Noboa-Jaquez v Town Sports Intl., LLC
2015 NY Slip Op 32556(U)
April 8, 2015
Supreme Court, New York County
Docket Number: 116744/09
Judge: Andrea Masley
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Index No.: 116744/09

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

DECISION/ORDER

SOFIA NOBOA-JAQUEZ,
Plaintiff,

HON. ANDREA MASLEY
Judge, Supreme Court

-against-

TOWN SPORTS INTERNATIONAL, LLC, d/b/a NEW YORK SPORTS CLUB,
Defendant.

In this personal injury action, defendant Town Sports International, LLC, d/b/a New York Sports Club (the "Gym"), moves pursuant to CPLR 4401 for a directed verdict after the conclusion of plaintiff's case at a bench trial ending on February 3, 2014.[1]

Plaintiff Sofia Noboa-Jaquez alleges that on the morning of July 15, 2009, she fell in the shower area of the locker room on the 14th floor of defendant's gym at 1601 Broadway, N.Y., N.Y., due to the Gym's negligence, causing injury to Ms. Noboa. The Gym argues that plaintiff failed to satisfy her burden of proof on liability.

CPLR 4401 provides for judgment during trial after the close of evidence by the opposing party. The question is whether the plaintiff has made out a prima facie case, viewing the evidence in a light most favorable to the plaintiff. *Nichols v Stamer*, 49 AD3d 832, 833 (2d Dept 2008). The standard is whether a trier of fact could find for the plaintiff by any rational process. *Prince v City of New York*, 21 AD 2d 668 (1st Dept 1964). "Although plaintiff's case may be dubious," the court may not direct a verdict

[1]Decision of this motion was delayed by Ms. Noboa's motion for recusal denied by this court in August 2014. Ms. Noboa's appeal to the Appellate Division, First Department, was denied and the temporary stay vacated on October 14, 2014. Ms. Noboa's counsel also requested a delay in submitting written opposition to the Gym's 4401 motion because he was on trial in an unrelated wrongful death matter. The court granted plaintiff's request for a 3.5 month delay. The court received plaintiff's opposition on January 30, 2015 and the Gym's reply on February 13, 2015.

based on credibility or the lack thereof. *Id.*[2] In a nonjury trial, the court must not weigh the evidence, and must view it most favorably to the nonmoving party. *Crowley v Brown*, 91 AD 2d 601 (2d Dept 1982).

Ms. Noboa presented seven witnesses.[3] First, Ms. Noboa called Luz Feliz, housekeeper on location, who testified that she has been employed by the Gym for eighteen years. Ms. Feliz stated that her job in the female locker rooms on the 14th and 15th floors is to clean the bathrooms, vacuum carpeted areas, wash the sauna and showers, provide fresh towels and remove them after use, and mop whenever and wherever a wet spot appears on the floor of the tiled area adjacent to the shower stalls. She explained that each shower stall was protected by a shower curtain to prevent water from running into the adjoining shower area and she mopped any moisture from the tile floors as needed. Ms. Feliz also recalled that the shower area had once been furnished with rubber floor mats prior to a renovation of the area at some point before July 15, 2009.

As was her routine, Ms. Feliz arrived at work on July 15th around 4:40 A.M. and showered in the 14th floor women's locker room before the gym opened its doors at 6. Ms. Feliz stated that when she first arrived, the locker room was clean and the floors adjacent to the shower stalls were dry and free of any foreign substance or debris. Ms. Feliz firmly responded that over the course of the morning she visited the locker and shower areas repeatedly, as was her duty, and mopped any moisture from the tile

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[2]Accordingly, Ms. Noboa's argument that credibility is the province of the jury, while true if Ms. Noboa had opted for a jury trial, is moot on a motion under CPLR 4401. Likewise, plaintiff's reliance on cases where summary judgment is denied because issues of fact exist is misplaced since here a trial was held and facts are established. *E.g. O'Neil v Holiday Health & Fitness*, 5 AD3d 1009 (4th Dept 2004).

[3]The court summarizes the testimony of the witnesses concerning liability only.

flooring between 6 and 9 A.M., the period in dispute. She stated that a yellow caution sign on the floor in the shower area was plainly visible on approach from the locker room. When Ms. Feliz entered the locker room to perform her duties, Ms. Noboa told her she had fallen and pointed to the location. Ms. Feliz did not see water in the indicated area. Ms. Feliz asked if Ms. Noboa needed help, went to the 15th floor where she reported the incident to Nancy Jones, and returned with two ice packs for Ms. Noboa.

Ms. Feliz was clear and certain that she was present in the shower area at some point between 6:15 and 6:30 A.M. on the morning of July 15th, and again around 7:00 or 7:15 A.M. She saw no pooling or puddling of water by the drain, no soapy substance, and no hair or debris clogging the drain. She did not hear any complaints of a wet or slippery floor.

Ms. Noboa called Nancy Jones, the Gym's reception desk clerk on duty on July 15, 2009, who explained that she worked on the fifteenth floor. Typically, she arrived by 5:30 A.M., turned on lights, including some lights in the 14th floor locker room where Ms. Noboa fell, but saw nothing around the drain, and opened for business at 6. Ms. Jones was familiar with Ms. Feliz's duties and that Ms. Feliz routinely mopped the floor in the locker rooms on the 14th and 15th floors. Ms. Jones confirmed Ms. Luz's account that locker rooms and the shower area are generally left clean at the end of the day and Ms. Feliz would inspect them at the start of her morning shift. Ms. Jones testified that on the morning of July 15th she was stationed at the 15th floor front desk when she learned from Ms. Feliz that a patron had fallen in the shower area of the female locker room on the 14th Floor. Ms. Jones testified that shortly thereafter Ms. Noboa reported she had fallen by the drain in the shower area adjacent to the showers. According to Ms. Jones,

she visited the scene where she met Ms. Feliz who did not have a mop in her hands. Ms. Jones testified that, on her eyewitness inspection of the tiled floor in the shower area shortly after Ms. Noboa's reported fall, she observed no pooling or puddling of water, no soapy substance, and no hair or debris clogging the drain. She saw "droplets of water." A yellow, "watch your step" caution sign was visible on the floor in the tiled area by the drain. Ms. Jones denied any prior complaints of a wet or slippery floor. Ms. Jones reported that she received a call the next morning from a person she believed to be Ms. Noboa and transferred the call to Jeff Fowler, the manager.

Ms. Noboa called Jeff Fowler, the Gym's manager at the time of the incident. Six days after the incident, Mr. Fowler prepared an electronic accident report in which he wrote "member alleges was wet inside lock," which he said referred to the 14th floor women's locker room.[4]

Ms. Noboa testified that on the morning of July 15th she arrived at the gym sometime between 6:30 and 7 A.M. and worked out for the first time at this location. She had toured the premises once before when she was contemplating membership renewal through her employer. After a workout in the gym area of about an hour, she visited the women's locker room to shower and dress for work. Ms. Noboa changed out of her gym clothes and struggled to keep two small towels wrapped around her while she looked for a shower, looking not at the floor. She explained that she wore flip flops at the gym to protect against slippery surfaces and foot disease. According to Ms. Noboa, as she took two steps into the shower area from the 14th floor female locker room and was looking for an empty shower stall, "I found myself on the floor." Ms.

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[4]As plaintiff called defendants' liability witnesses, the only witnesses left for the Gym to call are its doctors.

Noboa testified that a patron emerged from inside a shower stall with shampoo in her hair and, without slipping, helped Ms. Noboa back to her feet. According to Ms. Noboa, she saw water where she fell. T. Dec. 12, 2013 at 102:4-5. When asked "what else did you . . . Besides water what else did you see, if anything?" She responded "It was like the foam from when you rinse your shampoo or your soap, was kind of like a foam in the water." T. Dec. 12, 2013 at 102:10-11. When asked what caused her to fall, Ms. Noboa responded it was "water in the shower area." T. Dec. 12, 2013 at 111:10 to 11. When asked the same question again, she said "soapy water on the floor and the lack of mats." T. Feb. 3, 2014 at 23:20-22. Ms. Noboa could not identify the source of the water or soapy water or foam. T. Dec. 13, 2013 at 79: 15-22. She stated that she was in a rush to reach work by 8:50 A.M. She stated she did not complete an incident report, got no help for her arm, and left for the office shortly before 9. After an hour and a half or so, Ms. Noboa left work for the emergency room at Roosevelt Hospital.

A duty of reasonable care is owed by landowners to people on their property. *Basso v Miller*, 40 NY2d 233, 241 (1976). The happening of an accident does not establish liability. *Lewis v Metro Transp. Auth.*, 99 AD2d 246, 250 (1st Dept), *affirmed*, 64 NY2d 670 (1984). Rather, in a case for negligence, a plaintiff must show (1) a duty owed by defendant to plaintiff; (2) a breach of the duty; and (3) an injury proximately resulting from the breach. *Benjamin v City of New York*, 99 AD2d 995 (1st Dept), *aff'd*, 64 NY2d 44 (1984). To recover for premises liability, plaintiff must prove that (1) the premises were not reasonably safe; (2) defendant was negligent in not keeping the premises in a reasonably safe condition; and (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing injury to plaintiff. PJI 2:90, *Third Ed.*, 554.

Where plaintiff alleges that a foreign substance caused injury, she must show that it was "present under circumstances sufficient to charge the defendant with responsibility therefor." *Goodman v 78 W 47th St. Corp.* 253 AD2d 384 (1st Dept 1998). Plaintiff must show that defendant had actual or constructive knowledge of the dangerous condition, or proof that defendant caused the condition. *Acevedo v York Intern. Corp.*, 31 AD3d 255 (1st Dept 2006), *lv to appeal denied*, 8 NY3d 803 (2007). Mere speculation as to the cause is not sufficient to sustain a negligence action. *Segretti v Shorenstein Co. E., L.P.*, 256 AD2d 234 (1st Dept 1998)("Plaintiff, who testified only to seeing 'stuff' on the floor of the lobby, has merely established that there was an 'oily substance' on his shoes with no known etiology. While surmising that it might have come from the garbage room located across the hall from defendant Champ, plaintiff testified that he never saw any substance emanating from that source.")

The presence of water alone is insufficient to establish a dangerous condition. *Nespoli v Equinox Holiday Inc.*, 2012 NY Slip Op 32420U (Sup Ct, NY County 2012)(where plaintiff slipped on moist tiles in sink area of gym, case dismissed on summary judgment because wet floor is incidental to use of locker room and not a dangerous condition or defect). Where plaintiff slipped and fell on a tile floor near a swimming pool and there was no evidence as to how long the water had existed, nor was the water "above and beyond what one might ordinarily expect to encounter around a pool," the water was "necessarily incidental" to the use of the pool. *Dove v Manhattan Plaza Health Club*, 113 AD 3d 455 (1st Dept), *lv to appeal denied, 24 NY3d 901 (2014).* Where plaintiff slipped and fell near shower stalls of defendant golf club where a mat had recently been removed for cleaning, the complaint was dismissed because the

absence of a mat adjoining the shower stall did not constitute negligence, where there was no evidence that the shower room was constructed improperly, drained improperly, or maintained in such a manner that existing water was "increased by an act of defendant." *Traub v Progress Country Club, Inc.*, 256 AD 249, 250 (1st Dept 1939). Where the evidence "demonstrates that the complained-of hazard upon defendant's premises, a wet locker room floor, was not visible and apparent, much less visible and apparent for a sufficient period of time to permit its discovery and remediation, the complaint was properly dismissed." *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 139 (1st Dept 2004).

Ms. Noboa maintains that the Gym breached its duty of reasonable care by failing to maintain the women's locker room in a safe condition. According to plaintiff, the Gym allowed soapy water to accumulate beyond that which would normally be incidental to showering, and defendant knew or should have known that this posed a risk of injury. Ms. Noboa argues the Gym's prior use of mats creates a duty to continue to furnish mats. Ms. Noboa asserts that Ms. Feliz' practice of repeated mopping shows that the Gym knew a wet floor could be hazardous. Ms. Noboa also argues that the yellow caution sign shows that "soap scum and foamy water" were a known hazard.

Viewing the evidence in a light most favorable to the nonmovant, as the court must on a motion under CPLR 4401, Ms. Noboa has not demonstrated that the Gym breached its duty of care by failing to maintain the women's locker room in a reasonably safe condition. The testimony of Luz Feliz and Nancy Jones, plaintiff's witnesses, establishes that the locker room was dry and clean of debris when the gym opened at 6 A.M. The testimony further establishes that Ms. Feliz made repeated visits to the 14th floor shower area and repeatedly mopped to ensure that water did not accumulate. Ms.

Feliz testified that she inspected the 14th floor shower area floor found it dry around 7:15 A.M., not long before Ms. Noboa fell. Ms. Noboa's testimony that she saw water or soapy water or foam by the drain in the floor, without more, indicates nothing more than the passing presence of water or soapy water or foam incidental to the use of the shower area. Ms. Noboa fails to establish whether foam was present before she fell and did not fall from the head of the patron who came to her rescue from the shower with shampoo foam on her head, according to Ms. Noboa. Ms. Noboa conceded that she wore flip flops to protect against the known risk of slippage in shower areas. There is thus no evidence that the Gym allowed a dangerous buildup of slippery substances, water or foam or soap.

Ms. Noboa's vague description is insufficient to establish that it was a dangerous condition. *See e.g. Van Stry v State of New York,* 104 AD2d 553 (2d Dept 1984)(the water condition was not "necessarily incidental" where the water puddle in the locker room, where the injury occurred, located 20 to 30 feet from the shower area, measured 18th of one inch deep and 4 to 5 feet in diameter). Here, Ms. Noboa testified to water or soapy water or foam. Ms. Jones testified to "droplets" of water. Droplets of water are necessarily incidental to a shower area.

Notably, Ms. Noboa offered no expert testimony to show that the Gym created a dangerous condition. There is no proof of the condition or composition of the floor, the tiles. *See e.g. Pena v Bally Total Fitness*, 2014 WL 3795955 (Sup Ct, Bronx County 2014). Nor does Ms. Noboa mention any violation of a code or rule. The court heard no testimony on the industry standard for tile flooring near shower stalls. Ms. Noboa proffered no evidence that the shower room was constructed or drained improperly. *See Weisbart v. Hudson Manor Terrace Corp.*, 299 AD2d 160 (1st Dept 2002). Ms.

Noboa fails to prove that there was an actual dangerous condition.

Plaintiff may establish constructive notice with evidence that an "ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord." *O'Connor-Miel v Barhite & Holzinger, Inc.*, 234 AD2d 106, 106-107 (1st Dept , 1996)(where plaintiff shows a history of laundry powder on stairs where she fell, defendant's assertion that it regularly cleans without more detail is insufficient for determination as matter of law that remediation was sufficient). The court agrees with Ms. Noboa's assertion that the Gym's use of a yellow danger sign and constant mopping by Ms. Feliz demonstrate an ongoing and recurring water condition, not soap scum or foamy water as plaintiff's attorney asserts, nor a dangerous condition unaddressed by defendant. *Cf, Choi v Olympia & York Water St. Co.*, 278 AD2d 106 (1st Dept 2000)(use of mats when it rains is not proof of a general awareness of a dangerous recurrent condition that defendants routinely left unaddressed). However, proof of regular inspections and maintenance establishes the absence of notice of the particular condition that caused the injury or a condition remediated by landlord. *Stewart v Canton-Potsdam Hosp. Found., Inc.*, 79 AD3d 1406 (3d Dept 2010).

Nor is there evidence that the watery, soapy or foamy condition by the drain was visible and apparent, let alone for a sufficient period to permit remediation. "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 defendant's employees to discover and remedy it ." *Gordon v American Museum of Natural History*, 67 NY2d 836 (1986)("the piece of paper that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation"). "[T]he law imposes no obligation to take continuous remedial action to

remove moisture accumulating as a result of pedestrian traffic." *Thomas v Boston Props.*, 76 AD3d 460 (1st Dept 2010). *See, Pomahac v Trizechahn*, 65 AD3d 462 (1st Dept 2009)(defendant "not obligated to provide constant remedy to the problem of water being tracked into building in rainy weather"); *See also Choi, supra* (where plaintiff slipped in building lobby an hour after it rained, case dismissed as defendant had no obligation to constantly remedy water that may have been tracked in immediately before plaintiff fell).

As to Ms. Noboa's theory that the Gym negligently failed to provide the area outside the shower stalls with rubber mats, as had been its past practice, the record is bereft of any proof that mats were required. *See Promahac, supra* (failure to adhere to its practice of placing a certain number of mats in a particular fashion when it rained insufficient to raise issue of negligence because a defendant's breach of its own policy cannot be considered evidence of negligence where the policy transcends reasonable care). Ms. Noboa offers no authority, explanation or expert opinion for her proposition that mats outside of the shower stalls would have prevented a mishap to Ms. Noboa near the drain, steps from the locker area. *See e.g. Pena*, *supra* (expert opines that textured tiles, Carborundum grit embedded into the surface or rubber mats should have been provided). Ms. Noboa also fails to address Ms. Feliz's testimony that mats were permanently removed by the Gym after the premises were renovated. There is no evidence that the Gym's premises were maintained in such a manner that an unsafe condition was created or increased by Gym's removal of mats. *Traub v Progress Country Club, Inc., supra.* While mats may have been required before the renovation, that the shower room floor remained slippery after the renovation is speculative.

As to the yellow sign or absence thereof, Ms. Noboa admitted that she was

aware of the slippery condition. Indeed, she wore flip flops because of the known slippery condition. Whether Ms. Noboa saw the sign or not is irrelevant.

Here, the evidence is simply insufficient to establish liability. There is no evidence to weigh. Rather, there is no rational basis for a trier of fact to find for Ms. Noboa and against the Gym on the issue of liability. As Ms. Noboa has failed to establish that the Gym breached a duty of care, the court need not reach the issue of injury.

The court need not address Ms. Noboa's failure to offer any evidence that the New York Sports Club was owned by Town Sports International.

Accordingly, it is

ORDERED that the Gym's motion is granted and the action is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: April 8, 2015

Andrea Masley, JSC

HON. ANDREA MASLEY

FILED

APR 14 2015

COUNTY CLERK'S OFFICE
NEW YORK