

Lokenauth v The Mount Sinai Hosp.

2014 NY Slip Op 31750(U)

July 7, 2014

Sup Ct, New York County

Docket Number: 108729/09

Judge: Doris Ling-Cohan

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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 DORIS LING-COHAN**
Justice

PART 36

Lo kenaw tu
Mt. Sinai Hospital et al.

INDEX NO. 108729/09

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2 + memo
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ for Summary judgment
is denied in accordance with
the attached memorandum dec'n.
(Consolidated with motion Seq 004)

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

FILED
JUL 08 2014
NEW YORK
COUNTY CLERKS OFFICE

Dated: [Signature]

[Signature], J.S.C.
JUSTICE DORIS LING-COHAN

- 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

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
PREETA LOKENAETH

Plaintiff

-against-

Index No. 108729/09

Motion Seq. No.: 003/004

THE MOUNT SINAI HOSPITAL a/k/a MOUNT SINAI
MEDICAL CENTER and ARAMARK MANAGEMENT
SERVICES LIMITED PARTNERSHIP,

Defendant.
-----X

FILED

JUL 08 2014

NEW YORK
COUNTY CLERK'S OFFICE

DORIS LING-COHAN, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

The defendant Aramark Management Services Limited Partnership (Aramark Management) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint (motion sequence 003). The defendant The Mount Sinai Hospital a/k/a Mount Sinai Medical Center (Mount Sinai) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint, and the cross claims (motion sequence 004).

This is an action to recover damages for personal injuries suffered by the plaintiff Preeta Lokenauth in a slip and fall accident caused by a gel-like substance on the floor of a hospital hallway. The defendant Mount Sinai owns the hospital, and the defendant Aramark Management, by contract, trains and manages Mount Sinai's housekeeping personnel. Mount Sinai has cross-claimed against Aramark for contribution and indemnity. Aramark likewise cross-claimed for indemnification and contribution from Mount Sinai.

In support of its motion, Aramark Management argues that it owed no duty of care to the plaintiff, and that it neither created, nor had actual or constructive notice, of the gel-like substance on the floor. Despite the volume of the papers submitted, a photocopy of only a single page from its multi-page contract with Mount Sinai is attached to Aramark's motion (buried within exhibit E to Aramark's motion).

In support of its motion, Mount Sinai argues that it had neither actual, nor constructive notice of the condition that caused the plaintiff to slip and fall.

In opposition to both motions, the plaintiff makes the following arguments. Mount Sinai's motion is untimely. The defendants fail to satisfy their initial burden by only offering testimony as to their general cleaning practices, and not offering evidence regarding any particularized, or specific inspection in the area, on the day that the plaintiff fell. The plaintiff witnessed hospital staff polishing the floors earlier on the date of the accident. Two security guards told the plaintiff that the slippery substance had been on the floor since earlier that day. There is an inadequate lighting claim that the defendants have failed to address in their motions. Finally, it is argued that, by virtue of Aramark's supervision of Mount Sinai's cleaning personnel, Aramark owed a duty to the plaintiff.

In reply, Aramark argues that, as an independent contractor providing training and management to Mount Sinai's employees, it owed no duty to the plaintiff as a non-contracting third party. It also argues that Mount Sinai controlled the lighting, and that the plaintiff's affidavit claiming inadequate lighting contradicts her deposition testimony. Finally, Aramark argues that the plaintiff may not oppose the motion based solely on the hearsay testimony from the two security guards.

In reply, Mount Sinai argues that it made its motion beyond the deadline because superstorm Sandy forced the closing of both the courts and counsel's office. In addition, Mount Sinai argues that there is no evidence that the plaintiff slipped because of inadequate lighting.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Moreover, it is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). A party seeking summary judgment must affirmatively demonstrate the merit of its claim or defense (*Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 [1st Dept 1994]). A moving defendant does not meet its burden by merely citing gaps in the plaintiff's case (*Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]).

An owner owes a duty of reasonable care to maintain the property in a reasonably safe condition (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]). To establish a prime facie

case of negligence, the plaintiff ultimately is required to demonstrate: (1) that the defendants owed a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see Pulka v Edelman*, 40 NY2d 781 [1976], *rearg denied* 41 NY2d 901 [1977]). However, a

“defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [citations omitted]).

Preliminarily, the defendant Mount Sinai has presented an adequate excuse and sufficient good cause, for the filing of a late motion for summary judgment. Flooding from the storm forced the closure of both the courts and counsel’s office, making it impossible to meet the filing deadline. Therefore, the court will consider the summary judgment motions on the merits.

Nevertheless, the defendants’ motions for summary judgment must be denied, as they failed to prove entitlement to dismissal as a matter of law. Additionally, issues of fact exist as to, inter alia, whether the lighting in the hospital hallway was adequate, contributing to the accident. Contrary to defendants’ assertion, “the burden is not on plaintiff to show that defendant[s] had notice, but on defendant[s] to show that [they] lacked notice” that the lights in the hall were inadequate (*Green v New York City Hous. Auth.* 7 AD3d 287, 288 [1st Dept 2004]). The defendants’ motion papers do not even address the lighting issue. Furthermore, nothing about the plaintiff’s affidavit indicates that it was tailored to avoid summary judgment, or that it contradicts plaintiff’s deposition testimony about the lighting. Finally, a movant may not remedy a fundamental defect in the in the moving papers, by submitting evidence with the reply (*Trizec*

Hahn, Inc. v Timbil Chiller Maintenance Corp., 92 AD3d 409 [1st Dept 2012]). For counsel to allege in reply that the lighting was “bright enough” is pure speculation, and insufficient to show lack of notice as a matter of law, as it merely points out a perceived weakness in the plaintiff’s case (See *Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448 [1st Dept 2012]). As described above, the initial burden of demonstrating the absence of triable issues of fact is on the moving defendants, and it is only after the defendants have satisfied their threshold burden that the court will examine the sufficiency of the plaintiff’s opposition.

