

Grib v New York City Hous. Auth.

2014 NY Slip Op 33698(U)

August 25, 2014

Supreme Court, Kings County

Docket Number: 3348/11

Judge: David I. Schmidt

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6946-1109

At an IAS Term, Part SCP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of July, 2014.

PRESENT:

HON. DAVID I. SCHMIDT,
Justice.
----- X

HELENA GRIB,
Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY,
Defendant
----- X

Index No. 3348/11
Seg no 4+5

The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3
Opposing Affidavits (Affirmations) _____	4
Reply Affidavits (Affirmations) _____	5
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memorandum of Law</u> _____	6

Upon the foregoing papers, defendant the New York City Housing Authority (NYCHA) moves, pursuant to CPLR 3212 seeking summary judgment dismissing plaintiff Helena Grib's complaint.

Background

On August 16, 2010, plaintiff a resident of a NYCHA building known as Carey Gardens located at 2845 West 23rd Street in Brooklyn (the building), slipped and fell in a hallway of the building, just off of the lobby area. Plaintiff testified that she left work at 6:00 P.M. that day and returned home to the building at approximately 6:10 P.M. She further testified that at approximately 2:00 P.M. on that day it began to rain heavily and continued to do so until around 5:30 P.M. When plaintiff arrived at her building she entered through a back entrance which required her to walk up five steps to get to the door and then down three steps after she then went through the door. She was then in a hallway leading to the building's lobby. Plaintiff testified that she observed wetness on the floor of the hallway and decided to step over it. She claims that she took one step to try and go over it but that she slipped and fell. She further testified that she observed that she fell in a dirty puddle which was "[l]ike oil, it was dirty. It was like gasoline or something like that."

Edmond Laneville, a NYCHA employee, and Supervisor of the Caretakers at the building where plaintiff claims she was injured testified on NYCHA's behalf. He testified that there were two caretakers assigned to the building, one for each side and that each day the lobby and elevators are cleaned and the floors and stairs are swept and mopped. He added that "if there are any spills or anything irregular, it is cleaned as needed." Mr. Laneville added that he personally walked through the lobby and surrounding area at least two times each day. He testified that if there is a mess in the building that needs to be

cleaned up he becomes aware of it either through the building caretakers observing it and informing him that they had observed it, or if he himself observed it, or if a tenant called in to let him know of a condition that needed to be remedied. He further testified that he did not receive any complaints about the lobby floor being wet on the day of plaintiff's fall, nor did he receive any complaints about the floor being dirty. He testified that his working hours were from 8 AM to 4 PM and that if a complaint came in after 4 PM, it would come in through the central call office and that the condition would either be taken care of by someone dispatched to the building to remedy the situation or a ticket would be left for him informing him to take care of it the next day.

Richard Cholewa, property manager for the Carey Gardens building, submitted an affidavit in support of NYCHA's motion in which he affirms that he is unaware of any complaints made regarding any slippery, and/ or hazardous condition including but not limited to oil and/or gasoline in the floors of the lobby adjoining hallway of 2945 West 23rd Street. Moreover, he affirms that there was no use of oil or gasoline by NYCHA personnel inside or outside of the building on the day of plaintiff's accident.

NYCHA's Motion

NYCHA moves for summary judgment dismissing plaintiff's complaint arguing that liability cannot be imposed upon it because there was no actual or constructive notice of the alleged condition of the floor, there was a storm in progress, and plaintiff assumed the risk. Specifically, NYCHA argues that plaintiff has not submitted any proof demonstrating that

NYCHA had actual notice of the alleged wet, oily/greasy condition which she alleges caused her to fall. Nor has she demonstrated that the condition was present for a sufficient amount of time to allow NYCHA to receive notice of it and take corrective action.

NYCHA argues that a noxious substance such as gasoline with its strong and distinctive odor could not have been present very long and gone unnoticed by other tenants. NYCHA points to the testimony of its employees which establishes that there were no reports of any wet, or oily/greasy substances present on the floor of the lobby or hallway area in which plaintiff fell. Moreover, NYCHA contends that plaintiff has not established that NYCHA had constructive notice of the alleged condition and that such condition was visible, apparent and existed for a sufficient length of time.

In opposition, plaintiff argues that NYCHA had constructive knowledge of this dangerous condition which she contends was a recurring situation. In support of this position, she points to her deposition testimony at p 34:

Q. What did you see?

A. I saw wetness and I decided to step over it. The floor was not flat and there's always something collecting down there.

Q. There's always something collecting down there?

A. Yes.

In reply, NYCHA points out that plaintiff testified at her deposition that she slipped on "oil" and "gasoline" mixed with water and testified that "sometimes water collects down there." NYCHA argues that since plaintiff cannot establish actual or constructive notice of

the presence of an oil/gasoline and water mixture she is attempting to allege the existence of a recurrent condition but that she fails to allege with any specificity how many times the condition allegedly occurred or, even, what the recurrent condition was. NYCHA points out that plaintiff never mentioned the prior presence of gasoline or oil in the area in which she fell. NYCHA maintains that in order to survive the instant summary judgment motion plaintiff must demonstrate that the gasoline, oil and water mix at issue was present for a sufficient period of time for NYCHA to have received notice of it and take corrective action prior to the accident. They point to Mr. Laneville's testimony that on the day in question he was consistently in the lobby to get to his office and argue that a noxious substance like gasoline could only have been present for a short time since its noxious odor would not have gone unnoticed by the tenants.

In addition, NYCHA argues that the climatological records it has produced establish that there was precipitation, in the form of rain, falling before, during and after the time of the alleged accident, thus there cannot be liability imposed upon it because there is no evidence from which a jury could infer that such a condition existed for a sufficient period of time to allow NYCHA to have discovered it and remedied it. NYCHA argues that it was not obligated to provide a constant remedy to the problem that occurs when water is tracked in to a building during rainy weather conditions. They point to Mr. Laneville's testimony that he did not receive any complaints of water or dirt on the day of plaintiff's accident.

Discussion

“Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law” (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2011], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant’s showing only by introducing “evidentiary proof in admissible form sufficient to require a trial of material questions” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Recurring Condition

To the extent plaintiff seeks to base liability on NYCHA's alleged notice that a recurring water condition existed on the floor of the area in which she fell, such a theory fails, as no notice can be imputed on this ground. "[A] general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall . . . liability could be predicated only on failure of defendants to remedy the danger presented by the [condition] after actual or constructive notice of the condition" (*Gloria v MGM Emerald Enter.*, 298 AD2d 355, 356 [2002] [internal citations and quotation marks omitted]; *see also Gordon*, 67 NY2d 836). A defendant needs to have had actual notice of the alleged recurring condition; liability under a recurring hazard theory requires that the defendant routinely leave a known defect unattended (*Halpern v Costco Warehouse/Costco Wholesale*, 95 AD3d 828, 828-829 [2012]; *Gloria*, 298 AD2d at 356, citing *Sweeney v D & J Vending*, 291 AD2d 443 [2002] [leaking vending machine]; *David v New York City Hous. Auth.*, 284 AD2d 169 [2001] [leaks causing rainwater to accumulate in stairwell]; *McLaughlan v Waldbaums, Inc.*, 237 AD2d 335 [1997] [unstable supermarket display]). The court notes that plaintiff did not allege in the Complaint or Bill of Particulars that there was a recurring water and/or oil condition present in the area in which she fell that NYCHA failed to remedy, and she cannot now advance a new theory of recovery on this basis (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [2012]; *Mezger v Wyndham Homes, Inc.*, 81 AD3d 795 [2011]).

Here, NYCHA, through the testimony and affidavit of its employees, demonstrates that there had never been any complaints made regarding a recurring water and/ or oil, gasoline condition in the area in which plaintiff fell. Thus, the court finds that plaintiff fails to raise any triable issues of material fact regarding whether NYCHA was on notice of any recurring water/oil/gasoline condition in the area in which plaintiff fell. Although plaintiff testified that there was always something collecting in that area, she never complained to anyone about it nor is there any evidence that any other tenant complained of such a condition being present in that area.

Constructive/Actual Notice

"A defendant has constructive notice of a dangerous condition when it is visible and apparent, and existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409, 410 [2006]; see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). "To meet its initial burden on the issue of lack 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" (*Gadzhdiyeva v Smith*, 116 AD3d 1001 [2014] quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599, [2008]; see *Schiano v Mijul, Inc.*, 79 AD3d 726, 726-727 [2010]).

Here defendants submit the testimony of its employee Mr. Laneville, who testified that he was consistently in the area in question through out the day inasmuch as he must pass it

to get to his office and that if any condition existed he would have noticed it and remedied it. He testified that the area was cleaned in the morning and would be cleaned as need if a situation warranted it. He further testified that when it rains, as it did on the day of plaintiff's accident, the floors are cleaned more frequently. In addition, Ronald Cholewa affirms that he is not aware of any complaints made regarding any slipper, wet or dangerous condition and that there was "no use of oil or gasoline by NYCHA personnel for any purposes whatsoever inside or outside of 2945 W. 23rd Street on the day of plaintiff's accident."

The court notes that the record is devoid of any evidence regarding precisely when the condition at issue came into existence (*see Lipsky v Firebaugh Realty Corp.*, 26 AD3d 313, 314 [2006]; *Giuffrida v Metro North Commuter R.R. Co.*, 279 AD2d 403, 404 [2001]). In the absence of proof as to how long the alleged water and/or oil/gasoline condition was present on the floor, there is no evidence to permit an inference that the defendant had constructive notice of the condition which allegedly caused plaintiff's fall (*see Perlongo*, 31 AD3d at 410-411; *McDuffie v Fleet Fin. Group*, 269 AD2d 575, 575 [2000]). Additionally, "[a] general awareness that water might be tracked into a building when it rains is insufficient to impute to the defendants constructive notice of the particular dangerous condition" (*Sarandrea v St. Charles School*, 2014 N.Y. App. Div. LEXIS 3943 (N.Y. App. Div. 2d Dep't [June 4, 2014] quoting *Musante v Department of Educ. of City of NY*, 97 AD3d 731, 731 [2012]; *Yearwood v Cushman & Wakefield, Inc.*, 294 AD2d 568 [2002]).

Here, the evidence that NYCHA has submitted in support of its motion, the deposition testimony of Laneville and the affidavit of Cholewa, is sufficient to establish, prima facie, that NYCHA did not create or have actual or constructive notice of the alleged hazardous condition (see *Gadzhiyeva v Smith*, 116 AD3d 1001, 1002 [2014]; *Arslan v Richmond N. Bellmore Realty, LLC*, 79 AD3d 950 [2010]; *Scheer v Pathmark Stores*, 6 AD3d 520 [2004]).

Storm in Progress

NYCHA also argues that liability cannot be imposed upon it based upon the “storm in progress” rule, which holds that a landowner will not be held liable for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (see *McCurdy v KYMA Holdings, LLC*, 109 AD3d 799 [2013]; *Smith v Christ’s First Presbyt. Church of Hempstead*, 93 AD3d 839, 840 [2012]; *Marchese v Skenderi*, 51 AD3d 642, 642 [2008]; see also *Ali v Village of Pleasantville*, 95 AD3d 796 [2012]; *Dubensky v 2900 Westchester Co., LLC*, 27 AD3d 514 [2006]). Whether the doctrine applies to storms involving only rain has been questioned (see *Toner v National R.R. Passenger Corp.*, 71 AD3d 454 [2010] [Andrias and McGuire, JJ, concurring]; *Hilsman v Sarwil Assocs., L.P.*, 13 AD3d 692 [2004]), although some trial courts have found the doctrine applicable (see *Rijper v City of New York*, 2013 WL 1494998 [Sup. Ct. New York County 2013]; *Bush v Duane Reade Holdings, Inc.*, 2012 WL 2154978

[Sup. Ct. New York County 2012]; *Beyda v New York City Tr. Auth.*, 16 Misc.3d 1116(A) [Sup. Ct. New York County 2007]). Here, however, even if the doctrine was applicable, at this summary judgment stage, the use of the storm in progress doctrine does not completely eliminate a landowner's duty to exercise reasonable care to remedy hazardous storm-related conditions (see *Rijos v Riverbay Corp.*, 105 AD3d 423 [2013]; *Kuznicki v Beth Jacobs Teachers Seminary of Am. Inc.*, 39 Misc.3d 286 [Sup. Ct. Kings County 2013] citing *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856 [1998]).

Here, NYCHA submits a document from the National Climatic Data Center which establishes that it rained .12 inches at John F. Kennedy airport on the day of plaintiff's accident with the bulk of the rain falling at 5:00 p.m. and trace amounts still detectable at 6:00 and 7:00 p.m. Plaintiff herself testified that it began raining at 2 PM and stopped approximately 40 minutes before she finished working that day, which was at 6:00 p.m. Based upon a review of the record, the court finds that the defendant has established its prima facie entitlement to summary judgment as a matter of law by submitting evidence that demonstrates that a sufficient amount of time had not elapsed from the cessation of the rain and plaintiff's accident to enable NYCHA to remedy any situation that may have resulted from water being tracked into the building during the storm (see *McCurdy*, 109 AD3d at 799; *Smith*, 93 AD3d at 840; *Marchese*, 51 AD3d at 642; see also *Ali*, 95 AD3d at 796; *Dubensky* 27 AD3d at 514).

Accordingly, based upon the foregoing, NYCHA's motion to dismiss the complaint is granted and this action is hereby dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.

WILLIAM L. SCHMIDT



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