

**Furuya v AMC Entertainment Inc.**

2019 NY Slip Op 30615(U)

March 8, 2019

Supreme Court, New York County

Docket Number: 150632/2017

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 150632/2017

ANNE FURUYA

MOTION DATE 08/27/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

AMC ENTERTAINMENT INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Defendant's motion for summary judgment is granted. The following facts are not in dispute.

On January 7, 2017, the weather was snowy. Around 7:00 PM, plaintiff Anne Furuya went to the AMC Lowes movie theatre, located at 1998 Broadway, New York, NY 10023. The certified weather, data from the National Oceanic & Atmospheric Administration (NOAA) indicates that there was a storm in progress at the time of the plaintiff's accident. Specifically, local readings from New York City show that a snowstorm was in the area from approximately 9:00 AM through 9:00 PM, with measurable amounts of snowfall. There was also sustained and gusts of wind. The AMC Lowes movie theatre in question has three front doors, a revolving door surrounded by 2 single glass doors. The single doors had walk-off mats, but the revolving door did not. Plaintiff entered the theatre using the revolving door and after she took two to three steps, her left foot slipped out from underneath her and she fell backwards onto the floor. There is no contention that the lobby floor was wet with soap or anything other than water. Although plaintiff had not realized the floor was wet, upon walking in to the theatre, plaintiff did think that

the floor was shiny prior to her fall. Plaintiff testified that after she fell, she did not see any cones, barricades or warning signs about wet conditions. The manager at the theatre testified for defendant, that it was defendant's general policy and procedure to make sure that ushers are mopping during inclement weather. Neither side produced any evidence as to when the last time a mopping was performed on that day.

Defendant argues that the motion for summary judgment should be granted as the wet floor condition was caused by an ongoing storm and not a dangerous condition attributable to defendant. In support of the motion, defendant submitted the expert affidavit of Jeffrey J. Schwalje, P.E, who opined that floor was constructed and maintained in compliance with all codes, statutes, regulations, standards and guidelines and was properly slip-resistant. Defendant also submitted a certified weather report. Plaintiff argues that defendant is liable and submitted the expert affidavit of Elise Dann, an architect, who opined that the floor had a slip co-efficient of friction, when wet, of 0.30 and when dry, of 0.82. It was her opinion that said floor allowed a hazardous slip condition to persist, which was a cause of plaintiff's slip, loss of balance, fall, and injuries. Additionally, Ms. Dann opined that the failure to provide a walk-off mat and warning signs was also a cause.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must make a *prima facie* showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

There is no duty to remove snow and ice while a storm is in progress (*Grau v Taxter Park Assoc.*, 283 AD2d 551 [2nd Dept 2001]). The “storm in progress” defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean (*Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345 [1st Dept 2002]). The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless (*id.*). Evidence of an ongoing storm presents a *prima facie* case for dismissal of the complaint (*Mangieri v Prime Hosp. Corp.*, 251 AD2d 632 [2d Dept 1998]).

The fact that an accident occurred indoors on surface made wet due to an ongoing storm is not of consequence (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [1st Dept 2005] *affd* 6 NY3d 734 [2005] [summary judgment granted when plaintiff slipped on a slippery station floor during an ongoing winter storm]; *Kovelsky v City Univ. of New York*, 221 AD2d 234 [1st Dept 1995][plaintiff’s claim that he slipped on a second floor wet surface resulting from tracked-in, melting snow was properly dismissed]). Nor was defendant required to cover all of its floors with mats, or continuously mop up all moisture from the storm (*Gonzalez-Jarrin v New York City Dept. of Educ.*, 50 AD3d 334, 335 [1st Dept 2008]; *Solazzo* at 736-737; *Kovelsky* at 234).

Here, plaintiff in her argument in opposition stated “[S]imply put, water existed on the floor in the subject lobby due to patrons tracking moisture, water and snow into the subject lobby.” It is not disputed that there was a storm in progress. Accordingly, defendant has established its *prima facie* entitlement to summary judgment and the burden shifts to plaintiff to raise some genuine issue of fact. Plaintiff, in opposition, raises several arguments primarily relying on the expert report which concluded that the wetness on the floor constituted a slipping hazard and that the failure to place mats or warning signs also constituted a hazard. Plaintiff also argued that defendant was obligated to do something to avail itself of the storm in progress defense.

Plaintiff’s arguments are without merit. The case law on storm in progress does not show a time requirement whereupon a landowner must “do something” in order to avail itself of the doctrine (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005] [Court of Appeals noted that it had been snowing, sleet and raining on and off the entire day of the accident]). On the contrary, the doctrine is premised on the fact that during a storm there is a presumption of futility in attempting to remediate the snow, ice and wetness (*Powell* at 345; *Simeon v City of New York*, 41 AD3d 344, 344 [1st Dept 2007]). Similarly, plaintiff’s contention that defendant was obligated to place mats in the area is contrary to caselaw cited above. Although defendant did have mats out, that specific area was not covered, and defendant was not obligated to cover every inch of the lobby floor.

Plaintiff also argues based upon the expert report that the floor had a slip co-efficient of friction, when wet, of 0.30, which was below the standard of 0.5. However, a close reading of the experts affidavit states that UL 410 has established “a minimum COF of 0.5 as the standard for slip-resistant dry walking surfaces.” Similarly, ASTM D 2047-11 “also established a


minimum COF of 0.5 as the standard for slip-resistant dry walking surfaces.” Both of these standards have been established for “dry” walking surfaces. In this case, the floor was not dry.

Defendant has established that a storm was in progress at the time of plaintiff’s fall. Plaintiff has not her burden to raise a genuine issue of fact that would give rise to liability. It is therefore

ORDERED that defendant’s motion for summary judgment is granted and this matter is dismissed in its entirety, and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

3/8/2019  
DATE

  
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DAVID BENJAMIN COHEN, J.S.C.  
**HON. DAVID B. COHEN**  
**J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE