

Mandel v West Hempstead Pub. Lib.

2014 NY Slip Op 33695(U)

July 17, 2014

Supreme Court, Nassau County

Docket Number: 14585/11

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. DANIEL PALMIERI
J.S.C.**

TRIAL/IAS PART 21

-----X

FRIEDA MANDEL,

Index No. 1458 5/11

Plaintiff,

Mot. Seq. #001

-against-

Mot. Date: 6-16-14

**WEST HEMPSTEAD PUBLIC LIBRARY, JOHN
DOES 1-10 AND ABC CORPS. 1-10,**

Submit Date: 7-11-14

Defendants.

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The following papers were submitted on this motion:

- Notice of Motion, dated 5-21-14.....1**
- Affirmation in Opposition, dated 6-16-14.....2**
- Reply Affirmation, dated 7-7-14.....3**

Defendant's motion for summary judgment pursuant to CPLR § 3212 is denied.

All requests not specifically addressed are denied.

On Wednesday, November 3, 2010 shortly before 9:00 p.m., plaintiff slipped and fell at the defendant library in West Hempstead, New York. Plaintiff testified at her deposition that she had just entered the library and walked past the check out counter when she fell on a tile floor landing on her right side and that when she got up her skirt and stockings were " a little bit wet or I was damp on my side where I fell". Prior to the accident she observed a gentlemen with a bucket with a mop in it standing in a corner. She does not know if the bucket held any liquid.

Defendant's employee testified that he works the 3-11 p.m. shift as a "cleaner", has no specific recollection of his activities that evening and that he is constantly walking around the building, picking up. At about 8:00 p.m. he is on the second floor cleaning, then back down for closing at 9:00 p.m. He did not see the incident. The weather was clear and dry with no precipitation. The employees at the library did not see the accident but heard a "thud". None of the employees testified as to as observing the tile prior to the accident. One employee testified that after the fall there was no liquid on the floor and noted the observation on her incident report. None of the defendants witnesses testified as to any observation of the plaintiff's clothing or as to any inspection of the tile floor before the accident.

Defendant contends that a dangerous condition was not present and that if there was a dangerous condition it did not have notice thereof.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, even when the facts are construed in the

nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212 (b). In negligence cases, there may be more than one proximate cause of the injury-causing occurrence (*Lopez v Reyes-Flores*, 52 AD3d 785 [2d Dept. 2008]), and thus the proponent of the motion must establish freedom from comparative negligence as a matter of law. *Pollack v Margolin*, 84 AD3d 1341 (2d Dept. 2011). Absent this initial showing, the court should deny the motion, without passing on the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). A movant cannot satisfy its initial burden merely by pointing to gaps in plaintiff's case *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909 (2d Dept. 2011); *Cummings v. New York Methodist Hospital*, 85 AD3d 1082 (2d Dept. 2011)

If such a *prima facie* case is made, the burden shifts to the non-moving party. To

defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also* *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

On such a motion the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993). The Court need not, however, ignore the

fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *Sexstone v. Amato*, 8 AD3d 1116 (4th Dept. 2004). The Court may also search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of a motion for summary judgment without the necessity of a cross-motion. CPLR 3212(b); *Katz v. Waitkins*, 306 AD2d 442 (2d Dept. 2003).

In order for a defendant to successfully move for summary judgment in a slip and fall case it “has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice.” *Joachim v. 1824 Church Ave., Inc.* 12 AD3d 409 (2nd Dept. 2004); *Valdez v. Aramark Servs.*, 23 AD3d 639, (2nd Dept. 2005). Actual notice may be found where the defendant created the condition, or was aware of its existence prior to the accident. *Pianforini v. Kelties Bum Steer*, 258 AD2d 634, 635 (2nd Dept. 1999). To constitute constructive notice, a defect “must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it.” *Gordon v. American Museum of Natural History*, 67 NY2d 836, (1986). A defendant may satisfy its burden of showing that it had no notice of a dangerous condition if there is proof of regular inspection of the area in question and “any remedial action just prior to the incident.” *Hagin v. Sears*, 61 AD3d 1264, 1266 (3rd Dept. 2009).

To satisfy the burden on the issue of lack of constructive notice, the moving defendant must provide evidence when the area was last inspected relative to the time of the injured plaintiff's accident. *Gerbi v. Tri-Mac Enterprises of the Stony Brook, Inc.*, 34 AD3d 732, 733 (2nd Dept. 2006); *Birnbaum v. New York Racing Ass'n, Inc.*, 57 AD3d 598, 598-99 (2nd Dept. 2008). In *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572-73 (2nd Dept. 2006), the Court held that defendant did not make a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of the defect because the defendant failed to introduce evidence that the puddle at issue was not visible and apparent.

Merely submitting testimony of general inspection or cleaning practices and providing no evidence regarding any particularized or specific inspection or cleaning procedure in the area of and on the date of the accident is insufficient to satisfy the defendant's initial burden on the issue of lack of constructive notice. Only after a defendant has satisfied this initial burden will the sufficiency of the plaintiff's opposition be examined. *Schiano v. Mijul, Inc.* 79 AD3d 726 (2d Dept. 2010); *Mercedes v. City of New York*, 107 AD3d 767 (2d Dept. 2013).

Here, defendant has failed to satisfy its initial burden because it has not submitted any evidence of inspection of the fall area by any employee or witness. The submitted deposition testimony is generalized and does not establish when the accident locale was last inspected or cleaned before the plaintiff's fall.

Since the defendant did not make a *prima facie* showing of entitlement to summary judgment it is not necessary to reach the issue of the sufficiency of plaintiff's opposition. *Boudreau-Grillo v. Ramirez*, 74 AD3d 1265 (2d Dept. 2010).

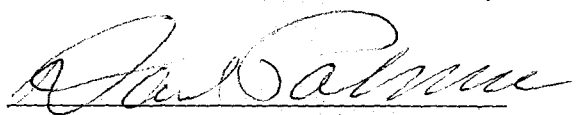
However plaintiff has raised an issue of fact as to whether or not the area where she fell was wet. Plaintiff's testimony indicates that her garments were damp after she fell on a day when it was dry and there was no precipitation. See, *Gomez v. Shop-Rite of New Greenway*, 110 AD3d 483 (1st Dept. 2013).

The defendant's motion for summary judgment therefore is denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: July 17, 2014



HON. DANIEL PALMIERI
Supreme Court Justice

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ENTERED

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COUNTY CLERK'S OFFICE