Lilavois v JP Morgan Chase & Co.
2015 NY Slip Op 32724(U)
June 4, 2015
Supreme Court, Nassau County
Docket Number: 600613-11
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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MARIE LILAVOIS AND FRANTZ LILAVOIS,

Plaintiff,

-against-

JP MORGAN CHASE AND COMPANY AND VORNADO REALTY TRUST,

Defendants.

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TRIAL PART: 9

NASSAU COUNTY

MOTION SEQ. NO: 3,4

INDEX # 600613-11

SUBMIT DATE: 4/20/15

The following papers have been read on this motion:

Notice of Motion.....1
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Motion by defendants JP Morgan Chase Bank, N.A. s/h/a JP Morgan Chase and Company ("Chase") and Vornado Realty Trust ("Vornado"), for judgment dismissing the complaint pursuant to CPLR§ 3212, is denied.

Cross-motion by plaintiffs for an Order, striking Chase's answer pursuant to CPLR §3126 for spoliation of the security camera video of the accident is granted to the limited extent that an adverse inference charge may be available against Chase at trial. Plaintiffs' additional request for leave to amend the complaint and add two new defendants, is granted as to Vornado Management Corp. ("Management"), and denied as to Green Acres Mall, LLC.

On Monday, August 3, 2009, at approximately 9:45 A.M., plaintiff Marie Lilavois fell as she began to enter her PIN code at an ATM located in Chase's vestibule inside Green Acres Mall. She alleges that she fell due to a "watery substance" on the floor, which she did not notice before her fall. She testified that her purse, parts of her pants and her sandals got wet from the clear liquid

on the floor, but she didn't know how long the liquid was on the floor prior to her fall.

Chase is the lessee of the premises where plaintiff fell. Stevie Adams, the systems branch manager for the Chase location at issue on the date of Ms. Lilavois' fall, testified that the mall maintained Chase's ATM vestibule, because it was outside the bank. Mr. Adams noted that although the bank was not open on Sundays, the vestibule was open then. Although he actually never saw any person clean the vestibule, Mr. Adams had observed mall maintenance workers walking around or mopping up when it was raining or snowing. He testified that if there was a watery condition in the vestibule, he would get an employee of the mall to clean it up. In general, the first employee in the bank in the morning would walk through the branch and make sure everything was in order.

When he learned of Ms. Lilavois' fall from another employee, Mr. Adams went to see if he could help. He testified that everybody was gone, but there was a cup on the floor and some liquid on the floor. The liquid was clear and looked like water. Mr. Adams testified that he was not aware how long the cup that he saw on August 3, 2009 was in the ATM area, nor how long the wet condition existed on the floor of the ATM area, prior to Ms. Lilavois' fall. Mr. Adams could not recall if the manager, Caroline Tufano, or the assistant manager, Lorenzo Camacho, were working on the day of plaintiff's fall, and he did not know if it was the first time he went out to the vestibule on August 3, 2009, when he saw the cup and the watery condition. Although he testified that there were surveillance cameras in the ATM vestibule in August, 2009, Mr. Adams never made a request to view the video footage from that day.

Mr. Adams did not know the name of Chase's cleaning company, whose employees came in to clean after the bank closed for the day, and he did not know if that cleaning company cleaned the ATM vestibule. Chase did not employ a janitor; it was the responsibility of all employees, generally, to inspect and maintain the physical premises. Mr. Adams admitted that there were instances in which Chase employees would clean up minor messes, sometimes accessing the custodial closet, where cleaning supplies were kept for the cleaning company.

Joseph Floccari was deposed on behalf of Vornado. He testified that in August, 2009, he was the General Manager at the Green Acres Mall, and that his employer was Management. When asked the relationship between Vornado and Green Acres Mall, Mr. Floccari stated that Vornado

was a subsidiary to Green Acres Mall LLC. As to a difference between Vornado and Management, Mr. Floccari testified that he did not know the difference.

As the General Manager, Mr. Floccari's job was to oversee workers maintaining the mall to the "lease line," or the demarcation between the common areas of the mall and the leased premises. The maintenance staff were employees of Green Acres Mall, LLC. They patrolled the common areas with push carts.

According to Mr. Floccari, the tenant was to maintain the interior of the leased premises. If a tenant did not keep its premises in good order and repair, a verbal notification would be made, and if necessary followed by a written notification from Green Acres Mall, LLC.

Mr. Floccari submits a copy of a lease (Exhibit I to the moving papers) between Green Acres Mall, LLC, and Chase's predecessor, Washington Mutual Bank. He also submits a copy of a Receiver's Assignment and Assumption of Lease ("Receiver's Assignment"), pursuant to which FDIC, the Receiver for Washington Mutual Bank assigned the subject lease to Chase and Chase assumed the tenant's obligations under the lease. The lease and the Receiver's Assignment were in effect on August 3, 2009. According to Mr. Floccari, Management maintained the subject lease and Receiver's Assignment.

On this record defendants seek summary judgment dismissing the complaint in its entirety at this time. They argue that Vornado had no duty to plaintiff. The further argue that in any event there is no evidence that defendants created the alleged watery condition of which plaintiff complains, nor is there any evidence that defendants had active or constructive notice of the condition that allegedly caused plaintiff's fall.

Plaintiffs oppose the motion and cross-move for sanctions against Chase for spoliation, and leave to amend the complaint to add two new defendants.

Summary Judgment Standard

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 N.Y.2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d

72, 82 [2003]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The evidence must be viewed in the light most favorable to the non-moving party (*Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931 [2007]; *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 315 [2004]). It is not the court's function on a motion for summary judgment to assess credibility (*Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 631 [1997]; *Cerniglia v. Loza Rest. Corp.*, 98 A.D.3d 933 [2nd Dept. 2012]).

Defendants' Motion for Summary Judgment

Defendants' first argument is that Vornado owed no duty of care to plaintiff. Vornado relies upon the lease (Exhibit I) which provides, in pertinent part:

> All Store Floor Area of Tenant, including vestibules, entrances and returns, doors, fixtures, windows and plate glass, shall be maintained in a safe, neat and clean condition.

(Exhibit I at Exhibit E - Rules and Regulations, at par. 5). Mr. Floccari testified that each tenant was responsible for maintaining its premises to the lease line. Consequently, Vornado insists that it had no duty to maintain Chase's vestibule where plaintiff fell.

In opposition, plaintiffs argue that pursuant to their Amended Answer (Exhibit C to the moving papers), Vornado admits that it owns the subject property. Plaintiffs insist that the lease does not supersede Vornado's common law duty to maintain its premises.

Absent a duty of care to the person injured, one cannot be held liable in negligence (*Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339, 342 [1928]). A landowner has a duty to maintain its property in a reasonably safe condition under all of the circumstances (*Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). An out-of-possession owner is not liable for injuries that occur on owned or leased premises unless it has retained control over the premises, is statutorily or contractually obligated to repair or maintain the premises (see *Martin v. I Bldg. Co., Inc.*, 126 AD3d 861 [2d Dept. 2015] and *Alnashmi v. Certified Analytical Group, Inc.*, 89 AD3d 10 [2d Dept. 2011]), or

has assumed such a duty by virtue of a course of conduct (*Ritto v. Goldberg*, 27 N.Y.2d 887, 889 [1970]; *Dimas v. 160 Water St. Assoc.*, 191 AD2d 290 [1st Dept. 1993]; *Cherubini v. Testa*, 130 AD2d 380 [1st Dept. 1987]).

On this record Vornado has established that it is not contractually obligated to maintain the leased premises, and plaintiff does not raise any issue as to a statutory obligation. However, Mr. Adams' testified that the mall maintained Chase's vestibule because it was outside the bank, and the Court is compelled to view this evidence in the light most favorable to the non-moving party. Under these circumstances defendants have failed to make out a *prima facie* case that Vornado did not engage in a course of conduct by which it assumed a duty of maintenance, notwithstanding the lease. Consequently, Vornado's request for summary judgment dismissing the complaint on the grounds of no duty, must be denied.

Defendants further seek summary judgment on the grounds that they did not create the condition and had no actual or constructive notice of the alleged watery condition that cause Ms. Lilavois' fall. The record contains no evidence of creation by defendants or actual notice.

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 defendants' employees to discover and remedy it (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]). Mr. Adams testified that the bank opened at 8:30 A.M. on weekdays, and that there was no routine schedule he knew of, by which any employee of Chase or the mall was responsible to inspect and clean the ATM vestibule. His testimony regard the morning walk-through was general. In addition, he could not recall if he cleaned up the watery condition on August 3, 2009, or if somebody else did.

Defendants have the initial burden of making a *prima facie* case showing of no constructive notice. They failed to satisfy this burden since they failed to offer evidence as to when the accident location itself was last inspected or cleaned before Ms. Lilavois' fall (*Derise v Jaak 773, Inc.*, 127 AD3d 1011 [2d Dept. 2015]; *Moore v. 1772 Weeks Ave. Hous. Dev. Fund Corp.*, 123 AD3d 456 [1st Dept. 2014]; *Heck v. Regula*, 123 AD3d 665 [2d Dept. 2014]; *Williams v. New York City Hous. Auth.*, 119 AD3d 857 [2d Dept. 2014]; *Oliveri v. Vassar Bros. Hosp.*, 95 AD3d 973 [2d Dept. 2012], lv. app. dsmd. 20 N.Y.3d 965 [2012]). Mr. Adams' testimony regarding a morning

walk-through was insufficient because it described a general procedure, rather than the events of August 3, 2009, prior to the fall, of which he had no specific recollection (see *Williams*, *supra.*).

Based on the foregoing, defendants' motion for summary judgment dismissing the complaint must be denied.

Plaintiffs' Cross-Motion for Sanctions and Leave to Amend

In the cross-motion plaintiffs seek sanctions against Chase for alleged spoliation of the video footage of Ms. Lilavois' fall and the time immediately preceding her fall. Plaintiffs note that defendants have produced four "still" photos of the ATM vestibule (Exhibit C to Kurzatkowski affirmation). They seek the video footage from which the "still" photos were taken. Two of the photographs shows Ms. Lilavois on the floor in front of an ATM.

In opposition, Chase submits an affidavit from Patricia York, Chase's Vice President of Global Security and Investigation. She testifies that ATM vestibule video footage from security cameras is generally only maintained for 90 days. However requested footage is preserved on recordable media/DVD and forwarded to the requestor. She did receive a request for surveillance video in connection with the subject accident on the day of the accident. According to Ms. York she performed a search for the requested video and "determined that no such surveillance video exists for this location" (York affidavit, par. 13).

The attorney for defendants claim that the four photographs "were taken by Vornado following the Plaintiff's alleged accident" (Kurzatkowski affirmation in opposition, par. 16). The photos were allegedly mailed, together with an incident report to Vornado's insurer on September 10, 2009 (Exhibit D to Kuzatkowski affirmation). Vornado insists that it has no surveillance video of plaintiff's fall because its video cameras cover the food court.

Overall, it is defendants' attorney who avers that defendants "have not inadvertently and/or intentionally destroyed any surveillance video in connection with Plaintiff's alleged accident" (Kurzatkowski affirmation, par. 16).

Under the common law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thus depriving an adversary of the ability to prove a claim, the responsible party may be sanctioned under CPLR§ 3126 (*Biniachvili v. Yeshivat Shaare Torah, Inc.*, 120 AD3d 605 [2d Dept. 2014];

Neve v. City of New York, 117 AD3d 1006 [2d Dept. 2014]; *Samaroo v. Bogopa Serv. Corp.*, 106 AD3d 713 [2d Dept. 2013]). The determination of whether sanctions for spoliation are appropriate is within the sound discretion of the trial court (*Lentini v. Weschler*, 120 AD3d 1200 [2d Dept. 2014]; *Neve, supra*; *Samaroo, supra*; *Giuliano v. 666 Old Country Road, LLC.,* 100 AD3d 960 [2d Dept. 2012]). The nature and severity of the sanctions for spoliation depend upon a number of factors, including, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of evidence, and the degree of prejudice to the opposing party (*Lentini, supra*; *Neve, supra*; *Samaroo, supra*).

