Jackson v New York Service Group
2014 NY Slip Op 33235(U)
April 24, 2014
Supreme Court, Bronx County
Docket Number: 303497/2011
Judge: Alison Y. Tuitt
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 FILED May 06 2014 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

ROSALAND JACKSON,

Plaintiff,

-against-

NEW YORK SERVICE GROUP,

Defendant.

INDEX NUMBER: **303497/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Plaintiff's Motion to Reargue Defendant's for Summary Judgment

On Calendar of **1/27/14**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, plaintiff's motion to reargue defendant's motion for summary judgment is granted. Upon reargument, defendant's motion for summary judgment is denied for the reasons set forth herein.

The within action involves plaintiff's claim that she was injured on June 12, 2010 when she allegedly caused to slip and fall on a hallway floor which was in the process of being waxed by defendant New York Service Group (hereinafter "NYS") on the 9th floor at 30-30 75th Street, Long Island City, New York. NYS was a cleaning contractor retained by the 9th floor tenant, plaintiff's employer, Cynergy Data LLC (hereinafter "Cynergy"). It is undisputed that plaintiff was not a party to the contract between NYS and Cynergy. By decision and Order, defendant's motion for summary judgment was granted on the grounds that

defendant, a service contractor, owed no duty of care to plaintiff, a non-contracting third-party out of its contractual obligations.

C.P.L.R. Rule 2221 permits a party to move for reargument where it is shown that the court overlooked or misapprehended any matters of fact or law in issuing the underlying Order. Reargument of a motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. Massey v. City of New York, 672 N.Y.S.2d 679 (1st Dept. 1998); Pahl Equipment. v. Kassis, 588 N.Y.S.2d 8 (1st Dept. 1992). Plaintiff has demonstrated that this Court overlooked or misapprehended matters of law or fact in deciding the underlying motion. This Court agrees that it overlooked matters of law in issuing the underlying decision and Order with respect to defendant's motion for summary judgment and reargument is granted on those grounds.

Hossameldeen Ali Khalef, the owner and general manager of NYS since 2008-2009, testified at his deposition that Cynergy and NYS entered into a maintenance/cleaning agreement in 2008-2009. As part of the agreement, NYS periodically waxed the 9th floor hallways at the premises every three to four months. On June 12, 2010, Mr. Khalef was in the process of waxing the floor near the kitchen. Before starting his work, Mr. Khalef informed the building security guard that he was going to be working and asked him to inform everyone that he would be working. He also placed a sign on a glass door that read "Please Do Not Use This Door!". On the other side of the glass door is where Cynergy employees worked. Mr. Khalef testified that he used yellow plastic warning signs that provided "Wet Floor" when the floors were being waxed and that he placed those signs in the corridor where he was waxing. Mr. Khalef had just completed waxing the floor a few minutes prior to plaintiff's fall. He observed the door open and a lady "came running" at which time one of his workers started to shout a warning. Mr. Khalef saw plaintiff slip and fall backward but he could not assist her because of the wax on the floor; he did not want to "spoil" his work and he was also concerned that he would slip on the wet wax. After plaintiff was helped up from the ground and left, he was concerned with "how to go back and repair that area where she had spoiled. Mr. Khalef testified that he had just removed the "Wet Floor" sign prior to plaintiff's fall, and had it to his "side" because they had finished waxing that area. Mr. Khalef stated that the reason the sign was removed was because "[t]his area had been dried and the job was finished...". Mr. Khalef then contradicts his earlier testimony, in essence, testifying that the area of the floor where plaintiff fell was still wet but the sign had been removed.

Plaintiff testified at her deposition that she was at work as a technical support associate for Cynergy. The accident occurred on June 12, 2010 as she was on her way to the bathroom. Plaintiff testified that she went through a door into the corridor where the bathroom was located. Upon going through the door, she made a right turn to walk towards the bathroom. Plaintiff opened the door, took one step into the corridor and slipped, falling backwards. Plaintiff testified that there was a loud noise when she hit the floor and her co-workers responded and helped her up as "[t]hey were trying not to slip and fall, either." Plaintiff observed that the wet waxed floor caused her to fall. When she was on the ground, she could feel that the floor was wet and sticky. Before her accident, no one told her not to walk through the corridor door and there were no signs advising not to enter or that the floor was slippery. After her co-workers helped her up, plaintiff saw "the guy who does the cleaning, he was squatting on - - directly from where I fell; I mean, he didn't help, nothing." Plaintiff further testified that prior to her fall, plaintiff was not told that the floor was being waxed and she saw no "yellow sign on the floor" advising of the waxing. Plaintiff did not receive any emails or "any printed papers signs" to the effect.

NYS had moved for summary judgment on the grounds that it did not owe a duty of care to plaintiff, as plaintiff was a third party outside the scope of its contract for cleaning services. The Court erroneously agreed with defendant and granted the motion. The motion should have been denied. It is well settled that a service contractor owes no duty of care to a non-contracting third-party out of its contractual obligations" See, Jackson v. Board of Education of the City of New York, 812 N.Y.S.2d 91 (1st Dept. 2006); Church v. Callanan Industries, 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 138-139 (2002); Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579 (1994). However, as correctly argued by plaintiff, "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'", that contracting party may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons. Espinal, 98 N.Y. 2d at 140 (Citation omitted). See also Jackson, 812 N.Y.S.2d at 98 quoting Church, 99 N.Y.2d at 111 (The contracting party may be held liable "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk").

Here, as argued by plaintiff, defendant's principal's admission during his deposition that the floor where plaintiff fell was wet and slippery with wax, raises an issue of fact as to whether defendant launched the

instrument of force or harm that caused plaintiff's alleged injuries. Accordingly, since summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue, defendant's motion should have been denied. See, Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978); Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).

This constitutes the decision and Order of this Court.

Dated: 4/24/2014

Hon. Alison Y. Tuitt