Gillot v Port Auth. of N.Y. & N.J.
2015 NY Slip Op 31700(U)
September 1, 2015
Supreme Court, Queens County
Docket Number: 28122 2011
Judge: David Elliot
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ANNE ILDA GILLOT,
Plaintiff(s),

- against -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,
Defendant(s).

Index No. 28122 2011

Motion Date August 20, 2015

Motion Cal No. 61

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,
Third-Party Plaintiff(s),

-against-

KEN-CAR CONTRACTORS, INC., etc.,
Third-Party Defendant(s).

Motion Seq. No. 7

The following papers numbered 1 to 8 read on this motion by defendants Port Authority of New York and New Jersey (Port Authority), Capital Contractors, Inc. (Capital), and Bombardier Transportation (Holdings) USA, Inc. (Bombardier), for an order granting them summary judgment dismissing plaintiff's amended verified complaint against them.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a trip-and-fall accident which occurred on May 17, 2011 at approximately 11:00 p.m., inside the Lefferts Boulevard AirTrain Station, County of Queens, City and State of New York, as a result of a mislaid area rug abutting the exit doors at said location.

Plaintiff testified that she was employed by ABM as a cleaner in Terminal 7 at John F. Kennedy International Airport (JFK airport). After completing her 10:30 p.m. shift, she used the AirTrain to get to the Lefferts Boulevard station. At the Lefferts Boulevard stop, she exited the AirTrain and took the escalator down to street level. There were several people in front and in back of her who were also leaving the station. A carpet was located just in front of the sliding exit doors. As she traversed the carpet, her right foot tripped on a bump thereon, and she fell to the ground. She did not see the bump before the fall, as she was looking straight ahead and simply "expected it to be flat"; she noticed the bump for the first time after her fall and realized that it was the bump on the carpet on which she tripped and fell. She stated that she was not aware of that carpet prior to her fall, nor was she aware of any prior accidents or complaints regarding same. When she returned to the accident site some time later, she noticed that the carpet had been changed and flattened. Finally, when asked to identify three pictures of the area in which she fell, plaintiff indicated that, while it depicted the area, the carpet was not the same as the one over which she fell, as the one depicted in the photograph was not bumpy.

Yesenia Rodriguez, an AirTrain agent operator, appeared for deposition on behalf of Bombardier. She does not believe that she was working on the date of the accident, but indicated that one employee would have been assigned to the Lefferts Boulevard station around the time of the subject accident. Ms. Rodriguez's duties include customer service, in addition to being certified to operate the AirTrain. As an agent, she assists passengers with general questions, advises her company's Operations department of the existence of unattended bags, maintenance issues, and falls. She explained that Bombardier is contracted by the Port Authority as the latter's "eyes" in terms of spotting issues in the airport such as maintenance. If such an issue is spotted by Bombardier, an employee thereof would call it in to Operations which, in turn, sends "Capital Cleaners" (defendant Capital herein) to address it. Bombardier employees were supposed to remain in the area until Capital arrived and, thereafter, were to inform Operations once the issue has been resolved. She stated that the carpet depicted in photographs she was shown of the area was always present, and that Capital was responsible for cleaning, vacuuming, or fixing it if it were out of place. Ms. Rodriguez testified that she "rarely" has seen the carpet bunch up, but such a condition would usually occur during a storm or strong winds. She never saw anyone trip over the carpet, nor was she aware of any reports of same, nor has she seen a bump in the carpet at the Lefferts Boulevard station. Further, neither has she personally made a radio communication to

Operations regarding a bunched up carpet, since she would correct the situation herself by "just lay[ing] it straight," something that she has done before since it is "simple to fix" and, as such, Capital need not be called. Finally, Ms. Rodriguez stated that she is not familiar with Capital's cleaning procedures, and she is not sure whether Capital is 100% responsible for issues with respect to the carpet.

Luis Calderon, a police officer from the Port Authority Police Department, appeared for deposition on the Port Authority's behalf. His duties include patrolling JFK airport. Although his name appears on the Patron Incident Report as having provided assistance in connection with the subject accident – though he stated that it was a different officer who prepared the report – he had no recollection of the incident, nor do his own notes indicate that there was one. He is not responsible for caring for the condition of the carpet, nor is he aware of whose responsibility it is to maintain same.

Finally, Charles F. Peitz testified on Capital's behalf. Capital is in the commercial cleaning business. Mr. Peitz is Capital's regional sales manager, and he oversees sales and day-to-day operations for the New York region. Capital has a contract with Bombardier to provide cleaning services for JFK airport. Capital, in turn, subcontracted the cleaning to "Mountain Contractors" (defendant North Mountain Contractors, Inc., herein). Capital was not present on-site; rather, Capital's function was to manage and ensure that Mountain Contractors adhered to the specifications as set forth by Bombardier. Mountain Contractors, on behalf of Capital, was to maintain the carpets at the AirTrain stations. Mr. Peitz indicated that, if there was no inclement weather, there would be no need for mats or carpets; in such a case, Mountain Contractors would store them in a supply closet until they were needed. Mr. Peitz testified that he was not aware of any prior incidents involving the carpets, and he only recently was made aware of plaintiff's accident.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if it meets this burden will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v City of New York, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Defendants first argue that they are entitled to dismissal of the amended complaint because plaintiff cannot identify the cause of her fall. While it is true that a plaintiff's

inability to do so is fatal to his or her cause of action since a finding that a defendant's negligence, if any exists, proximately caused the injury would be based upon speculation (*see Ash v City of New York, Trump Vil. Section 3, Inc.*, 109 AD3d 854 [2013]; *Deputron v A & J Tours, Inc.*, 106 AD3d 944 [2013]; *Califano v Maple Lanes*, 91 AD3d 896 [2012]), plaintiff's testimony herein, taken as a whole, and in a light most favorable to her (*see Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903 [2012]); *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920 [2005]), was sufficiently specific so as to establish that she was caused to fall as a result of a bump in the carpet (*see e.g. Richichi v CVS Pharmacy*, 127 AD3d 951 [2015]; *Martino v Patmar Props., Inc.*, 123 AD3d 890 [2014]; *Cipriano v City of New York*, 120 AD3d 738 [2014]; *Altinel v John's Farms*, 113 AD3d 709 [2014]).

It should be noted that defendants do not appear to challenge the description of the condition simply as a "bump" in the carpet (*i.e.*, as not sufficiently specific); indeed, it does not appear from a reading of plaintiff's testimony that questions were asked regarding the size, width, height, *etc.*, thereof. The court does note that, in any event, there do not appear to be cases which indicate that plaintiff cannot maintain a negligence action due to a bump on a mat or carpet or one alleged to be "mislaid" (*see e.g. Jangana v Nicole Equities LLC*, 127 AD3d 458 [2015]; *Kasner v Pathmark Stores, Inc.*, 18 AD3d 440 [2005] [dismissed on other grounds]; *Allison v D'Agostino Supermarkets, Inc.*, 282 AD2d 219 [2001]; *Barkow v New York Downtown Hosp.*, 260 AD2d 334 [1999] [dismissed on other grounds]).

Defendants also argue that they cannot be held liable for plaintiff's accident because the subject carpet was not inherently dangerous as a matter of law. The cases to which defendants cite for said proposition, *i.e.*, *Gonzalez v New York Racing Assn., Inc.* (69 AD3d 673 [2010]), *Leib v Silo Rest., Inc.* (26 AD3d 359 [2006]), and *Mansueto v Worster* (1 AD3d 412 [2003]), are inapposite since all involve mats or carpeting which were laid flat; plaintiff's testimony indicates that it was a "bump" in the carpet which caused her to fall (*see generally Sainval-Brice v All Seasons Indus. Servs., Inc.*, 85 AD3d 1004 [2011]; *Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655 [2009]; *Massucci v Amoco Oil Co.*, 292 AD2d 351 [2002]). The issue of whether the particular condition of the carpet was open and obvious and not inherently dangerous is, thus, one for the jury (*see Bloomfield v Jericho Union Free School Dist.*, 80 AD3d 637 [2011]).

Turning to the last branch of defendants' motion, while they may have established by the testimony submitted thereon that they neither created nor had actual notice of the alleged condition of the carpet, they failed to eliminate issues of fact with respect to constructive notice. In order to meet their burden in this respect, defendants must "offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff tripped" (*Marchese v St. Martha's Roman Catholic Church, Inc.*, 106 AD3d 881 [2013]; *see also Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598 [2008]; *Santos v*

786 Flatbush Food Corp., 89 AD3d 828 [2011]; *Holub v Pathmark Stores, Inc.*, 66 AD3d 741 [2009]). A defendant fails to meet its burden when it merely provides evidence of general inspection practices rather than when, specifically, the subject area was last inspected prior to plaintiff's fall (*see Mercedes v City of New York*, 107 AD3d 767 [2013]; *Marchese*, 106 AD3d at 882).

Ms. Rodriguez, who appeared on Bombardier's behalf, was not present on the date of the accident and did not submit any evidence as to who was present and whether the procedures which she delineated with respect to maintenance issues were followed prior to plaintiff's accident. Though Officer Calderon was produced on behalf of the Port Authority, he had no recollection of having been on duty that day or of having been present after plaintiff's accident had occurred. Finally, Mr. Peitz stated that he would not have been present on the date of the accident and that all of the maintenance was handled by Mountain Contractors. He did not provide any detail as to Mountain Contractor's activities on the date of the accident.

The "shift reports" submitted on the motion, titled "JFK AirTrain Operations Center Supervisor's Log," were not authenticated in any meaningful way[1]; though one may assume that an AirTrain agent was at the Lefferts Boulevard station from 3:00 p.m. to 11:30 p.m. on the date of the accident, there is no information provided as to when the particular "area in question" was last inspected. In any event, the shift reports submitted only demonstrate inspections alleged to have been made by Bombardier employees; given the differing testimony offered as to whose responsibility it was to maintain the carpet, failure to submit the activities of Mountain Contractors renders defendants unable to meet their burden on this motion.

Accordingly, the motion is denied.

Dated: September 1, 2015

J.S.C.

1. Ms. Rodriguez generally spoke of a "sheet of paper" of which she did not know the name, whereby supervisors record, *inter alia*, which agents are assigned to particular stations.