Colmorgen v Board of Trustees of Cornell Univ.
2017 NY Slip Op 31884(U)
September 11, 2017
Supreme Court, Tompkins County
Docket Number: 2012-0492
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 21st day of July, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

JESSICA ANN CHASEY COLMORGEN,

Plaintiff,

-vs-

BOARD OF TRUSTEES OF CORNELL UNIVERSITY and CORNELL UNIVERSITY,
Defendants.

DECISION

Index No. 2012-0492
RJI No. 2017-0163-J

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a motion for Summary Judgment made by the Board of Trustees of Cornell University and Cornell University ("Defendants" or "Cornell") and pursuant to CPLR §3212. Jessica Colmorgen ("Plaintiff") cross moved for Partial Summary Judgment regarding negligence, and reserving issues of comparative negligence to the finder of fact.

The facts are not in dispute. In August of 2009, the Plaintiff was a student at Cornell University and resided in Baker Tower on the Cornell University Campus, Ithaca, New York. The Plaintiff's room had an adjacent bathroom which contained two toilets, two sinks and a shower stall. On August 28, 2009, a few days after moving into the residence hall, the Plaintiff entered the adjacent bathroom to wash a dish. She noticed a four to five inch by six inch area of pooling water near a floor drain and walked around it. After washing the dish, the Plaintiff began to exit the bathroom and walked through the water and slipped and fell to the floor sustaining injuries.

Numerous Cornell employees were deposed. Most acknowledged that the there was an area adjacent to the drain that was lower than the drain and therefore would not drain properly if water accumulated in that area. The area was characterized as a "slight depression" approximately an eighth to a sixteenth of an inch deep. However, no one acknowledged being aware of the defect prior to Plaintiff's accident. There is no evidence of maintenance requests, or complaints regarding the defect prior to the accident.

Defendants argue that the water on the floor was open and obvious, incidental to the use of a bathroom, and not inherently dangerous. They further argue that they did not create, or have actual or constructive notice of the defect, and had no obligation to warn of the defect. Plaintiff asserts that the depression in the floor was a design defect, and that the slippery floor was not incidental to the use of the bathroom. She further argues that Defendants had constructive notice of the defect.

SUMMARY JUDGMENT STANDARD

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). If the movant fails to make this showing, the motion must be denied. *Id.* Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

In moving for summary judgment, defendant bears "the initial burden of establishing that it 'maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition'" *Cietek v. Bountiful Bread of Stuyvesant Plaza, Inc.*, 74 AD3d 1628, 1629 (3rd Dept. 2010), *quoting Candelario v. Watervliet Hous. Auth.*, 46 AD3d 1073, 1074 (3rd Dept. 2007); *see Cerkowski v. Price Chopper Operating Co., Inc.*, 68 AD3d 1382, 1383 (3rd Dept. 2009).

Plaintiff alleges Defendants had a duty to warn regarding the alleged dangerous condition. However, the law imposes no such duty to warn against obvious dangers where, "[u]nder such circumstances, the condition is a warning in itself." *Tarricone v. State of New York*, 175 AD2d 308, 309 (3rd Dept. 1991). In the present matter, Plaintiff admits to seeing the water on the floor upon entering the bathroom and specifically avoiding it. This admission makes clear that the alleged dangerous condition was open and obvious to the Plaintiff. As such, the condition, observed by the Plaintiff, was a warning in itself, and the Defendant had no duty to warn of its existence.

Nevertheless, even if a condition is open and obvious, the landowner is not relieved of its

responsibility to maintain the premises in a reasonably safe condition. *Barley v. Robert J. Wilkins, Inc.*, 122 AD3d 1116 (3rd Dept. 2014); *see also MacDonald v. City of Schenectady*, 308 AD2d 125 (3rd Dept. 2003). Other than the condition of the floor at issue here, there does not appear to be any real issue as to the premises being reasonably safe.

Defendants also argue that they did not create the allegedly dangerous condition. The evidence suggests that the slight depression in the floor may have existed for many years.[1] Neither side alleges any knowledge of how the water came to be located on the bathroom floor. However, Defendants assert that they did not create the hazardous condition, nor did they have any knowledge of its existence.

Deposition testimony of Cornell employees fails to support the conclusion that Defendants had any actual notice of "pooling water" in the subject bathroom. There is no evidence of any complaints or maintenance requests regarding the subject floor. (Affidavit of Karen C. Muckstadt, Director of Facilities Management for Student and Campus Life at Cornell University at ¶ 7) Further, the custodian who cleaned the bathroom in the time frame of the accident denied noticing any "pooling" of water on the subject floor. (*See* June 17, 2014 Deposition of Jason W. McGarrigle). Moreover, no issues regarding the floor, or pooling of water, were ever identified by City of Ithaca Building inspectors who annually inspect Baker Tower. The Plaintiff also acknowledged that she never made any complaint regarding the subject bathroom.

There is likewise no evidence of constructive notice of the pooling water. "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, 837 (1986). For example, Mr. McGarrigle, the custodian who routinely cleaned the subject bathroom, testified that he never observed a puddle of water in the location in question. Likewise, Kathleen Stapleton, a former custodial supervisor, testified that she never observed water pooled in the subject location. In

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[1]Baker Tower was built in 1913.

short, none of the Cornell witnesses ever saw water pooling in the location of this accident.

The Court concludes that Defendants have submitted *prima facie* evidence that they did not create nor had actual or constructive knowledge of the alleged dangerous condition . Although upon inspection, Defendant acknowledges the presence of a small depression which could result in the pooling of water, this knowledge was acquired after the Plaintiff's accident.

In opposition to the Defendants' *prima facie* case, and in furtherance of her partial summary judgment motion, Plaintiff argues that the testimony of Cornell employees supports the conclusion that a defect in the subject floor is present. However, it is not enough that there is a defect. Rather, Plaintiff has to offer evidence that Defendants either created, or had actual or constructive knowledge of the defect. The testimony of Defendants' witnesses unanimously stand for the proposition that they neither created nor had any knowledge of the defect. The fact that after the accident they acknowledge the defect is of no significance. Further, Plaintiff offers no evidence as to whether Defendants created or knew or should have known of the defect.

The Court finds that the Plaintiff has failed to rebut the Defendants' prima facie showing for summary judgment. Therefore, the Defendants, motion for Summary Judgment is **GRANTED** and the Plaintiff's motion for Partial Summary Judgment is **DENIED**.

This constitutes the **DECISION** of the Court. Defendants are to submit a Proposed Order, on notice to Plaintiff, within 30 days of the date of this Decision. The transmittal of copies of this Decision by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: September 11, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice