Graziano v Mount Sinai Hosp.
2016 NY Slip Op 30833(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 156292/2012
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. **PART** 35

Index Number : 156292/2012
GRAZIANO, CARMELA
vs
MOUNT SINAI HOSPITAL
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/29/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

The motion by defendant The Mount Sinai Hospital ("defendant") for summary judgment dismissing the complaint of the plaintiff is decided as follows:

Discussion

In this personal injury action, plaintiff alleges that on July 16, 2012, she slipped and fell on a wet floor in a hallway located on the fifth floor of the Guggenheim Pavilion of defendant's hospital.

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 962 NYS2d 46 [1st Dept 2013]; *Pfeuffer v New York City Housing Authority*, 93 AD3d 470,

Dated: _____ , **J.S.C.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

940 NYS2d 566 [1st Dept 2012]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 927 NYS2d 49 [1st Dept 2011]). To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Harrison v. New York City Transit Authority*, 113 A.D.3d 472, 978 N.Y.S.2d 194 [1st Dept 2014] *citing Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]).

Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" *(Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, *supra, citing Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 913 NYS2d 189 [1st Dept 2010], *citing Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v. Genger*, 123 AD3d 445, 447 [1st Dept 2014] lv to appeal denied, 24 NY3d 917 [2015] *citing Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

In *Green v. Gracie Muse Restaurant Corp.*, 105 A.D.3d 578963 N.Y.S.2d 240 [1st Dept 2013), the Court held that defendant restaurant demonstrated that it had no notice of the slippery substance by submitting "the testimony of its manager who stated that on the day of the accident, he had been on duty for several hours before plaintiff's fall, and walked around and inspected the entire restaurant every three to four minutes. He also testified that he did not see any spills of food, liquid, or debris on that day, and did not receive any complaints about such conditions. The hostess on duty at the time also testified that she did not receive any such complaints. Moreover, the manager observed that the floor was clean and dry prior to the accident, and inspected the area where plaintiff fell shortly thereafter and saw that it was still clean and dry." The court also noted that plaintiff did not observe a hazardous condition prior to her fall.

Here, defendant established that it neither created nor had constructive notice of the alleged wet condition prior to plaintiff's accident.

Plaintiff testified at her deposition that at approximately 5:00 p.m. on July 16, 2012, she and her son Carl Graziano ("Carl") were walking with a nurse from the waiting area to the Intensive Care Unit ("ICU") where her husband was located. (EBT, pp. 35-36). As she was walking, she fell on "a liquid" in the "hallway" "area like an atrium" (EBT, p. 40). She saw the liquid after she fell; she did not see the liquid before she fell (EBT, pp. 41-42). She did not know what the liquid was and did not notice the color of the liquid (EBT, p. 41).

Carl testified at his deposition that after his mother fell, he observed "a liquid in the middle of the hallway" (EBT, p. 23). The liquid spanned approximately one feet long and one foot wide (EBT, p. 24). The first time Carl saw the liquid on the floor was after his mother's fall

(EBT, pp. 59-60).

Defendant's Director of Housekeeping, Brendan Scott, testified at his deposition that staff is required to use an "automated machine[] that clean[] and vacuum[s] up the water directly behind it for [] daily cleaning" (EBT, p. 15). Corridors and hallways are "cleaned once a day, Monday through Friday utilizing the 'Autoscrubber machine'" (EBT, pp. 16-17). The floor is left dry in the process of the Autoscrubber cleaning and vacuuming the floors (EBT, pp. 18-19).

Marissa Janneire attests that the Autoscrubber was used to clean the fifth floor Pavilion between 11:15 and 11:30 p.m., 15 hours before the alleged accident (Affidavit, ¶7).

Further, the defendant's call log for the date in question, as attested to by Marissa Janneire, indicates that no reports or calls of "any wet floor condition" as to the fifth floor Atrium was made. And, the floors of the Pavilion are inspected by operations managers and other support associates at least once an hour during their shifts, and any condition that needs to be cleaned, including a spill, will be personally cleaned by such staff if seen (Affidavit, ¶8). The shifts are either 6 a.m. to 4 p.m., 2 p.m. to 12 a.m., or 9 p.m. to 2 a.m.

Based on the above, there is no evidence that defendant created or had prior notice of the alleged wet condition prior to plaintiff's accident. There is no evidence of the period for which the alleged wet condition remained on the floor prior to plaintiff's fall, or that any of defendant's employees created the wet condition in any manner. Notably, the inspection schedule indicates that staff inspected the area at 4:00 p.m., one hour prior to plaintiff's accident, and that no reports of a spill was made.

In opposition, plaintiff failed to raise an issue of fact as to the issue of notice.

Plaintiff's claim that an inference of constructive notice, *i.e.*, a recurring condition, can be drawn from the testimony that the floors were cleaned on a regular basis, amounts to a claim of general awareness that floors may become wet, which the First Department recently held was insufficient to establish constructive notice of a particular wet condition (*Pagan v New York City Hous. Auth.*, 121 A.D.3d 622996 N.Y.S.2d 10 [1st Dept 2014] (finding absence of issue of fact where there was no "evidence that a recurring dangerous condition of wetness on the stairs was left unaddressed, since the caretaker and supervisor testified that these areas were cleaned daily, and plaintiff testified that complaints to the porters concerning the stairs were addressed")). Plaintiff's claim that defendant had knowledge of the purported "recurring" condition of the wet floor is unsupported by any evidence in the record. There is no evidence of any water or wet condition that occurred on any periodic basis prior to plaintiff's accident.

This is not an instance where the affidavit fails to state how often the floor was inspected or fails to state that the floors were inspected prior to the alleged accident (*cf. Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 985 N.Y.S.2d 509 [1st Dept 2014] (affidavit of owner held insufficient to establish a lack of constructive notice because "he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident")).

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint of the plaintiff is granted, and the complaint is hereby dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

The Clerk may enter judgment accordingly.

DATED: 5/5/16

HON. CAROL R. EDMEAD J.S.C.

J.S.C.

1. CHECK ONE : ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE