Kreitman v Town Sports Intl., LLC
2014 NY Slip Op 31459(U)
May 16, 2014
Supreme Court, New York County
Docket Number: 101019/2010
Judge: Lucy Billings

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 101019/2010
KREITMAN, MICHAEL
vs.
TOWN SPORTS INTERNATIONAL
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that ~~this motion is~~:

The court denies the motion by defendant Town Sports International, LLC, for summary judgment pursuant to the accompanying decision. C.P.L.R. § 3212(b).

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

Dated: 5/16/14

Lucy Billings, J.S.C.
LUCY BILLINGS
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: IAS PART 46

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MICHAEL KREITMAN, Index No. 101019/2010

Plaintiff

- against - DECISION AND ORDER

TOWN SPORTS INTERNATIONAL, LLC d/b/a TOWN SPORTS INTERNATIONAL HOLDINGS INC., and HERALD TOWERS, LLC,

Defendants

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LUCY BILLINGS, J.:

Plaintiff slipped and fell in a puddle of water on the tiled landing as he descended stairs exiting the showers in the locker room of defendants' fitness facility. Plaintiff claims that defendant Town Sports International, LLC, owned, operated, managed, and maintained this facility that he patronized and that Town Sports failed to maintain its premises in a safe condition. Specifically, he alleges that Town Sports allowed water to collect on the locker room floor, which created a recurrent hazardous passageway leading down from the showers and caused his fall and injury.

Plaintiff and Town Sports have discontinued their claims against the owner of the building in which the fitness facility was located, defendant Herald Towers, LLC. The remaining defendant Town Sports moves for summary judgment dismissing the complaint on the grounds that (1) the doctrine of assumption of the risk bars plaintiff's claims, (2) the condition of which

plaintiff complains was not hazardous as a matter of law, and (3) the undisputed evidence establishes the absence of defendant's negligence.

The defense of assumption of the risk is inapplicable to the alleged circumstances of plaintiff's fall on a landing at the bottom of a short flight of stairs from the shower area. Slipping in a pool of water while walking on a locker room floor is not an inherent risk of a sporting activity that the doctrine contemplates. Custodi v. Town of Amherst, 20 N.Y.3d 83, 88-89 (2012); Trupia v. Lack George Cent. School Dist., 14 N.Y.3d 392, 396 (2010); Ashbourne v. City of New York, 82 A.D.3d 461, 462-463 (1st Dep't 2011); Wollruch v. Jaekel, 103 A.D.3d 524, 524 (1st Dep't 2013). As discussed further below, plaintiff's carelessness bears on his comparative fault, but does not completely bar his claim. Ashbourne v. City of New York, 82 A.D.3d at 462.

Defendant's claim that the wet, slippery locker room floor was inherent in a shower area and therefore not hazardous as a matter of law is likewise inapplicable to the circumstances alleged. The hazardous condition that plaintiff alleges was not in the showers or immediately outside them, but on the locker room floor separated from the shower area by a flight of stairs. Aff. of Michael A. Rose Ex. D, at 103-104. The accumulation of water in this area is not a necessary incidence of the showers that renders the condition not hazardous as a matter of law. See Dove v. Manhattan Plaza Health Club, 113 A.D.3d 455, 456 (1st

Dep't 2014); Boyd v. New York City Hous. Auth., 105 A.D.3d 542, 542-43 (1st Dep't 2013); Verdejo v. New York City Hous. Auth., 105 A.D.3d 450, 450 (1st Dep't 2013); Seaman v. State of New York, 45 A.D.3d 1126, 1127 (3d Dep't 2007).

Defendant, as the tenant in possession of the fitness facility's premises, owed a duty to plaintiff, who was lawfully on the premises, to maintain the premises in a reasonably safe condition. Bucholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8 (2005); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006); DeMatteis v. Sears, Roebuck & Co., 11 A.D.3d 207, 208 (1st Dep't 2004); Longo v. Armor El. Co., 307 A.D.2d 848, 849 (1st Dep't 2003). Defendant is thus subject to liability for a hazardous condition on the premises that caused plaintiff's injury, if defendant created the condition or received actual or constructive notice of the condition. Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 500 (1st Dep't 2008); Alexander v. New York City Tr., 34 A.D.3d at 313; Mandel v. 370 Lexington Ave., LLC, 32 A.D.3d 302, 303 (1st Dep't 2006); Mitchell v. City of New York, 29 A.D.3d 372, 374 (1st Dep't 2006). Upon defendant's motion for summary judgment, defendant must make a prima facie showing that, as the tenant occupying, operating, and controlling the premises, it maintained them in a reasonably safe condition and received neither constructive nor actual notice of the alleged dangerous condition. Rodriquez v. New York City Hous. Auth., 102 A.D.3d 407, 407 (1st Dep't 2013); Walters v. Collins Bldg. Servs., Inc., 57 A.D.3d 446, 446 (1st Dep't 2008); Smith v. Costco Wholesale

Corp., 50 A.D.3d at 500.

In fact, defendant does not dispute that it was responsible for maintaining the locker room. Rose Aff. Ex. E, at 10-11. Therefore, even if the water pooling on the locker room floor was an open and obvious hazardous condition, it does not negate defendant's duty to keep the floor in a reasonably safe condition. Price v. Staples the Off. Superstore E., Inc., 85 A.D.3d 447, 447 (1st Dep't 2011); Sweeney v. Riverbay Corp., 76 A.D.3d 847, 847 (1st Dep't 2010); Francis v. 107-145 W. 135th St. Assoc., Ltd. Partnership, 70 A.D.3d 599, 600 (1st Dep't 2010); Tuttle v. Ann LeConey, Inc., 258 A.D.2d 334, 335 (1st Dep't 1999). At most, an open or obvious hazardous condition might raise factual questions regarding plaintiff's comparative negligence. Saretsky v. 85 Kenmare Realty Corp., 85 A.D.3d 89, 90 (1st Dep't 2011); Francis v. 107-145 W. 135th St. Assoc., Ltd. Partnership, 70 A.D.3d at 600; Tuttle v. Ann LeConey, Inc., 258 A.D.2d at 335.

Although plaintiff did not recall whether he observed the accumulated water before entering the shower area, Rose Aff. Ex. D, at 109, 112, he testified that there was always water collecting on the landing at the bottom of the stairs and that on multiple prior occasions he observed a Town Sports employee placing towels on that floor area to absorb water collected there. Id. at 113-15. This testimony shows defendant's awareness of recurrent water pooling on the locker room floor. Hill v. Lambert Houses Redevelopment Co., 105 A.D.3d 642, 643

(1st Dep't 2013); Dones v. New York City Hous. Auth., 81 A.D.3d 554, 554 (1st Dep't 2011); Lehr v. Mothers Work, Inc., 73 A.D.3d 564, 564 (1st Dep't 2010).

While plaintiff's testimony may also show that defendant eventually addressed the recurrent water accumulation, defendant has presented no evidence, in the first instance, demonstrating that the locker room floor was inspected, mopped, or otherwise cleaned regularly, let alone on the day plaintiff fell, or evidence of any routine maintenance procedure. Cater v. Double Down Realty Corp., 101 A.D.3d 506, 506 (1st Dep't 2012); Williams v. New York City Hous. Auth., 99 A.D.3d 613, 613 (1st Dep't 2012); Sabalza v. Salgado, 85 A.D.3d 436, 438 (1st Dep't 2011); Lehr v. Mothers Work, Inc., 73 A.D.3d at 565. See Castore v. Tutto Bene Rest. Inc., 77 A.D.3d 599, 599 (1st Dep't 2010). Absent such evidence, from testimony of a manager or person responsible for maintaining the locker room, defendant fails to make a prima facie showing that defendant maintained the area in a reasonably safe condition and, particularly given plaintiff's testimony, which defendant presents, that it was not on notice of the hazard plaintiff claims caused his fall. Yuk Ping Cheng Chan v. Young T. Lee & Son Realty Corp., 110 A.D.3d 637, 637 (1st Dep't 2013); Cater v. Double Down Realty Corp., 101 A.D.3d at 506; Williams v. New York City Hous. Auth., 99 A.D.3d at 613; Sabalza v. Salgado, 85 A.D.3d at 437-38. See Rodriguez v. New York City Hous. Auth., 102 A.D.3d at 407; Sweeney v. Riverbay Corp., 76 A.D.3d at 847; Walters v. Collins Bldg. Servs., Inc.,

57 A.D.3d at 446; Smith v. Costco Wholesale Corp., 50 A.D.3d at 500-501.

Because defendant Town Sports International, LLC, thus fails to meet its burden showing its entitlement to summary judgment, Cater v. Double Down Realty Corp., 101 A.D.3d at 506; Sosa v. 46th St. Dev. LLC, 101 A.D.3d 490, 492-93 (1st Dep't 2013); Sabalza v. Salgado, 85 A.D.3d at 438; Caicedo v. Cheven Keeley & Hatzis, 59 A.D.3d 363, 363 (1st Dep't 2009), the court need not address the sufficiency of plaintiff's opposition and denies the motion for summary judgment. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); JMD Holding Corp. v. Congress Fin. Corp, 4 N.Y.3d 373, 384 (2005); Scafe v. Schindler El. Corp., 111 A.D.3d 556, 557 (1st Dep't 2013); Williams v. New York City Hous. Auth., 99 A.D.3d at 613. Plaintiff and this remaining defendant shall appear for a pretrial conference July 24, 2014, at 3:30 p.m. in Part 46. 22 N.Y.C.R.R. § 202.26.

DATED: May 16, 2014

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.