

Brown v Addison Hall Owners Corp.

2015 NY Slip Op 30795(U)

April 2, 2015

Sup Ct, Bronx County

Docket Number: 309647/2010

Judge: Alison Y. Tuitt

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

PART IA - 5

NOEL BROWN, as Administrator of the Estate of SHARON BROWN, Deceased,

INDEX NUMBER: 309647/2010

Plaintiff,

-against-

Present: HON. ALISON Y. TUITT Justice

ADDISON HALL OWNERS CORP. and ORSID REALTY CORP.,

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 5/28/14

Notice of Motion - Exhibits and Affirmation	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

The within action involves plaintiff's decedent's claim that she was injured on August 23, 2010 at 12:45 p.m. when she slipped and fell while descending the lobby steps at 457 West 57th Street, New York. At the time of the accident, it had been raining and plaintiff claims that she slipped and fell on rain water as she descended the interior stairway inside the subject building. Plaintiff claims she suffered injuries which required surgery and was unable to return to work after the accident. Plaintiff passed away from natural causes about ten months later. She was not deposed in this case. There is a videotape that depicts the occurrence of the accident and the videotape is properly authenticated. However, plaintiffs argue that notwithstanding that they put

defendants on notice to the presence of the surveillance video, by certified mail on August 25, 2010, two days after the accident, defendants only preserved ten minutes of the surveillance. This is important to note because plaintiff argues that defendants had actual and constructive notice of the alleged dangerous conditions, i.e., rain water being tracked into the building by numerous people walking into the building for at least 45 minutes before plaintiff's accident. Plaintiff argues that defendants' failure to preserve any and all surveillance can only be viewed as either a negligent or willful attempt by defendants to destroy evidence crucial to plaintiff's effort to make a prima facie case on either constructive or actual notice. This Court agrees with plaintiff's position because notice is at the heart of this case. The undisputed facts show that it was raining the day of the accident. It is also undisputed that, as depicted in the video, numerous people walked into the building in the few minutes before plaintiff's accident. There was a mat permanently placed inside the front of the doors of the building, and another mat at the bottom of the interior stairs (a staircase consisting of five steps) that was put in place when it rained. The video depicts both mats, as well as a yellow warning sign at the foot of the stairs, several feet away from the last step.

The court's function on motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet

its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a “...reasonably safe condition, considering all of the circumstances including the purposes of the person’s presence and the likelihood of injury...” Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

Defendants’ motion for summary judgment must be denied as plaintiff has raised an issue of fact as to whether defendants had constructive notice of the alleged dangerous water condition that caused plaintiff’s fall and injuries. As already stated, defendants failed to preserve the entire surveillance tape as requested by plaintiff. Plaintiff claims that defendants had constructive notice of the dangerous condition for at least 45 minutes before the accident and the surveillance is critical to this claim. Defendants were on notice within three days after the accident that they were to preserve the videotape, but only preserved only a few minutes of the tape. Moreover, issues of fact are created by the substantial evidence submitted by plaintiff in opposition to the motion. Thomas Chavanne, the concierge of the building testified that there is a lot of traffic entering and leaving the building between 8:00 a.m and 12:00 p.m. There are frequent dog walkers coming in and out of the building during those hours and on a rainy day those people and dogs track water back onto their feet into the building. The mat at the top of the stairs did not cover the entire front of the entrance and did not at all cover the steps leading into the building. Also, there was no umbrella receptacle in the lobby for people to place their umbrellas. Plaintiff’s accident occurred at 12:45 p.m. Mr. Chavanne testified that he would run a dry mop over the subject stairs if the stairs were wet. However, on the date of the accident, Mr. Chavanne does not recall mopping the stairs between 8:00 a.m. when he started his shift until 12:00 p.m. at which time he took a break. Immediately following plaintiff’s accident, Mr. Chavanne exited an elevator and observed plaintiff laying on the floor at the bottom of the lobby steps. He prepared an incident report where he provided that the cause of plaintiff’s fall was “slipped on stairs, rainy day”. Furthermore, the ambulance call report, which is noted in the

incident report prepared by Mr. Chavanne, provides that plaintiff slipped down four tile steps after slipping on water on the top step. The information was provided by the plaintiff and was contemporaneous to the happening of the accident. While the information contained therein is hearsay, hearsay evidence may be utilized and considered by the Court in a motion for summary judgment so long as it is not the only evidence upon which the granting or denial of the motion is predicated. Guzman v. L.M.P. Realty Corp., 691 N.Y.S.2d 483, (1st Dept.,1999). Additionally, Michael Padilla, plaintiff's supervisor, was listed as a witness in Mr. Chavanne's incident report. Mr. Padilla is seen on the surveillance video as the first person to respond to plaintiff after the accident. Mr. Padilla submits an affidavit wherein he states that it was raining that morning and floor area where plaintiff slipped was wet and moist.

Defendants are correct that they had no obligation to cover the entire lobby floor with mats or to continuously mop up all tracked in water. Thomas v. Boston Properties, 906 N.Y.S.2d 265 (1st Dept. 2010) (The law imposes no obligation on property owners and operators to take continuous remedial action to remove moisture accumulating as a result of pedestrian traffic); Gonzalez-Jarrin v. New York City Dept. of Education, 855 N.Y.S.2d 87 (1st Dept. 2008), quoting Garcia v. Delgado Travel Agency Inc., 771 N.Y.S.2d 646 (1st Dept. 2004)(Defendants were under no obligation "to cover the entire floor with mats and to continuously mop up all tracked-in water"); Keum Choi v. Olympia & York Water Street Co., 718 N.Y.S.2d 42 (1st Dept. 2000) (Defendants had no obligation to provide a constant remedy for water on the floor that had been tracked into the building by individuals immediately preceding plaintiff's accident); Kovelsky v. City University of New York, 634 N.Y.S.2d 1 (1st Dept. 1995)(City was not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in snow, in order to avoid liability for slip on wet floor).

Defendants contend that they did not have constructive notice of the alleged water on the stairs. Mr. Chavanne testified that when he left the building at 12:00 p.m., he did not see any moisture on the stairs. When he went to plaintiff as she was laying on the steps (about 12:45 p.m.), he cannot remember if there was water on the steps. He could not remember if he investigated the location to determine if there was any moisture on the floor. He also did not recall whether he had used the dry mop to dry up any moisture in the area during the four hours that he had been on duty that morning. But he did note in his incident report that the accident occurred when plaintiff "[s]lipped on stairs, rainy day".

Defendants further contend that, as a matter of law, 40 minutes (when they claim the stairs were

last inspected by Mr. Chavanne) is not sufficient time to constitute constructive notice. However, the cases cited by defendants for distinguishable. In Weiss v. Gerard Owners Corp., 803 N.Y.S.2d 51 (1st Dept. 2005), plaintiff fell inside defendant's building. It had been raining at the time of the accident, at 8:30 a.m. and had been, on an off, for some time before the accident. The Court noted that the building's porter gave uncontroverted testimony that the floor in question had been dry at about 7:30 A.M. The Court held that "since the record provides no nonspeculative basis to determine whether, and for how long, the water was on the floor before plaintiff walked in, or, alternatively, whether plaintiff himself tracked in the moisture on which he slipped, plaintiff has failed to raise a triable issue of fact as to whether defendants created the condition or had actual or constructive notice of it". The facts of the instant matter differ in that here there was surveillance video of exactly what transpired during those 40 minutes, but defendants failed to preserve it. They only provide several minutes of footage, despite being on notice that plaintiff's requested the preservation of the surveillance. In those several minutes before plaintiff's accident, several people walked into the building from outside where it was or had been raining. It is not speculative then to state that within those 40 minutes many more people, and animals, walked into the building from outside, tracking in rain water which was not totally absorbed by the mat in place at the front of the doors. In Budd v. Gotahm House Owners Corp., 793 N.Y.S.2d 340 (1st Dept. 2005), plaintiff slipped and fell on a carpet in the lobby of her apartment building which she claimed was frequently wrinkled and that its edges were often curled and raised. Plaintiff testified she had left her building at 7:30 p.m. and saw no wrinkles in the carpet. When she returned at 9:45 p.m., she did not notice that the carpet was bunched or wrinkled. She testified that she fell on the carpet but it was not until after she fell that she saw a raised wrinkle in the rug. The building superintendent submitted an affidavit stating that he had observed the condition of the rug as of 8:30 P.M. on the night of the incident, and did not see any wrinkles. The First Department held that defendants were entitled to summary judgment based on plaintiff's testimony that saw no wrinkles in the carpet at 7:30 p.m and the superintendent's statement that he did not observe any wrinkles in the carpet at 8:30 p.m. The Court reasoned that nothing submitted in opposition to the motion demonstrated that a hazardous condition was "visible and apparent and [existed] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it". Citations omitted. Again, in the instant matter, the surveillance footage during those 40 minutes would have been illustrative in showing whether there was a hazardous condition of water or moisture visible and apparent for a sufficient length of time

to permit defendants to discover and remedy it.

Moreover, defendants contention that 40 minutes is insufficient as a matter of law to constitute constructive notice is contradicted by the First Department. See, Spinner v. 1725 York Owners Corp., 869 N.Y.S.2d 12 (1st Dept. 2008)(The evidence that rain had been falling for an hour and a half before plaintiff slipped and fell and that persons entering the building were carrying, and sometimes closing, umbrellas in view of the doormen for at least 40 minutes raises a triable issue whether defendants had actual or constructive notice of a dangerously wet and slippery condition in the lobby of their building).

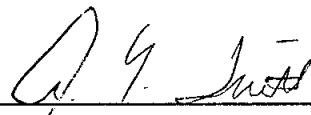
Additionally, plaintiff's argument that the placement of the warning signs at the bottom of the stairs raises issues of fact also has merit. The video submitted show one yellow warning cone at the bottom of the stairs, to the side, has been there since Mr. Chavanne began his shift at 8:00 a.m. Plaintiff argues that the warning cones should have been at the top of the stairs to warn people entering the building that water was being tracked into the building. In Rosado v. Phipps Houses Services, Inc., 940 N.Y.S.2d 866 (1st Dept. 2012), plaintiff alleged that she slipped and fell in a puddle located on an exterior landing of defendants' premises and that two yellow caution cones had been placed against the wall, to her right and left, as she exited, but not in the area of the liquid condition. The First Department held that the presence of caution cones created a triable issue of fact as to prior actual notice of the condition, as defendants' witness admitted that they would place such caution cones to alert others to a slippery condition. With respect to plaintiff's contention that the mats did not cover the entirety the floors and left certain areas exposed, the Court of Appeals has held that where a foot and a half of floor area was left uncovered, it created an issue of fact. In Fortgang v. Chase Manhattan Bank, 23 N.Y.2d 895 (1969), the lessee provided mats for the floor on rainy days as a safety factor. On the day of the accident, which was a rainy day, the lessee's porter had put mats in the lobby but had left a space of about a foot and a half from the elevator door not covered by mats. Plaintiff stepped on floor that was not covered by a mat while getting into the elevator and slipped and fell. The Court held that an issue of fact was raised as to whether the building lessee maintained properly placed mats on the lobby floor during rainy weather and kept the uncovered areas free of excessive moisture.

Accordingly, for the reasons stated, defendants' motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated:

4/2/15



Hon. Alison Y. Tuitt