

Ahnor v City of New York
2015 NY Slip Op 30583(U)
March 4, 2015
Sup Ct, Bronx County
Docket Number: 305051/2009
Judge: Jr., Kenneth L. Thompson
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Upon Reargument
Δ SJ motion
DENIED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
FLORENCE AHNOR,

Index No: 305051/2009

Plaintiff

-against-

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES, IPIS
AGENCY, WILDCAT SERVICE CORPORATION, and
NEW YORK STATE INDUSTRIES FOR THE
DISABLED, INC.,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants X

The following papers numbered 1 to 3 read on this motion to reargue

No	On Calendar of November 19, 2015	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1
	Answering Affidavit and Exhibits-----	2
	Replying Affidavit and Exhibits-----	3
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Memorandum of Law-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

MAR 12 2015

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Remaining defendants, Wildcat Service Corporation, (Wildcat), and the New York State Industries for the Disabled Inc., move pursuant to CPLR 2221(d) to reargue defendants' CPLR 3212 motion for summary judgment dismissing the complaint that resulted in the decision and order of this Court dated September 2, 2014. Defendants' motion was denied in the underlying motion.

This action arose as a result of personal injuries sustained by plaintiff in a slip and fall while employed as a security guard. Plaintiff was employed by nonparty, FJC Security Services, (Security), which provided security services for former defendants, City of New York and New York City Department of Homeless Services. Plaintiff was assigned to an intake trailer. Wildcat was responsible to provide housekeeping services for the trailer. Plaintiff called in a puddle that she observed in the trailer on her 2-way walkie-talkie. While waiting for someone from Wildcat to respond to her call to clean up the puddle, plaintiff observed a man with a child walking

toward the puddle. While stepping in front of the homeless man with a child, plaintiff slipped in the puddle herself and fell, injuring herself. Plaintiff avers that 30-45 minutes elapsed between her phone call and her fall.

Defendants' motion to reargue is granted.

Defendants' argue that the sur-reply in the underlying motion should not have been considered, as it was unauthorized. However, it was defendants who submitted the deposition transcript of Alvin R. Brown, (Brown), a former supervisor for Wildcat, in its reply papers. Brown's deposition was taken after plaintiff had submitted her opposition to defendants' motion. The only opportunity plaintiff would have to oppose the arguments interposed by defendants that were supported by the newly submitted evidence in reply papers, would have been in sur-reply papers. Plaintiff asked for permission to submit the sur-reply papers in a letter dated June 3, 2014 to avoid clear prejudice to plaintiff had the reply paper been considered without plaintiff being afforded a sur-reply. By interim order of this Court dated June 12, 2014, plaintiff's sur-reply papers were submitted and the underlying motion for summary judgment was adjourned to July 1, 2014 to afford defendants the opportunity to submit sur sur reply papers. Sur sur reply papers were not submitted by defendants. Defendants' attorney avers he did not receive notice of the interim order. With this motion to reargue, defendants have an opportunity to respond to plaintiff's sur-reply. (*Matter of Kennelly v Mobius Realty Holdings LLC*, 33 A.D.3d 380 [1st Dept 2006]). The Court has discretion to authorize a sur-reply, and it was clearly warranted in this case.

Defendants argue that the Court erred in finding that "[t]here is opposing testimony regarding whether plaintiff's message notifying about the puddle on the 2 way walkie talkie connected to Wildcat or was received by Security, to then be relayed to Wildcat for service." Defendants argue that plaintiff merely observed that the maintenance staff that cleaned up the

spill had the same walkie talkies as plaintiff, and there is no evidence that the walkie talkies were connected or tuned to the same frequencies. Actually, plaintiff testified that Wildcat and plaintiff's supervisors would hear messages she sent over the walkie talkie. (p.41). Thus, plaintiff has submitted evidence of actual notice.

Furthermore, there is evidence of constructive notice as plaintiff testified that the spill remained on the floor 30-45 minutes after plaintiff noticed it to the time of plaintiff's slip and fall. Moreover, Alvin Brown testified that Wildcat did inspections of the trailers every 15 to 25 minutes. (Transcript p. 25). "A triable issue of fact exists as to whether defendant had constructive notice of the puddle of water in defendant's cafeteria that allegedly caused plaintiff to slip and fall, where the documentary and testimonial evidence demonstrates that this condition may have been observed as much as a half hour prior to the occurrence (see, *Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19)." (*El-Taher v. Memorial Hosp. for Cancer and Allied Diseases*, 266 A.D.2d 92 [1st Dept 1999]).

Defendants cite to *Ramsay v Mount Vernon Board of Education*, 32 AD3d 1007 [2nd Dept 2006], for the holding that there is no duty to warn of an open and obvious condition that is not inherently dangerous. *Ramsay* is distinguished on grounds that in *Ramsay*, the plaintiff slipped on a mopped floor, while the plaintiff herein, slipped in an unmopped puddle of water. (Plaintiff's transcript p. 25, 189). Having the floor mopped was plaintiff's purpose in notifying Wildcat of the puddle.

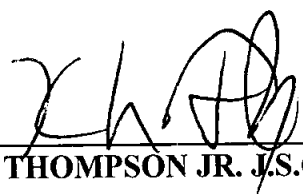
Plaintiff's observation of the puddle before she slipped does not render her actions the sole proximate cause of her injuries. "[P]laintiff's testimony that she had frequently observed the protruding metal on many frequent visits to the building does not establish, as a matter of law, that the alleged danger was open and obvious, and we note that there is no evidence as to how far the metal protruded from the heater (see *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69,

72 [2004]). Second, while an open and obvious danger negates the duty to warn and is relevant to the issue of comparative negligence, it does not negate the duty to maintain the premises in a reasonably safe condition (see id. at 72-73; *Caicedo v Cheven Keeley & Hatzis*, 59 AD3d 363 [2009]), and we cannot say, as a matter of law, that the stairwell was in a reasonably safe condition.” (*Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 A.D.3d 599, 600 [1st Dept 2010]).

Accordingly, defendants’ motion to reargue is granted, and upon reargument, defendants’ underlying motion for summary judgment is denied.

The foregoing shall constitute the decision, and order of the Court.

Dated: MAR 04 2015



KENNETH L. THOMPSON JR. J.S.C.