Chase was on notice, from the day of the accident, that the ATM video surveillance footage was to be preserved. Ms. York admits that she received the request for the video surveillance footage, and performed a search for that footage. Without a single detail regarding that search, her statement that "no such surveillance video exists for this location" (York affidavit, par. 13), is conclusory and unsupported. It is also unclear how Vornado came to be in possession of still photos apparently taken moments after Ms. Lilavois' fall, with no explanation whatsoever.

Ms. Lilavois has already testified that there were no witnesses to her fall and she was not aware of the watery condition of the floor prior to her fall. Even the "still photos" do not provide evidence of the duration of the alleged watery condition. Consequently the requested video surveillance footage is critical to the issues of actual and constructive notice of the subject watery condition in Chase's ATM vestibule on the morning of plaintiff's fall.

On this record, a question of fact is presented as to whether spoliation of relevant evidence occurred (*Pennachio v. Costco Wholesale Corp.*, 119 AD3d 662 [2d Dept. 2014]), and the determination of this issue is one of credibility for the jury (*Pennachio*). If the jury credits testimony that "no surveillance video exists" for the subject location, then sanctions are not warranted. However, if the jury does not credit the testimony, it should be instructed to draw an adverse inference against Chase regarding the unavailable surveillance video (*Pennachio*, *supra*; see generally *Giuliano, supra).*

Finally, plaintiffs seek leave to amend their complaint and bring in two new defendants, Green Acres Mall, LLC. and Management. Although the negligence limitations period has expired, plaintiffs argue that the "relation-back" doctrine allows a claim asserted against a defendant in an

amended complaint to relate back to claims previously asserted against a co-defendant for limitations purposes, where the two defendants are united in interest (*Roseman v. Baranowski*, 120 AD3d 482 [2d Dept. 2014]). Plaintiffs characterize Mr. Floccari's testimony as establishing that Management and Green Acres Mall, LLC. are united in interest with Vornado.

Under the relation-back doctrine, three conditions must be met in order for claims against one defendant to relate back to claims asserted against another, and they are: (1) both claims arose out of the same conduct or occurrence, (2) the new party is "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense, and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Buran v. Coupal*, 87 N.Y.2d 173, 178 [1995]).

Defendants concede that the first prong of the test is satisfied.

However, contrary to plaintiffs' attorney's claim, Mr. Floccari did not testify that Management and Green Acres Mall, LLC. are united in interest with Vornado. He testified that he did not know the difference between Vornado and Management, and that Vornado was a subsidiary of Green Acres Mall, LLC.

The existence of a parent-subsidiary corporate relationship is insufficient to establish a unity of interest between two corporations (*Achtziger v. Fuji Copian Corp.*, 299 AD2d 946 [4th Dept. 2002]). Related corporations are united in interest only where one corporation is vicariously liable for the acts of another (*Id.*). "For such vicarious liability to exist the parent corporation must exercise complete dominion and control over the subsidiary's daily operations" (Id.). Here there has been no showing that Green Acres Mall, LLC. exercises complete dominion and control over Vornado. Furthermore, in its Amended Answer Vornado admitted ownership of the subject premises. On this record, plaintiffs' request to add Green Acres Mall, LLC., as a defendant, must be denied.

In contrast, the relationship of Vornado and Management is unclear, and it appears that "the two companies, intentionally or not, often blurred the distinction between them" (*Donovan v. All-Weld Prods. Corp.*, 34 AD3d 257 [1st Dept. 2006]). It is significant that Mr. Floccari was

produced for deposition by Vornado, even though he was employed by Management (*Id.*). Under these circumstances plaintiffs have made out a *prima facie* case that Management is "united in interest" with Vornado, and that but for plaintiffs' mistake, the action would have been brought against it as well. Accordingly, plaintiffs' request for leave to amend the complaint to add Management as a party defendant is granted.

This constitutes the decision and order of this Court.

ENTER

DATED: June 4, 2015

HON. ARTHUR M. DIAMOND
J. S.C.