In addition, there is evidence in the form of hearsay, from the two security guards, that the allegedly dangerous condition was visible and apparent for a sufficient period of time to constitute constructive notice. While such hearsay may not be sufficient at trial to sustain plaintiff’s burden, the defendant Mount Sinai misconstrues the burden of proof in its summary judgment motion brought against plaintiff by arguing that the plaintiff should have deposed the two security guards. Rather, it is the defendants’ burden on their motion for summary judgment, to establish the absence of notice as a matter of law (*Colt v Great Atl. & Pac. Tea Co., Inc.*, 209 AD2d at 295).

Further, hearsay evidence may be sufficient to bar summary judgment, if it is not the only evidence submitted (*Mermelstein v Singer*, 85 AD3d 440 [1st Dept 2011]). Here, the plaintiff is not relying solely on hearsay evidence from the two security guards. Plaintiff has also proffered her testimony that she observed the floor being polished earlier in the day. Thus, there is sufficient evidence to permit the fact finder to infer that the slippery substance was either created by, or could easily have been noticed and removed by, one of Mount Sinai’s employees.

"To meet its initial burden on the issue of . . . constructive notice, the defendant must

offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008]). In the face of evidence tending to the contrary, the moving defendants offer no work records from the day in question, supporting their conclusory denials of any notice of a dangerous condition (*Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462 [1st Dept 2010]).

There is also an issue of fact concerning whether or not the gel-like substance was created by the earlier polishing of the floor. The absence of direct evidence that the defendants created the condition is not fatal to the plaintiff's claim, as the plaintiff shows "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986] [internal quotation marks and citations omitted]). For example, evidence has also been offered showing that maintenance personnel were polishing the floor, and that the plaintiff observed cleaning supplies and/or equipment prior to her fall (*Velez v New York City Hous. Auth.*, 91 AD3d 422 [1st Dept 2012]; *Allen v Turyali Fast Food, Inc.*, 51 AD3d 468 [1st Dept 2008]; *Healy v ARP Cable*, 299 AD2d 152, 155 [1st Dept 2002]). Such evidence is sufficient to permit a finding based on "logical inferences" (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d at 744). "[S]omeone who knowingly makes a floor dangerously slippery by causing wax, polish, or paint to be applied acts negligently" (*Walsh v Super Value, Inc.*, 76 AD3d 371, 375 [2d Dept 2010]).

Turning to Mount Sinai's motion to dismiss Aramark's cross claim, the extent to which the defendants will be entitled to indemnification will depend on the extent to which each defendant's negligence is determined to have contributed to the accident. Paragraph 6 of the administrative services agreement between the defendants (exhibit H to Mount Sinai's motion)

provides that Mount Sinai will indemnify Aramark from any liability arising from Mount Sinai's negligence to the extent such loss arises from any "defective physical condition in the Facilities." Mount Sinai's counsel's affirmation in support of the motion does not address the scope of the hold harmless clause, or its enforceability. Therefore, Mount Sinai's motion to dismiss Aramark's cross claim must be denied.

Finally, the complaint against Aramark cannot be dismissed on the ground that it did not owe a duty of care to the plaintiff. As a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties (*Moch Co. v Rensselaer Water Co.* 247 NY 160, 168 [1928]). Exceptions to the general rule include: first, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk...[by] launching a force or instrument of harm;" second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation;" and third, "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Church v Callanan Indus.*, 99 NY2d 104, 111-112 [2002] [*internal quotation marks and citations omitted*] ; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

Although "[n]o view of the facts supports a conclusion that cleaning and waxing the floors constitute[s] an inherently dangerous activity" (*Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d 378, 379 [1st Dept 1987]; *accord Spitzer v Kings Plaza Shopping Ctr. of Flatbush Ave.*, 275 AD2d 450 [2d Dept 2000]), by negligently polishing the hospital hallway, and leaving a gel-like substance on the floor, Aramark-trained and supervised workers launched a force or instrument of harm (*Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544, 545 [1st Dept 2011]).

Furthermore, by failing to include with its motion papers, a complete copy of its contract with Mount Sinai (*Rivas v 525 Building Co.*, 293 AD2d 733, 734 [2d Dept 2002]), Aramark fails to demonstrate its right to summary judgment in the first instance on the issue of whether or not its contract displaced the property owner's duty to maintain the premises safely (*Palka v /Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]).

Accordingly, it is

ORDERED that Aramark Management Services Limited Partnership's motion for summary judgment dismissing the complaint (motion seq. no. 003), and The Mount Sinai Hospital's motion for summary judgment dismissing the complaint and cross claims (motion seq. No. 004), are both denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated: 7/7/14

FILED
JUL 08 2014
NEW YORK
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Doris Ling-Cohan, J.S.C.