

Smith v Wildcat Servs. Corp.
2016 NY Slip Op 31345(U)
June 20, 2016
Supreme Court, Bronx County
Docket Number: 310808/11
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

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KWANZA SMITH,

Plaintiff,

-against-

WILDCAT SERVICES CORP.,

Defendant.

Index No.: 310808/11

DECISION/ORDER

Howard H. Sherman
J.S.C.

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The following papers 1-3 read on this motion for summary judgment defendant noticed on October 30, 2015 and duly submitted after oral argument on February 8, 2016

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits A-I and Affidavit Annexed	1	
Answering Affidavit and Exhibits A-F	2	
Replying Affidavit and Exhibits	3	

Plaintiff Kwanza Smith (Smith) seeks damages for personal injuries alleged to have been sustained on October 11, 2011 when she slipped and fell on the floor of the lobby of the Bronx County office building where she was employed as a peace officer for the New York City Department of Homeless Services (DHS). At th at time, pursuant to its contract with DHS, Wildcat Services Corporation (WSC) ¹ was providing janitorial services for the agency at the location.

¹ WSC is a division of FedCap, a 501[c][3] not-for-profit engaged in vocational training and job procurement.

Motion

WSC now moves pursuant to CPLR 3212 for an award of summary judgment dismissing the complaint on the grounds that the record demonstrates as a matter of law that it neither created the causative transitory condition alleged, nor, have actual or constructive knowledge of its existence on the lobby floor before the incident.

The motion is supported by copies of the pleadings, and of the transcripts² of the deposition testimony of plaintiff, and defendant by its Manager of Operations for Building Services, and a witness for the former third-party defendant AHRC New York City-Hudson River Services (AHRC).³

Plaintiff opposes the motion contending that defendant failed to make its prima facie showing, and alternatively, plaintiff has raised material issues of fact precluding dispositive relief.

Testimony

In pertinent part, plaintiff testified that while walking to the elevator on the tiled lobby floor her foot slipped from underneath her and she fell to the ground. After the fall, she observed "some type of thick, waxy film was on my hands ... on [her]pants." [48: 16-20]. Smith testified that the substance was "colorless except on her pants, and it had a "chemical" smell [49: 3]. She had previously observed WSC maintenance work wax

² All transcripts are unsigned and with the exception of that of AHRC's witness, uncertified by the court reporter. However, as the contents are not challenged as inaccurate, the court will consider the testimony on the motion.

³ AHRC is a not-for-profit organization providing assistance, including support employment for people with developmental disabilities.

the floors [49: 11-20].

Mario LaRosa (LaRosa), WSC's manger of operations, testified that the daily janitorial services provided at the site included sweeping and mopping the corridors and hallways, including the first floor lobby at regular intervals. [8:12;18-20]. The mopping, which would follow a sweeping of the section with a dust mop , would usually be performed by crews between 10:00 pm and 5:00 am on weekdays ⁴ and the equipment would include floor signs, and a bucket with a wringer, and an all purpose de-greaser [13-21]. No contemporaneous records were kept in connection with this task [13].

Despite the fact that the contract specifically stated that "stripping, waxing and polishing" of the floors was an enumerated task assumed by the vendor, these services , while performed by WSC at other locations, since the inception of the contract in 2008, were never performed at the subject facility at the specific directive of the DHS contract liaison [33-34; 36-41]. AHRC by New York City Hudson River Services was the party responsible to perform in-site "stripping, waxing, and buffing of the floors." [23: 8-9], and he did not know when these services had last been performed prior to the incident [23]. He was unaware of any complaints concerning the condition of the floors at the building before the accident [51].

Wayne Thomas (Thomas) was a Regional Director for AHRC, charged with oversight of janitorial contracts with city agencies, and of the non-profit's

The incident occurred on a Wednesday at 6:30 a.m.

support employment, and he testified that AHRC provided janitorial services, including daily mopping and periodic waxing of floors, at the subject DHS location only after January 2012 [21-22], and he was not aware as to whether WSC performed these services at the location prior to that date [23].

Discussion and Conclusions

To obtain dispositive relief on this motion, defendant is required to demonstrate as a matter of law that there is no issue of fact that it caused the waxy substance to be on the lobby floor at the time of the accident or that prior to the incident it knew or should have known that this dangerous condition existed there.

The court finds that defendant has failed to satisfy its initial burden on the motion with respect to both the causation of the condition as well as the lack of constructive notice of its existence prior to the accident.

Concerning the former, defendant's witness conceded that the contract with DHS in effect at the time of the accident called for WCS to provide services encompassing the waxing of the floors of the facility. Plaintiff observed such services being performed by WCS employees during the course of the one to two year period she had been working there. Serving to further diminish the probative value of defendant's evidence that it never waxed the floors of the facility, is the testimony of AHRC's regional director concerning the timing of that entity's assumption of janitorial services at the location. This evidence as afforded all favorable inferences in favor of plaintiff raises a material issue of fact as to

whether WSC employees waxed the floor of the lobby prior to the accident.

Also unresolved here is the issue of constructive notice of the alleged condition since defendant failed to offer probative evidence as to when the accident location was last inspected and/or cleaned by its employees before plaintiff's fall (see, Jackson v Whitson's Food Corp., 130 A.D. 3d 461, 462, 13 N.Y.S. 3d 71 [1st Dept. 2015]; Tucker v New York City Hsg. Auth., 127 A.D. 3d 619, 620, 8 N.Y.S. 3d 141 [1st Dept. 2015]; Seleznyov v New York City Tr. Auth., 113 A.D. 3d 497, 979 NYS 2d 44 [1st Dept. 2014]; Nelson v Metropolitan Transp. Auth., 122 A.D. 3d 532, 998 N.Y.S. 2d 14 [1st Dept. 2014]; Rodriguez v Board of Educ. of the City of N.Y., 107 A.D. 3d 651, 651-652, 969 N.Y.S. 2d 25 [1st Dept. 2012]).

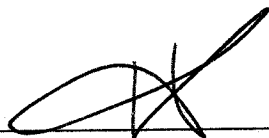
As defendant has failed to make its initial showing on the motion, the court need not consider the sufficiency of the submissions in opposition (see, Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]).

Accordingly, it is

ORDERED that the motion be and hereby is denied.

This constitutes the decision and order of this court.

Dated: June 20, 2016
Bronx, New York



Howard H. Sherman
J.S.C.