Cordone v Gasho of Japan, Inc.
2019 NY Slip Op 32699(U)
September 11, 2019
Supreme Court, Suffolk County
Docket Number: 13-32564
Judge: Martha L. Luft

SHORT FORM ORDER

INDEX No. 13-32564
CAL. No. 16-01171OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 12-17-18 (005)
MOTION DATE 12-20-18 (006)
ADJ. DATE 1-18-19
Mot. Seq. # 005 - MG
006 - MG; CASEDISP

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BETTY CORDONE,

Plaintiff,

- against -

GASHO OF JAPAN, INC., and WHITE PLAINS COAT & APRON CO., INC., d/b/a WHITE PLAINS LINEN,

Defendants.

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Upon the following papers numbered 1 to 68 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; 28 - 48 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 49 - 60; 61 - 64 ; Replying Affidavits and supporting papers 65 - 66; 67 - 68 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 005) by defendant Gasho of Japan, Inc., and the motion (seq. 006) by defendant White Plains Coat & Apron Co., Inc., d/b/a White Plains Linen are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Gasho of Japan, Inc., for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion by defendant White Plains Coat & Apron Co., Inc., for summary judgment dismissing the complaint and cross claims against it is granted.

Plaintiff Betty Cordone commenced this action to recover for personal injures she allegedly sustained as a result of an accident that occurred at the restaurant known as Gasho of Japan, which is owned and operated by defendant Gasho of Japan, Inc., on September 7, 2013. The accidently allegedly occurred when plaintiff tripped and fell on an area rug as she entered Gasho of Japan. Defendant White Plains Coat & Apron Co., Inc., d/b/a White Plains Linen allegedly rented the subject area rug to Gasho of Japan, Inc., at the time of the incident. By her complaint, as amplified by her bill of particulars, plaintiff alleges that defendants failed to maintain the premises in a reasonably safe condition by permitting the subject area rug to be unsecured, worn, curled, and raised. By order of this Court dated October 23, 2018, this case was restored to the trial calendar, and the parties were directed to re-notice the previously stayed summary judgment motions within 20 days of that order.

Gasho of Japan, Inc., now moves for summary judgment dismissing the complaint against it, contending that plaintiff cannot establish that a dangerous condition existed prior to her fall, and that it did not have notice of the alleged dangerous condition. In support of its motion, Gasho of Japan, Inc., submits, among other things, the transcripts of the deposition testimony of Stephen Cordone and Didin Lembana. In addition, White Plains Coat & Apron Co., Inc., moves for summary judgment dismissing the complaint and cross claims against it, arguing that it owed no duty of care to plaintiff, and that it did not have notice of the alleged dangerous condition. In support of its motion, White Plains Coat & Apron Co., Inc., submits, among other things, the transcripts of the deposition testimony of Mr. Cordone, Thomas Moscati, and Lembana.

Plaintiff opposes the motions by defendants, contending that she is able to identity of the cause of her fall. In support of her opposition, plaintiff submits the affidavit of Mr. Cordone. Gasho of Japan, Inc., opposes the motion by White Plains Coat & Apron Co., Inc., to the extent that if its own motion for summary judgment is denied, there remain triable issues of fact as to whether the subject rug was defective at the time of delivery.

According to the testimony of plaintiff's husband, Stephen Cordone, he was walking behind plaintiff at the time of the incident. He testified that prior to the accident, he did not observe the movement of plaintiff's feet, and that he did not observe "the bubble" in the rug until after plaintiff fell. He further testified that except for the raised portion of the area rug, which was approximately two inches in height and located in the center of the right doorway, the rug had no visible tears or defects. Over three years after the accident occurred, Mr. Cordone submitted an affidavit, in which he alleges for the first time that he observed plaintiff stumble, as her right foot appeared to catch onto something as soon as she placed it on the ground.

Manager of Gasho of Japan at the time of the incident, Didin Lembana, testified that at the time of the incident, Gasho of Japan, Inc., rented the area rugs exclusively from White Plains Coat & Apron Co., Inc., pursuant to a written agreement. The subject area rug allegedly was four feet by six feet, and was

replaced every two weeks by a delivery driver. He admitted that no employee would inspect the area rug to verify that they were properly positioned, and that there were no markings on the floor to indicate the proper placement of the rug. He testified that he would inspect the rugs daily, and that they would be cleaned each night. However, he admitted that he did not inspect the subject rug earlier in the day on the date of the accident. According to his testimony, from the time that the restaurant opened, at 11:00 a.m., until 6:00 p:m, there were approximately 30 people that walked across the subject area rug. He stated that employees of Gasho of Japan would gather up the area rug near the doorway, vacuum underneath it, and put it back down daily. Although he stated that previously he had seen the area rug in this particular location raised, he did not observe any portion of it to be raised on the date of the accident. He stated that there was no employee specifically assigned to verify that the area rug was not raised. He testified that prior to the accident, he did not observe anyone trip on the area rug near the front entrance.

Vice President of Sales of White Plains Coat & Apron Co., Inc., Thomas Moscati, testified that White Plains Coat & Apron Co., Inc. delivered area rugs to Gasho of Japan, Inc. every other week. Moscati testified that although the area rugs contained rubber knobs underneath, which prevented them from moving, they would occasionally shift. Moscati testified that the delivery person would usually replace the soiled area rugs with the clean area rugs. However, he also stated that when the restaurant appeared to be crowded, the delivery person would leave the clean area rugs rolled up, to be replaced at a later time. According to his testimony, prior to the accident, a clean area rug near the front entrance was last delivered on August 28, 2013, but he was not aware of whether an employee of White Plains Coat & Apron Co., Inc. or of Gasho of Japan, Inc. positioned the clean area rug for this particular delivery.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***New York City Asbestos Litig. v Chevron Corp.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Stonehill Capital Mgt., LLC v Bank of the West***, 28 NY3d 439, 45 NYS3d 864 [2016]).

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Pilgrim v Avenue D Realty Co.***, 173 AD3d 788, 99 NYS3d 688 [2d Dept 2019]; ***Chang v Marmon Enters., Inc.***, 172 AD3d 678, 99 NYS3d 397 [2d Dept 2019]). Although a defendant moving for summary judgment in a trip-and-fall case ordinarily has the initial burden of making a prima facie showing that it did not create the alleged hazardous condition that caused the fall, and that it did not have actual or constructive notice of

that condition for a sufficient length of time to discover and remedy it (***Kontorinakis v 27-10 30th Realty, LLC***, 172 AD3d 835, 101 NYS3d 50 [2d Dept 2019]; *see* ***Dow v Hermes Realty, LLC***, 155 AD3d 824, 63 NYS3d 698 [2d Dept 2017]; ***Torre v Aspen Knolls Estates Home Owners Assn., Inc.***, 150 AD3d 789, 54 NYS3d 84 [2d Dept 2017]; ***Barron v Eastern Athletic, Inc.***, 150 AD3d 654, 53 NYS3d 689 [2d Dept 2017]), a defendant can also demonstrate its prima facie entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of the fall without engaging in speculation (*see* ***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]; ***Grande v Won Hee Lee***, 171 AD3d 877, 97 NYS3d 230 [2d Dept 2019]). A plaintiff's inability to identify the cause of the fall is fatal to the cause of action, as a finding that a defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*see* ***Kontorinakis v 27-10 30th Realty, LLC***, *supra*; ***Kozik v Sherland & Farrington, Inc.***, *supra*; ***Eienstein v Block 5298, Inc.***, 164 AD3d 1304, 83 NYS3d 6 [2d Dept 2018]; ***Aristizabal v Kostakopoulos***, 159 AD3d 860, 70 NYS3d 63 [2d Dept 2018], *lv denied* 31 NY3d 912, 81 NYS3d 371 [2018]).

Further, a contractual obligation, standing alone, will generally not give rise to liability in favor of a third party (*see* ***Stiver v Good & Fair Carting & Moving, Inc.***, 9 NY3d 253, 848 NYS2d 585 [2007]; ***Espinal v Melville Snow Contrs.***, 155 AD3d 824 [2002]; ***Reeves v Welcome Parking Ltd. L.L.C.***, ___ AD3d ___, 2019 NY Slip Op 06223 [2d Dept 2019]). The Court of Appeals has identified three exceptions to the general rule: (1) where the contractor, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contractor's duties; and (3) where the contractor has entirely displaced the other party's duty to maintain the premises in a safe condition (*see* ***Espinal v Melville Snow Contrs., Inc.***, *supra*; ***Pinto v Walt Whitman Mall, LLC***, ___ AD3d ___, 2019 NY Slip Op 06157 [2d Dept 2019]; ***Burger v Brickman Group Ltd.***, LLC, 174 AD3d 568, 104 NYS3d 189 [2d Dept 2019]). As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those ***Espinal*** exceptions that were expressly pleaded by the plaintiff, or that were expressly set forth in the plaintiff's bill of particulars (*see* ***Burger v Brickman Group Ltd., LLC***, *supra*; ***Turner v Birchwood on the Green Owners Corp.***, 171 AD3d 1119, 98 NYS3d 323, 2019 [2d Dept 2019]; ***Sperling v Wyckoff Hgts. Hosp.***, 129 AD3d 826, 12 NYS3d 131 [2d Dept 2015]).

