Gunzburg v Quality Bldg. Serv. Corp.
2014 NY Slip Op 31725(U)
June 25, 2014
Sup Ct, New York County
Docket Number: 115910/2009
Judge: Louis B. York
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SCANNED ON 7/7/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: L. York Justice

PART 2

Gunzberg
Quality Building Services, et al

INDEX NO. 116910/09

MOTION DATE

MOTION SEQ. NO. 04

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 decided in accordance with the accompanying decision.

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

Dated: 6/25/14

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [X] 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
NEW YORK COUNTY

2

PRESENT: LOUIS B. YORK J.S.C. Justice

PART _____

Index Number : 115910/2009
GUNZBURG, ARLEEN
vs.
QUALITY BUILDING SERVICES
SEQUENCE NUMBER : 005
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 decided in accordance with the decision in motion sequence no. 004

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

Dated: 6/23/11

LBY
LOUIS B. YORK J.S.C.

_____, 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 2

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ARLEEN GUNZBURG,

Plaintiff,

Index No. 115910/2009

-against-

QUALITY BUILDING SERVICES CORP., A/R RETAIL LLC, QUALITY PROTECTION SERVICES, INC., RELATED URBAN DEVELOPMENT, L.P. and RELATED URBAN MANAGEMENT COMPANY, L.L.C.,

Defendants.

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Motion sequence numbers 4 and 5 are consolidated for disposition and resolved as follows:

The papers, pleadings and depositions lay out the facts in great detail, and the Court need not discuss them at length. In summary, plaintiff alleges that she slipped while she headed for the down escalator on the third floor of the Time Warner Center in the shopping area at Columbus Circle ("the mall"). She claims that the floor was wet due to the rain outside and that the normal condition of the floor itself was overly slippery. The incident report by Quality, which Quality filled out when it responded to her accident, indicates that according to plaintiff the floor was slippery and wet where she fell. Plaintiff sues Related, which owns and manages the building, and Quality, which contracted with Related to clean and maintain the premises. In turn, Related seeks indemnification from Quality under the contract between these two parties.

Currently all parties in this case move for dispositive relief. Defendant Quality Building Services Corp. ("Quality") moves for summary judgment dismissing it from the

action. Defendants A/R Retail LLC, Related Urban Development, L.P. and Related Urban Management Company, L.L.C. (collectively, "Related") cross-move for conditional summary judgment against Quality on the issue of indemnification. Plaintiff cross-moves for partial summary judgment, on liability, against all parties, with a trial on damages.

Testimony.

Plaintiff indicated at her deposition that, at the mall, she headed to the third floor to get some coffee. She recalled that it was a rainy day and she was wearing flat sandals, but did not remember whether there were mats in the mall and whether people were carrying umbrellas in the mall. After she had coffee she looked at the restaurants on the fourth floor, then headed down the escalators and out of the building. As she neared the third floor escalator, she stated, she slipped and fell on what she later realized was rainwater, grabbing the moving escalator rail in an attempt to steady herself. Plaintiff stated that she hadn't noticed the rain before she fell, just the high beamed lights and reflective lights hitting the floor. However, her clothes became wet; the individuals who dried the floor at the accident site told her she slipped on rainwater; and when she was on the ground she saw drops of water on the floor near her, in an area less than two feet in diameter. After the incident, she stopped at the security or concierge desk on the first floor and notified Ray Sanchez, a Quality supervisor, of the water condition. She states that she took him to the spot where she fell so he could take care of the problem, refused medical assistance, stating that her wrist was killing her but she would visit her own physician. In addition, she took five photographs of the area on her cell phone. She further states she complained orally to Sanchez about the

water on the floor, and allegedly he replied that they did their best but it was impossible to keep all the rainwater off the floors when it was raining.

Quality produced Tomasz Woszczak, an area manager who supervised the cleaning at the mall at the time of the accident. He stated that he regularly examined all areas for which Quality was responsible. From 12:00 a.m. until 7:00 a.m. every day, he explained, the porters performed a deep cleaning of the building and auto-scrubbed the floor. At other times, they policed the area and responded to calls. On the third floor, the porter in charge of the area monitored the conditions of the floor, cleaning the restrooms, picking up trash, emptying trash cans, and cleaning the wood and glass. In addition, the porter cleaned up spills that he or she noticed or that were reported.

When it rained, Quality placed caution signs near the entrance doors, and handed out umbrella bags to customers. In addition, the ground floor porter ensured there was no water accumulation on the floor, concentrating on the areas near the entrance doors. He stated that water could discolor the granite and the marble if it were there for more than five or ten minutes, and because of this it was especially important not to let water accumulate. The regular staffing and procedure was sufficient to maintain the area except when there was a severe rainstorm or snowstorm. On these events, additional staff would be placed on the ground floor. Woszczak said that during severe rainy or snowy weather, the water accumulation was strongest on the first floor and occasionally required cleanup on the second floor as well, but did not cause major problems on the third floor or above.

Related produced Timothy Wilson, director of security at the mall during the period in question. Wilson testified that on occasion he would ask Quality employees to

move boxes and if he noticed a full trash can he would ask a worker to empty it. Moreover, members of his team patrolled each floor of the mall for security purposes. These individuals would notify Quality if they noticed water, any spilled substances, or a full trash can.

Also, Wilson received incident reports from Quality when there was an accident such as the one at hand. Wilson testified about the incident report involved here, which a Quality employee named Francisco Baptista filled out and Wilson received. However, Wilson did not indicate that he had any personal involvement, and he stated that he did not have personal knowledge of Quality's cleaning and maintenance practices.

In connection with this motion, plaintiff has produced the affidavit of Francisco Baptista, the former Quality employee who filled out the accident report when plaintiff fell. Although he did not remember plaintiff's fall specifically, based on the accident report he stated that plaintiff reported that the floor was wet and the ensuing inspection confirmed it. According to Baptista, Quality photographed the accident area as well. He indicated, based on the report, that plaintiff refused medical attention and left on her own, informing the Quality workers that she would visit her own doctor. Baptista stated that there was an ongoing problem with slippery floors when it rained, and that during the five years he worked for Quality he reported approximately five slip-and-falls on the first, second, third and fourth floors of the building. He did not specify how many of these incidents occurred on the third floor.

Plaintiff also submits the expert affidavit of civil engineer Scott M. Silberman, P.E. Silberman inspected the site approximately a year-and-a-half after the accident, on March 3, 2010. According to Silberman, plaintiff stated that the floor had not changed

since the accident. He stated that he performed a test in which he determined the Static Co-efficient of Friction ("SCOF") of the floor in its then-dry condition. The highest reading he obtained was 0.334, he stated. Silberman states that a 0.334 SCOF reading violates the slip coefficient standard. His affidavit is contrary to the deposition testimony of Reginald Gregory, an employee of Innovative Global, which supplied and installed the floor in question. Gregory stated that the floor's SCOF reading was at least 0.5 and therefore compliant.

Argument

Here, Related moves and plaintiff cross-moves for summary judgment on the issue of liability. Plaintiff has claimed that defendants were negligent because they allowed the water to remain on the floor near the third floor escalator. Plaintiff can show negligence in this context by demonstrating that defendants had actual knowledge of the water condition or that they had constructive notice of the condition either because they had not monitored the slippery conditions adequately or because the rain created a recurring slippery condition near the third floor escalators. Defendants state that, in fact, there was no actual or constructive notice. Moreover, they add, their precautions are sufficient to defeat the allegations against them in the complaint. The parties do not argue the issue of actual notice.

To show constructive notice based on failure to correct a specific problem, such as the rainwater here, plaintiff must demonstrate that the condition was visible and apparent, and that it existed at the site for enough time before the accident that defendants should have discovered and remedied it. *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837-38, 501 N.Y.S.2d 646, 647 (1986). Plaintiff argues

that summary judgment is proper in her favor on the issue of constructive notice. The Court disagrees. In *Love v. New York City Housing Auth.*, 82 A.D.3d 588, 919 N.Y.S.2d 149 (1st Dept. 2011), the First Department concluded that because the caretaker swept the staircases in the morning, mopped up the stairs whenever she noticed a wet condition, and reported all complaints about the stairs to her supervisor, plaintiff could not raise an issue as to notice. Similarly, Quality cleaned the mall's floors daily, and in addition a porter was assigned to the floor, dried any wet spots he or she noticed on normal patrols of their work areas and responded to all reports of slippery or other conditions. As defendants note, they were not "required to patrol [the floor] 24 hours a day." *Id.* at 588, 919 N.Y.S.2d at 150; *see Pfeuffer v. New York City Housing Auth.*, 93 A.D.3d 470, 471-72, 940 N.Y.S.2d 566, 568 (1st Dept. 2012). Moreover, where, as here, there was an ongoing rainfall, absent a showing of actual negligence defendants are not liable. *See Solazzo v. New York City Trans. Auth.*, 6 N.Y.3d 734, 735, 810 N.Y.S.2d 121, 122 (2005); *Gibbs v. Port Auth. of New York*, 17 A.D.3d 252, 255, 794 N.Y.S.2d 320, 323 (1st Dept. 2005).

Plaintiff also states that defendants had the burden of showing the exact time they had cleaned the accident site prior to the fall. However, she points to no cases that place the initial burden of proof on the defendant on this issue. On the contrary, plaintiff had to satisfy the initial burden of showing the water was on the floor for a sufficient period to allow defendants to discover and remedy the condition. *See Gibbs*, 17 A.D.3d at 255, 794 N.Y.S.2d at 322-23 (even where plaintiff testified that two individuals slipped on the water prior to her fall, and even if condition was visible and apparent when she

fell, plaintiff did not show the length of time the condition existed and thus failed to create triable issue as to constructive notice).

Moreover, to raise an issue of fact as to whether a recurring condition existed, plaintiff must show that defendants have more than a general awareness of the condition – that instead, a dangerous condition routinely recurs and routinely is not remediated. *Rodriguez v. New York City Housing Auth.*, 102 A.D.3d 407, 408, 959 N.Y.S.2d 127, 127 (1st Dept. 2013). Here, even if the comments plaintiff reported at her deposition, though not of evidentiary value, are accurate, all it shows is that the porters were aware that water accumulated generally when it rained and that it was hard for them to keep up with it. This is insufficient to create an issue as to whether there was a recurring condition. *See Solazzo*, 6 N.Y.3d at 735, 810 N.Y.S.2d at 122. Nor is the affidavit of Baptista sufficient. Even if, over the course of five years[1] he filled out five incident reports about slip-and-falls on the first, second, third, fourth or fifth floors, this is insufficient to create knowledge of a recurring condition near the third floor escalators. *See Phillip v. Young Men's Christian Ass'n of Greater New York*, 117 A.D.3d 413, –, 985 N.Y.S.2d 226, 227 (1st Dept. 2014); *Guttierez v. Lenox Hill Neighborhood House, Inc.*, 4 A.D.3d 138, 139, 771 N.Y.S.2d 513, 514 (1st Dept. 2004). Also, from Baptista's statement, it is not clear how many, if any, of those incidents occurred near the area in question.

In addition, plaintiff states that defendants are guilty of negligence based on the Silberman affidavit, which alleges that the SCOF reading is 0.334 and this violates the New York City Building Code. She alleges that summary judgment also is proper on

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[1]Plaintiff alleges Baptista filled out five accident reports over the course of two years. Either way, the Court's conclusion is the same.

this basis. However, as Related argues, the expert testimony that the SCOF is below the generally accepted standard and this made the floor slippery even when dry is insufficient to raise even an issue of fact as to negligence. *See Caicedo v. Sanchez*, 116 A.D.3d 553, 555, 984 N.Y.S.2d 323, 325 (1st Dept. 2014); *Green v. Gracie Muse Rest. Corp.*, 105 A.D.3d 578, 579, 963 N.Y.S.2d 240, 242 (1st Dept. 2013). Moreover, as Related notes, the expert did not establish that the condition of the floor at the time of inspection was the same as it was on the date of plaintiff's accident approximately one-and-a-half years earlier. *See Green*, 105 A.D.3d at 579, 963 N.Y.S.2d at 242. His statement that plaintiff told him the condition was the same as it had been at the time of her accident is insufficient to establish this as fact, as plaintiff had no awareness of the SCOF at either juncture.

As for spoliation, plaintiff alleges that defendants wrongfully withheld: 1) the photographs of the accident site that Baptista took in 2008; 2) a video tape recording of the incident; and 3) the five incident reports that Baptista stated he filed during his five years at Quality, relating to slips on rainwater on the first, second, third, fourth and fifth floors of the mall. However, as plaintiff has not established negligent maintenance of the floor during the rain, the issue is moot. *See Davydov v. Zhuk*, Index No. 12769/ 2007, 23 Misc. 3d 1129(A), 889 N.Y.S.2d 505 (Sup. Ct. Kings County May 26, 2009) (avail at 2009 WL 1444638, at *6)(even where it was clear that there was spoliation, issue was moot).

Quality's cross-motion also is moot as the case is dismissed. Moreover, plaintiff failed to create an issue of fact regarding Quality's negligence. Therefore, the incident

here did not trigger the indemnification agreement. For both of these reasons, the Court grants Quality's motion.

The Court has considered the parties' numerous other arguments, many of them based on alleged procedural errors, and finds them unpersuasive. In addition, the Court considered all affidavits and deposition transcripts

Accordingly, it is

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that Related's motion for summary judgment is granted; and it is further

ORDERED that Quality's motion to dismiss is granted; and it is further

ORDERED that the action is dismissed, and the Clerk is directed to enter judgment accordingly.

Dated: 6/23/14

ENTER:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.