

Torres v 2 Gold LLC
2019 NY Slip Op 31346(U)
May 10, 2019
Supreme Court, New York County
Docket Number: 150152/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 150152/2015

SAMANTHA TORRES,

Plaintiff,

MOTION SEQ. NO. 005

- v -

2 GOLD LLC and TF CORNERSTONE INC.,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 113

were read on this motion to/for SUMMARY JUDGMENT

In this slip and fall action, defendants 2 Gold Street LLC i/s/h/a 2 Gold LLC (“2 Gold”) and TF Cornerstone, Inc. (“TFC”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Samantha Torres was allegedly injured on September 5, 2014 when she slipped and fell on a wet floor in the lobby of 2 Gold Street in Manhattan. Docs. 97, 100. The building was allegedly owned, managed, operated and/or controlled by 2 Gold and TFC. Doc. 97.

Plaintiff’s Deposition

On the date of the incident, plaintiff was employed by My Clean, a residential apartment cleaning service, and she was assigned to clean an apartment at 2 Gold Street. Doc. 103 at 10, 24.

She had never been to the building before. Doc. 103 at 25. She arrived at the building between 11 a.m. and noon and, after and passing through a revolving entrance door and then an interior door from the sidewalk, she entered the lobby, took 4 or 5 steps, and then slipped and fell. Doc. 103 at 25-27, 29, 36. Only after she fell did plaintiff, who was wearing open-toed sandals, notice that the floor of the lobby was wet. Doc. 103 at 26, 31, 35-36, 43-44. It was not raining and she did not see any wetness on the lobby floor before or after she fell. Doc. 103 at 25, 30, 40. Nor did she see any footprints or track marks on the ground. Doc. 103 at 40. After she fell, it occurred to her that she might have tracked in water from outside, where a man was hosing down the sidewalk. Doc. 103 at 40-41. Plaintiff further testified that the lobby floor was made of marble and that it was not covered with a mat or carpet. Doc. 103 at 30, 36. Nor was there any "wet floor" sign present in the lobby. Doc. 103 at 30.

Subsequent to giving the foregoing testimony, defense counsel showed plaintiff a videotape of the accident which he had previously exchanged with her attorney. Doc. 103 at 44-45. Defense counsel then questioned plaintiff about 6 still photographs which had been made from the video. Plaintiff testified that the first photograph showed her outside of the building as she was about to enter. Doc. 103 at 45-46; Doc. 104, Ex. A. The second photograph showed the lobby but she could not be seen. Doc. 103 at 46; Doc. 104, Ex. B. Another photograph showed her on the ground inside the revolving door. Doc. 103 at 47; Doc. 104, Ex. C. The next showed her trying to get up while inside the revolving door. Doc. 103 at 47-48; Doc. 104, Ex. D. Yet another showed her pushing the revolving door after her accident. Doc. 103 at 48-49; Doc. 104, Ex. E. The last photograph shows plaintiff leaving the revolving door after the accident and stepping onto a red rug in the lobby of the building. Doc. 103 at 49-50; Doc. 104, Ex. F.

Deposition of Anthony Genao

Anthony Genao, a porter employed by 2 Gold, testified that the building was owned by TFC. Doc. 105 at 8, 12. He said that, in order to enter the single entrance to the building, one had to pass through a revolving door and then an inner entrance door which led to the lobby. Doc. 105 at 14-15. There was a rectangular rug next to the revolving door and a square rug adjacent to the inner entrance door. Doc. 105 at 37-39.

Porters employed by 2 Gold were responsible for cleaning the lobby floor. Doc. 105 at 19. The porters washed the sidewalk in front of the building with water from a hose that ran from a slop sink inside a service entrance located approximately 20 feet from the revolving door. Doc. 105 at 22, 24, 26-28. The hose was able to reach from the slop sink to the front of the building. Doc. 105 at 29. While cleaning the sidewalk, the porters would not wet the area in front of the revolving doors and, if that area needed to be cleaned, it would be mopped and air dried. Doc. 105 at 52-53, 55.

The revolving door would remain open for use while the sidewalk was washed. Doc. 105 at 34-35. Two yellow cones bearing the words "caution, wet floor" were placed outside the building when the sidewalk was washed. Doc. 105 at 34-35. One cone was placed near the revolving door and the other near the service entrance. Doc. 105 at 35-36. The signs were left on the sidewalk until it was dry, which would take a "[c]ouple of hours." Doc. 105 at 36.

Genao washed the sidewalk on the date of the alleged incident. Doc. 105 at 43-51. This included the sidewalk "[a] few feet away" from the revolving door. Doc. 105 at 51. Approximately three minutes after he began hosing down the sidewalk near the service entrance, he was standing near that entrance when he saw a woman in flip flops fall near the revolving door. Doc. 105 at 65-

68. He inspected the area where the woman fell and maintained that it was dry. Doc. 105 at 68-69, 72, 94.

Genao was not aware of any other slip and fall accidents at the building during the three years preceding the accident. Doc. 105 at 74. Nor was he aware of any complaints or violations received by the porters or the building. Doc. 105 at 74.

Plaintiff filed a note of issue on May 14, 2018. Doc. 69.

On July 12, 2018, defendants filed the instant motion for summary judgment. Doc. 95. In an affirmation in support of the motion, defense counsel argues that there is no proof that defendants created or had actual or constructive notice of the condition. Counsel further asserts that the complaint must be dismissed because although plaintiff alleges that she fell in the lobby of the building, the photographs demonstrate that she actually fell inside the revolving door. Additionally, counsel maintains that, even if plaintiff fell 4-5 steps into the lobby, she would have been standing on the rug adjacent to the inner entrance door and thus her testimony that she slipped on the wet floor of the lobby must fail.

In an affidavit in support of the motion, Steven Phillips, an employee of TFC, represents that his company was the property manager of the building and that the videotape of the incident was recorded by a camera in the lobby of the premises in the regular course of TFC's business. Doc. 102. In accordance with Uniform Rule 202.5-b(d)(7), defendants duly filed with NYSCEF a Notice of Hard Copy Exhibit Filing reflecting that the videotape was submitted in support of the motion. Ex. 1 to Doc. 102.

In an affirmation in opposition to the motion, plaintiff's counsel argues that the motion must be denied since she plaintiff raises an issue of fact regarding whether she was injured by a dangerous condition created by defendants. Plaintiff's counsel further asserts that defendants are

not entitled to summary judgment based on her misidentification of the precise location of her fall since the photographs confirm that she fell. Additionally, counsel maintains that a question of fact exists regarding whether defendants warned of the dangerous condition, since plaintiff testified that there were no caution signs at the premises, whereas Genao testified that he placed such signs on the sidewalk.

In an affidavit in opposition to the motion, plaintiff states, inter alia, that, at her deposition conducted November 7, 2017, more than three years after her accident, defense counsel showed her a videotape of the accident which “reminded [her] that [she] fell as [she] stepped through the revolving door of 2 Gold Street and that [she] not fall after [she] went through the revolving door.” Doc. 100 at par. 8. Although she had testified that nobody was inside the revolving door at the time of her fall (Doc. 103 at 27-28), the videotape also reminded her that a man was leaving the building at the time. Doc. 100 at par. 8. However, she insisted that the man did not cause her to fall. Doc. 100 at par. 8.

In a reply affirmation in further support of the motion, defendants’ attorney argues that the complaint must be dismissed since plaintiff’s accident clearly did not occur in the lobby of the building, as she initially alleged in this action, and as she testified at her deposition before being shown the videotape and photographs of entrance of the building. Defense counsel further asserts that plaintiff’s affidavit must be disregarded in its entirety since it is designed solely to feign a factual issue regarding how and where the accident occurred.

LEGAL CONCLUSIONS:

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v*

New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, defendants established their prima facie entitlement to summary judgment by submitting, among other things: 1) the pleadings; 2) the bill of particulars; 3) Genao's deposition transcript, including his testimony that he did not hose down or mop the area in front of the revolving door on the date of the accident; that plaintiff fell inside the revolving door and not, as she alleged, inside the lobby; and that the area inside the revolving door was dry; 4) video footage of the incident; and 5) still photographs made from the video footage.

In opposition, plaintiff raises an issue of fact by submitting her deposition transcript in which she stated, among other things, that she slipped and fell in the lobby of the building and, after she fell, realized that the area was wet. She further testified, after viewing the video and the photos, that she that actually fell inside of the revolving door. Plaintiff also submits an affidavit in which she attests, inter alia, that she fell inside of the revolving door on water being sprayed by an individual outside of the entrance to the building. Thus, a triable issue of fact exists regarding whether the area where plaintiff fell was wet or dry.

Although defendants argue that plaintiff's affidavit is designed to feign an issue of fact, this Court disagrees. While it is true that a self-serving affidavit submitted in opposition to a

motion for summary judgment is insufficient to raise an issue of fact where the affidavit clearly contradicts prior deposition testimony and has been tailored to avoid the consequences of prior testimony (*see, e.g., Caraballo v. Kingsbridge Apt. Corp.*, 59 A.D.3d 270 [1st Dep't 2009]), such a contradiction was not raised by the affidavit herein. At her deposition, plaintiff initially stated that she fell inside the lobby of the building. However, after she was confronted with the video and the photographs taken on the day of the incident, she testified that she fell inside the revolving door.¹ Thus, her affidavit is consistent with her deposition testimony at least with respect to a wet floor being the cause of her fall. Moreover, since plaintiff was never asked at her deposition whether she fell inside the revolving door because the area was wet, that portion of her affidavit in which she states that she fell on water being sprayed into that area is uncontradicted and raises an issue of fact regarding whether defendants created the condition.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

5/10/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

¹ As discussed above, the video shows a man exiting the building through the revolving door at the same time plaintiff was entering the building through the same revolving door. Although plaintiff denies that the man caused or contributed to her fall, a reasonable juror viewing the video could differ with plaintiff's representation.