Gasho of Japan, Inc. established its prima facie entitlement to judgment dismissing the complaint against it by demonstrating that plaintiff could not identify the cause of her fall (*see* ***Pasqualoni v Jacklou Corp.***, 165 AD3d 969, 85 NYS3d 192 [2d Dept 2018]; ***Winder v Executive Cleaning Serve., LLC***, 91 AD3d 865, 936 NYS2d 687 [2d Dept 2012]; ***Drago v DeLuccio***, 79 AD3d 966, 913 NYS2d 747 [2d Dept 2010]; ***Penn v Fleet Bank***, 12 AD3d 584, 785 NYS2d 107 [2d Dept 2004]). In support of its motion, defendant submitted that testimony of Mr. Cordone, who admitted that prior to plaintiff's fall, he did not observe the movement of her feet or the condition of the area rug. He further testified that he did not notice that the area rug was raised until after the accident occurred (*see* ***Giannotti v Hudson Val. Fed. Credit Union***, 133 AD3d 711, 21 NYS3d 132 [2d Dept 2015]; ***Winder v Executive Cleaning Servs., LLC***, *supra*; ***Drago v DeLuccio***, *supra*; ***Penn v Fleet Bank***, *supra*). In opposition, the opposing parties failed to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*). Mr. Cordone's affidavit in opposition, wherein he alleges for the first time that he observed plaintiff stumble as her right foot appeared to catch onto something as soon as she placed it on the ground, was inconsistent with his prior testimony, and, as such, was insufficient to negate the speculation as the cause of the accident (*see* ***Pasqualoni v Jacklou Corp.***, *supra*; ***Barron v***

Eastern Athletic, Inc., 150 AD3d 654, 53 NYS3d 689 [2d Dept 2017]; ***Trapani v Yonkers Racing Corp.***, 124 AD3d 628, 1 NYS3d 299 [2d Dept 2015]; ***Duncan v Toles***, 21 AD3d 984, 801 NYS2d 359 [2d Dept 2005]).

In addition, White Plains Coat & Apron Co., Inc. made a prima facie showing of its entitlement to judgment as a matter of law by proffering evidence that plaintiff was not a party to the agreement between defendants, and, thus, it owed her no duty of care (*see* ***Hagan v City of New York***,166 AD3d 590, 87 NYS3d 325 [2d Dept 2018]; ***Koslosky v Ross-Malmut***, 149 AD3d 925, 52 NYS3d 400 [2d Dept 2017], *lv denied* 29 NY3d 919, 64 NYS3d 670 [2017]; ***Glover v John Tyler Enters., Inc.***, 123 AD3d 882, 999 NYS2d 150 [2d Dept 2014]). As plaintiff failed to expressly plead or to expressly set forth in her complaint or her bill of particulars any ***Espinal*** exception, White Plains Coat & Apron Co., Inc. was not required to affirmatively demonstrate that these exceptions were inapplicable in order to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint and cross-claims against it (*see* ***Hagan v City of New***, *supra*; ***Laronga v Atlas-Suffolk Corp.***, 164 AD3d 893, 83 NYS3d 193 [2d Dept 2018]; ***Koslosky v Ross-Malmut***, *supra*; ***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 39 NYS3d 190 [2d Dept 2016]). In opposition, plaintiff failed to raise any triable issues of fact as to the applicability of any of the ***Espinal*** exceptions (*see* ***Hagan v City of New York***, *supra*; ***Laronga v Atlas-Suffolk Corp.***, *supra*; ***Mavis v Rexcorp Realty, LLC***, *supra*).

Accordingly, the motions by Gasho of Japan, Inc., and White Plains Coat & Apron Co., Inc. for summary judgment are granted.

Dated: 9/11/19

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION