fall case, a defendant must have either created or had actual or constructive notice of the dangerous condition which caused the injury (*Smith v. Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Matias v. Rebecca's Bakery Corp.*, 44 AD3d 429 [1st Dept 2007]). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (*Barrerra v. New York City Tr. Auth.*, 61 AD3d 425 [1st Dept 2009]). When a defendant moves for summary judgment in a slip-and-fall case, it has the burden of demonstrating that it neither created nor had notice of the allegedly dangerous

condition (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006] [on a motion for summary judgment, “defendant met its initial burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it”]); *Giuffrida v. Metro N. Commuter R.R. Co.*, 279 A.D.2d 403, 404 [1st Dept 2001] [“Contrary to defendant's suggestion, it is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law”]).

Here, the HIP defendant has not established, prime facie, that it had no constructive notice of the allegedly wet condition inside the premises. A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480 [1st Dept. 2010]; *Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469 [1st Dept. 2008]). The motion papers do not assert when the location was last inspected before the accident occurred. (*Moore v. 793-797 Garden St. Housing Dev. Corp.*, 46 A.D.3d 382 [1st Dept. 2007], citing *Porco v. Marshall's Dept. Stores*, 30 A.D.3d 284 [1st Dept. 2006]). Contrary to defendants' arguments, Plaintiff's failure to notice the hazard immediately before her fall does not definitively establish Defendants' lack of notice (*Wade-Westbrooke v. Eshaghian*, 21 A.D.3d 817 [1st Dept. 2005]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that MF Associates' motion for summary judgment is granted, and the complaint and all cross-claims are dismissed as to those defendants, and it is further,

ORDERED, that HIP's motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 3/6, 2014



Hon. Mary Ann Brigantti-Hughes, J.S.C.