Pinto v Walt Whitman Mall, LLC
2017 NY Slip Op 33155(U)
February 16, 2017
Supreme Court, Suffolk County
Docket Number: 63751/13
Judge: Paul J. Baisley, Jr.

Short Form Order

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MARIE A. PINTO,

Plaintiff,

- against -

WALT WHITMAN MALL, LLC., and SIMON MANAGEMENT ASSOCIATES, LLC., E.W. HOWELL CO., LLC., and ELITE FLOORS, INC.,

Defendants.

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WALT WHITMAN MALL, LLC., and SIMON MANAGEMENT ASSOCIATES, LLC.,

Third Party Plaintiffs,

- against -

ELITE FLOORS, INC.,

Third Party Defendant.

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INDEX NO.: 63751/13
CALENDAR NO.: 201600634OT
MOTION DATE: 8/18/16
MOTION SEQ. NO.: 001 MG;
002 CASEDISP

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Upon the following papers read on these motions for summary judgment ; Notice of Motion and supporting papers dated June 3, 2016 ; Notice of Cross Motion and supporting papers dated June 8, 2016 ; Answering Affidavits and supporting papers dated July 5, 2016, August 10, 2016 ; Replying Affidavits and supporting papers dated August 15, 2016, August 17, 2016 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendant Elite Floors, Inc. and the motion (motion sequence no. 002) of defendants Walt Whitman Mall, LLC, Simon Management Associates, LLC, and E.W. Howell Co., LLC, are consolidated for purposes of this determination; and it is further

ORDERED that the motion of defendant Elite Floors, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion of defendants Walt Whitman Mall, LLC, Simon Management Associates, LLC, and E.W. Howell Co., LLC, for summary judgment dismissing all claims against them is granted.

This action was commenced by plaintiff Marie A. Pinto to recover damages for injuries she allegedly sustained on September 17, 2013 when she tripped and fell while walking inside the Walt Whitman Mall in Huntington Station, New York.

Defendant Elite Floors, Inc. ("Elite") now moves for summary judgment in its favor on the ground that it owed no duty to plaintiff, and that any negligent act was committed by defendant E.W. Howell Co., LLC. In support of its motion, Elite submits copies of the pleadings; a copy of a contract with E.W. Howell Co.; two photographs; transcripts of the parties' deposition testimony; and an affidavit of Raymond Colabatistto.

Defendants Walt Whitman Mall, LLC, Simon Management Associates, LLC, and E.W. Howell Co., LLC (collectively referred to herein as "the Walt Whitman defendants"), also move for summary judgment in their favor on the ground that they had no notice of the alleged dangerous condition. In support of their motion, the Walt Whitman defendants submit, among other things, copies of the pleadings; copies of various contracts; transcripts of the parties' deposition testimony; transcripts of deposition testimony of nonparties Robert Rossetti and Joseph Barone; a copy of a "Walt Whitman Mall Incident Report"; and three photographs.

At her deposition, plaintiff Marie Pinto testified that on the date in question, at between 7:30 a.m. and 8:00 a.m., she arrived at the Walt Whitman Mall with the intention of walking inside for exercise, something she did approximately five days a week. She explained that as she was walking near the Lord & Taylor store entrance, she saw brown, paper-like material covering areas of the floor. Plaintiff indicated that since the brown paper was covering the area where she would normally walk, she elected to walk over it. She testified that after taking a few steps on the brown material, her left toe "hit something," causing her to fall to the floor.

At his deposition, Raymond Colabatistto testified that he is the owner/president of Elite and that he oversees the day-to-day work that is performed by the corporation. He indicated that Elite was a subcontractor hired by E.W. Howell Co., LLC ("E.W. Howell") to perform flooring work at the Walt Whitman Mall. He stated that the work involved preparing a substrate flooring by applying a "cemetitious Portland product" which is "almost in a liquid form" and "self levels." Mr. Colabatistto explained that the material Elite used at Walt Whitman Mall is called "Ardex K-301 self-leveling," that it is "polymer induced," "harden[s] extremely quickly," and is "safe to walk on and put flooring on top of." Mr. Colabatistto testified that while all products require some drying time, Elite never requires temporary flooring over its work during the drying period. In relation to Elite's cement work at Walt Whitman Mall, Mr. Colabatistto indicated that the surface "can probably be walkable within an hour." When questioned about photographs of masonite paneling secured with orange adhesive tape, he stated that such paneling is commonly placed over Elite's work by other subcontractors so that their construction work did not damage the work Elite had already finished. Mr. Colabatistto testified that Elite never installed protective flooring, masonite or otherwise, on top of its work. Upon further questioning, Mr. Colabatistto acknowledged that warping of the masonite covering could be seen in the photograph and that there were a number of factors that could have led to such warping. Those factors, according to Mr. Colabatistto, were the environment where the masonite was stored prior to placement,

moisture introduced to it from below, or moisture introduced to it from above. However, Mr. Colabatistto denied that Elite performed the work alleged to be covered by masonite in the photograph shown to him.

In his affidavit, Raymond Colabatistto states that it was an employee of E.W. Howell, not an Elite employee, that placed masonite boards atop Elite's wet concrete, which then warped and allegedly caused plaintiff's trip and fall. He further states that Elite's concrete work was required to air dry, that Elite never advised E.W. Howell to cover Elite's concrete with any material, and that Elite was never aware of any such protective covering being employed prior to plaintiff's fall.

Robert Timperio was deposed on behalf of E.W. Howell, and testified that he is employed as a project executive. He indicated that E.W. Howell signed an agreement with Walt Whitman Mall, LLC in 2012 to serve as a general contractor for a project at the mall. He stated that E.W. Howell subcontracted with Elite in 2013 to install self-leveling material and carpeting therein. With regard to the daily interaction between E.W. Howell and Elite, Mr. Timperio stated that Elite would inform E.W. Howell that it had completed its work, and that "floor protection" would be installed by a "night crew" employed by E.W. Howell. Regarding E.W. Howell's procedure for installing floor protection, Mr. Timperio indicated that 4 foot by 8 foot, quarter-inch thick sheets of masonite were put down on top of the surface, then the joints between the sheets of masonite were taped with high-visibility orange adhesive tape to avoid tripping hazards. Mr. Timperio testified that, on the date in question, he learned someone "fell from the temporary protection" at the mall and that an incident report was drafted by one of E.W. Howell's superintendents, Rick Rossetti. Mr. Timperio opined that warping of the masonite panels was caused by "[m]oisture, and possibly inaccurate mixing of self-leveling material." He further stated that on other occasions, when the cement work was not dry enough to place masonite on top of, the area would be cordoned off with barriers.

At his deposition, nonparty witness Robert Rossetti testified that at the time of plaintiff's accident, he was employed as a laborer for E.W. Howell, that his work hours were 10:00 p.m. to 6:00 a.m., and that it was his responsibility to ensure that the mall was "ready" for mall walkers who would arrive as early as 5:00 a.m. He indicated that he was the only E.W. Howell employee present at the mall the night before plaintiff's accident, and that it was he who placed and taped the masonite in question at approximately 5:00 a.m. on September 17, 2013. He stated that the last thing he did at the end of his shift was lay down the masonite, which he would remove at the start of his shift the next day so that subcontractors could continue working on the floor underneath. He further stated that he would reuse the same pieces of masonite over and over if they were "good." When questioned as to what would render a piece of masonite unusable, he explained that moisture or "over use" could cause it to warp and create a tripping hazard. However, when asked if he had ever seen masonite warped by uncured self-leveling compound, he replied in the negative. Regarding the masonite itself, Mr. Rossetti testified that it was ⅛ inch thick. Mr. Rossetti testified that each night he would wait until Elite finished its flooring work, waiting an hour "to let it dry," then put down the masonite on top of Elite's work area. He indicated that he "didn't want to cut masonite," so he placed the rectangular masonite sheets over

the oval area that Elite was working in. Mr. Rossetti testified that when he left the premises at approximately 5:30 or 6:00 a.m., the masonite was "flat," that he "would not have left it any other way," and that "I never would have left a tripping hazard for anybody."

James Horvath, deposed on behalf of Elite, testified that he was working as a foreman at the time of plaintiff's accident and was involved in the application of self-leveling compound to certain areas near the entrance of Lord & Taylor. He stated that the self-leveling material was laid down to create a smooth surface for carpeting. He indicated that the work schedule was directed by E.W. Howell, but that Elite chose the means and methods of its work. Mr. Horvath testified that self-leveling material should never be covered, that if it is covered it won't dry properly, as it needs to air dry, and that covering it was "unsafe." He further testified that he would tell "the gentleman" from E.W. Howell not to cover the area with anything but, rather, "protect" it. Mr. Horvath indicated that he did not know that E.W. Howell was covering his work with masonite and that, in his experience, his work areas would normally be blocked off with barriers and yellow caution tape or with orange cones.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; *see also Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; *see also Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

To recover against a defendant in a negligence action, plaintiff must prove the defendant owed him or her a duty of care and that the breach of that duty resulted in the injuries sustained by the plaintiff (*see Kimbar v Estis*, 1 NY2d 399, 153 NYS2d 197 [1956]; *Lugo v Brentwood Union Free School Dist.*, 212 AD2d 582, 622 NYS2d 553 [2d Dept 1995]). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (*Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120 [2002] [internal quotation marks and citations omitted]).

The Court finds defendant Elite does not fall within any of the aforementioned categories. Here, the alleged "instrument of harm" is a warped sheet of masonite. It is undisputed that Elite completed its application of self-leveling cement, and that an employee of E.W. Howell placed masonite sheets on top of the cement. While E.W. Howell alleges that Elite was aware masonite was being used to cover its cement work, there is no evidence that Elite requested that its work be covered by masonite, or had any ability to direct the actions of E.W. Howell. E.W. Howell voluntarily assumed the responsibility to protect the public from hazards on the premises by shielding work areas with masonite sheets and adhesive tape. E.W. Howell admittedly chose that form of safeguard, rather than erecting barriers. Therefore, Elite has established a *prima facie* case of entitlement to summary judgment by adducing evidence that, absent E.W. Howell's actions, the condition that allegedly caused plaintiff's fall would not exist.

Elite having established a *prima facie* case, the burden then shifted to the other parties to raise a triable issue (*see Nomura, supra*). In opposition to Elite's motion, plaintiff argues that Elite had a duty to warn against E.W. Howell covering Elite's work with masonite, and that Elite had a contractual duty to secure its own work area. Plaintiff offers no evidence or authority to support the contention that Elite had any duty to warn E.W. Howell. As to Elite's contractual obligations, it is undisputed that plaintiff was not a party to the contract between E.W. Howell and Elite. Therefore, plaintiff cannot be a beneficiary of a provision of that contract purporting to obligate Elite to keep its work site safe (*see Espinal v Melville Snow Contrs., supra*).

The Walt Whitman defendants also oppose Elite's motion, arguing that Elite's negligence was the proximate cause of plaintiff's injury. Specifically, the Walt Whitman defendants allege that Elite had a duty to secure its own work areas, and to warn E.W. Howell of the dangers of covering uncured cement; that Elite failed to use the contractually-specified Ardex self-leveler; and that Elite "overwatered" the self-leveler, causing the masonite to warp. In support of those arguments, the Walt Whitman defendants submit an affidavit of Robert Rossetti, an affidavit of Robert Timperio, two photographs, and a copy of an Ardex instruction pamphlet.

In his affidavit, Robert Rossetti states that "his work included making sure that work was concluded and that the Mall area was restored to order for the many customers who would visit to be able to safety (sic) traverse the common areas of the Mall." He avers that he used masonite to cover work areas for a period of a year and a half, that no other injuries were reported in that time, and that Elite was aware E.W. Howell was covering its work with masonite. Finally, Mr. Rossetti opines that it was Elite's "failure to ensure there was no excess moisture [in the substrate below its work] [that] was the probable cause of the warping."

Robert Timperio submitted an affidavit in which he states that he is a vice president at E.W. Howell and was the project executive for the Walt Whitman project. Mr. Timperio avers that, since there were no other instances of warping masonite in the one and a half years prior to plaintiff's accident, it is "clear" that Elite "did not use Ardex, over watered the filler, failed to check the substrate, [or] failed to use the manufacturers (sic) recommended moisture barrier." Mr. Timperio also annexes two photographs that purport to show Elite using some material other than Ardex at Walt Whitman Mall. These photographs are unauthenticated, inadmissible, and were not considered by the Court in deciding this matter.

The Court finds the Walt Whitman defendants' arguments unpersuasive. By Mr. Rossetti's affidavit, E.W. Howell admits it assumed the responsibility of ensuring a hazard-free public space, rendering Elite's contractual obligation to do so irrelevant. Walt Whitman's other contentions are wholly speculative and without legitimate basis (*see Daliendo v Johnson*, *supra*). Even if true, the Walt Whitman defendants' allegations regarding the type of self-leveler used, or the improper mixing thereof, have no causal connection to plaintiff's alleged injuries absent E.W. Howell's placement of masonite upon it. Thus, there is no rational basis upon which Elite can be held liable and, therefore, the Walt Whitman defendants have failed to raise a triable issue (*see Tolpa v One Astoria Sq., LLC,* 125 AD3d 755, 4 NYS3d 230 [2d Dept 2015]; *see also* General Obligations Law § 5-322.1). Accordingly, Elite's motion for summary judgment dismissing the complaint and cross claims against it is granted.

As to the Walt Whitman defendants' motion for summary judgment, it is well established that the owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). "A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Altinel v John's Farms*, 113 AD3d 709, 710, 979 NYS2d 360, 362 [2d Dept 2014]; *see Ingram v Long Is. Coll. Hosp.*, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]). For constructive notice to exist, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [defendant] to discover and remedy it" (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Altinel v John's Farms*, *id.*, quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599, 869 NYS2d 222, 223 [2d Dept 2008]). E.W. Howell alone, as a contractor hired by the remaining Walt Whitman defendants, is subject to *Espinal* analysis (*see Espinal v Melville Snow Contrs.*, *supra*).

At his deposition, Robert Schubert testified that he is employed by Simon Property Group as an operations director. He stated that on September 17, 2013, he arrived at Walt Whitman Mall at 6:00 a.m., reported to his office, and began reviewing e-mails for approximately 20 to 30 minutes. Mr. Schubert explained that after reviewing e-mails in his office, he took a "tour" of the mall, which entailed walking the entire length of the mall "verifying any work that might have been done the previous night" and identifying any maintenance or janitorial issues. He indicated that on the date in question, he met with Frank Seabrook, a "night supervisor" for E.W. Howell, and they both inspected the locations where work was done overnight. Mr. Schubert stated they made sure any work was complete, the work areas were cleaned, and "everything was secure" prior to mall walkers being permitted to enter at 7:00 a.m. Mr. Schubert further stated that he and Mr. Seabrook inspected the work area in front of the Lord & Taylor store, "saw nothing wrong," and continued their tour.

Upon his review of various photographs of the accident scene, Mr. Schubert acknowledged that they were fair and accurate representations of that scene as he saw it, and that raised areas of masonite are depicted. However, Mr. Schubert did not recall seeing such flooring

distortion when he conducted his inspection earlier in the morning and disagrees with the incident report's description of the masonite as being an "uneven" surface. Finally, Mr. Schubert stated that other areas of the mall were covered by masonite during construction, that "well over 5,000" people visited the mall each day, and that he knew of no complaints or reports of anyone tripping on masonite.

Joseph Barone testified that he is employed by Allied Barton Security and was acting in the title of security officer for Walt Whitman Mall at the time of plaintiff's accident. He explained that just prior to the start of his shift that day, at approximately 7:55 a.m., he was contacted by Mr. Schubert, via radio, and told to report to the area in front of the Lord & Taylor store and provide assistance with a medical emergency. Mr. Barone stated that when he arrived at the scene, he observed plaintiff sitting on the ceramic tile floor "maybe six feet" from the masonite-covered area. Mr. Barone indicated that he later completed the "Simon Property Walt Whitman Mall Incident Report" pertaining to plaintiff's accident. Mr. Barone stated that he conducted an inspection of the area after plaintiff was taken to the hospital and noted various portions of masonite or adhesive tape that had raised approximately ¼ inch above the adjacent ceramic tile. Mr. Barone testified that he did not know how long the masonite sheets had been in that location, but he had seen similar sheets, affixed in an identical manner, in other areas of the mall during its two and a half years of construction. Finally, Mr. Barone denied receiving any prior complaints regarding the masonite or reports of patrons tripping on it.

The Walt Whitman defendants have established a *prima facie* case of entitlement to summary judgment in their favor by establishing that they did not create the alleged dangerous condition, and that they had no actual or constructive notice of it (*see Mavis v Rexcorp Realty, LLC*, 143 AD3d 678, 39 NYS3d 190 [2d Dept 2016]; *Ferro v 43 Bronx Riv. Rd.*, 139 AD3d 897, 32 NYS3d 581 [2d Dept 2016]; *Sun Ho Chung v Jeong Sook Joh*, 29 AD3d 677, 815 NYS2d 641 [2d Dept 2006]; *Tresgallo v Danica, LLC*, 286 AD2d 326, 729 NYS2d 159 [2d Dept 2001]). The Walt Whitman defendants adduced evidence that masonite panels had been used for many months at the mall without incident, that the masonite panels were flat at the time Robert Rossetti left the mall at 5:30 a.m., that Robert Schubert conducted an inspection of the incident location approximately one and a half hours prior to plaintiff's fall, and that no warping of masonite had been observed at the mall previously (*see Kennedy v Wegmans Food Mkts.*, 90 NY2d 923, 664 NYS2d 259 [1997]; *contrast Talavera v New York City Tr. Auth.*, 41 AD3d 135, 836 NYS2d 610 [1st Dept 2007] [plaintiff observed leaking water pipe on earlier occasions]). The Walt Whitman defendants having established their *prima facie* case, the burden shifted to plaintiff to raise a triable issue (*see Alvarez v Prospect Hosp.*, *supra*).

Plaintiff opposes the Walt Whitman defendants' motion on the ground that they have failed to prove that E.W. Howell's actions were not the cause of plaintiff's fall. In support of that contention, plaintiff's counsel submits, among other things, Raymond Colabatistto's affidavit, a report prepared by Nicholas Bellizzi, P.E., an affidavit of nonparty witness Mary G. Fudens with accompanying photograph, and one additional photograph.

Here, plaintiff failed to raise a triable issue (*see generally Alvarez v Prospect Hosp.*, *supra*). In his expert affidavit, Nicholas Bellizzi, a licensed professional engineer, states that he did not visit the subject premises but, instead, reviewed unspecified photographs, deposition testimony, and incident reports associated with plaintiff's fall in order to reach his conclusions. Mr. Bellizzi avers that the distortion of the masonite panels, depicted in the unspecified

photographs he viewed, was caused by "trapped moisture" contained in the self-leveling concrete applied by Elite. Further, Mr. Bellizzi, disregarding the voluminous evidence of bright orange adhesive tape applied over all edges of the masonite, states that no "warnings were present at the subject accident site, such as yellow . . . edges" and that the "unexpected and unanticipated raised edge of the Masonite floor panel was not . . . warned of in any manner whatsoever."

Mr. Bellizzi's affidavit is devoid of any reference to a foundational scientific basis for his conclusions, rendering it without probative value (*see Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589 [1997]). Mr. Bellizzi makes no representation that he is an expert in the field of materials sciences, that he has any knowledge of the inherent characteristics of masonite, that he conducted any moisture tests on the masonite in question, that he analyzed the self-leveling concrete for evidence of "over watering," or that any professional publications support his contentions.

In her affidavit, nonparty witness Mary Fudens states that she was walking behind plaintiff just prior to her accident and observed plaintiff "trip and fall . . . when her foot caught on an upturned edge of the masonite covering." While providing some evidence of the cause of plaintiff's fall, Ms. Fudens' affidavit provides no information supporting when the alleged dangerous condition appeared, or if it was present for a period sufficient for defendants Walt Whitman Mall and Simon Management Associates to discover it (*see Gordon v Am. Museum of Natural History*, *supra*).

With regard to defendant E.W. Howell, plaintiff's counsel argues that since it laid down the masonite and chose not to cordon off the area, it created the alleged dangerous condition (*see Espinal v Melville Snow Contrs.*, *supra*). Here, plaintiff does not argue that E.W. Howell's masonite panels were dangerous per se; rather, she argues that only after the later introduction of some intervening factor did a potential tripping hazard emerge. Plaintiff, however, is unable to identify that intervening factor without resorting to speculation (*see Daliendo v Johnson*, *supra*). Accordingly, the Walt Whitman defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: February 16, 2017

J.S.C.

HON. PAUL J. BAISLEY JR.