

Goldszmidt v 589 Fifth TIC I, LLC
2019 NY Slip Op 33701(U)
December 23, 2019
Supreme Court, New York County
Docket Number: 151547/12
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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JUDITH GOLDSZMIDT and GABRIEL
GOLDSZMIDT,

Plaintiffs,

-against-

589 FIFTH TIC I, LLC, 589 FIFTH TIC II, LLC,
WESTERN MANAGEMENT CORP., 589
ASSOCIATES, L.P., RELIANT SECURITY CO., INC.,
"RELIANT SECURITY", ALTUS METAL & MARBLE
SERVICES, INC. "ALTUS METAL & MARBLE",
KENNETH WENTWORTH and "JOHN DOE,"
as further described in annexed complaint,

Defendants.

DECISION

Index No.: 151547/12

Motion Seq. No.: 004

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HON. TANYA R. KENNEDY, J.S.C.:

Plaintiff, Judith Goldszmidt (“Plaintiff”), commenced this action to recover damages for alleged personal injuries she sustained after a slip and fall accident at 589 Fifth Avenue, New York, New York (the “Premises”).¹ Defendants, 589 Fifth TIC I, LLC, 589 Fifth TIC II, LLC, Western Management Corp., 589 Associates, L.P., Reliant Security Co., Inc., “Reliant Security” and Kenneth Wentworth (collectively, “Defendants”) move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint. Plaintiff cross moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that she sustained personal injuries on September 20, 2011, at approximately 10:00 a.m., after she slipped and fell on a wet lobby floor at the Premises as she arrived to work (*see* Verified Bill of Particulars, dated December 20, 2012, ¶¶1-3; Goldszmidt Supporting Affidavit, ¶¶2-4). Plaintiff’s employer is a tenant at the Premises (*see* Goldszmidt Supporting Affidavit, ¶2). On

¹ Co-Plaintiff, Gabriel Goldszmidt, relinquished his derivative claims (*see* Gentile Supporting Affirmation, P.1, n 1).

the date of the accident, it continually rained during Plaintiff's commute from her New Jersey home until her arrival at the Premises (*id.*, ¶3).

Defendants 589 Fifth TIC I, LLC and 589 Fifth TIC II, LLC owned the Premises, which Defendant, Western Management Corp., ("Western Management") managed.² Defendant, Kenneth Wentworth ("Wentworth"), is the Vice-President of Western Management. Defendant, Reliant Security Co., Inc., "Reliant Security," ("Reliant") provided security guard services at the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that she entered the Premises through the doorways located on 48th Street and then walked through the exterior glass doors through a vestibule to reach the inner doors after passing over a metal floor that covered the vestibule (December 16, 2014 Transcript, P. 20, L. 4-6; P. 21, L. 2-P. 22, L. 5). Plaintiff indicated that she then walked through another set of interior doors from the vestibule into the lobby (*id.*, P. 22, L. 15-25).

According to Plaintiff, her accident occurred once she passed the second set of interior doors and entered the lobby and before she reached the turnstile, which gave her access to the elevators in the lobby (*id.*, P. 23, L. 5-P. 24, L. 9). Plaintiff indicated that the lobby floor was made of marble and that carpets were laid on top of the floor on the date of her accident (*id.*, P. 24, L. 18-P. 25, L. 2). Plaintiff indicated that carpets were laid out whenever it rained and that prior to the accident, the carpets laid out on the floor were wall to wall carpets (*id.*, P. 25, L. 10-P. 28, L. 9). However, Plaintiff maintained that the carpets were not laid to the entire floor from wall to wall on the date of her accident (*id.*, P. 28, L. 10-17).

Plaintiff indicated that she never looked at the lobby floor from the time she entered the Premises until the time that she fell (*id.*, P. 29, L. 9-13). She also indicated that her attorneys showed her a video of the accident, which she acknowledged depicted the actual accident but disagreed that

² The papers fail to indicate the connection, if any, between Defendant, 589 Associates, L.P. and the Premises.

it was a fair and accurate depiction of the incident (*id.*, P. 29, L. 25-P. 31, L. 6). The video showed that Plaintiff stepped off the carpet covering the marble floor to step around a person who had stopped walking on the carpet, which is when she fell (*id.*, P. 32, L. 18- P. 33, L. 7). According to Plaintiff, additional cameras would have showed the area where she fell and that it was her belief that the cameras did not sufficiently depict the lobby (*id.*, P. 33, L. 24-P. 34, L. 23).

Plaintiff also indicated that while she was aware that additional cameras existed at the Premises, she was unable to indicate in what direction they were positioned and the area they monitored (*id.*, P. 34, L. 24-P. 35, L. 7). However, Plaintiff maintained in her affidavit that she submitted in opposition to the motion and in support of her cross-motion herein that the video of her accident was a fair and accurate depiction of the incident (*see* Goldszmidt Supporting Affidavit, ¶5).

Plaintiff also testified that the mats were dark grey and the same color as the lobby floor (March 10, 2017 Transcript, P. 32, L. 5-12). According to Plaintiff, the size of the uncarpeted marble area adjacent to the carpeted area was very small, which she described as approximately the width of the door (*id.*, P. 49, L. 10-17). She also maintained that the uncarpeted area was in front of a glass wall, not a door, and that she was approximately three to four feet behind the woman who was in front of her when she entered the Premises (*id.*, P. 50, L. 5-19; P. 52, L. 23-P. 53, L. 17).

Plaintiff maintained that the substance she observed on the floor was water, which caused her to slip and fall (December 16, 2014 Transcript, P. 38, L. 12-25-P. 39, L. 2). She also indicated that she had no knowledge of the length of time that the water was on the floor prior to her accident, and that she did not observe anyone slip in the area where her accident occurred on the morning of the incident (*id.*, P. 39, L. 3-9). Lastly, Plaintiff maintained that she made no complaints about wet or slippery conditions at the Premises at any time prior to her accident (*id.*, P. 101, L. 17-20).

Deposition Testimony of Kenneth Wentworth ("Wentworth")

Wentworth testified that Western Management was responsible for daily cleaning of the floor and that it employed a maintenance worker at the Premises whose shift was from 7:00 a.m. to 4:00 p.m., and another worker whose shift was from 6:00 p.m. to 11:00 p.m. (April 20, 2017 Transcript, P. 12, L. 11-15; P. 39, L. 11-21; P. 48, L. 22-24). He indicated that defendant, Altus Metal & Marble Services ("Altus") was responsible for polishing the lobby floor as needed (*id.*, P. 40, L. 5-12).³ He also indicated that a security guard from Reliant was at the Premises on the day of the accident (*id.*, P. 19, L. 5-25).

Wentworth indicated that there were four cameras in the lobby, each with a different view or angle, and that only one showed the incident (*id.*, P. 30, L. 3-18). He testified that he saw Plaintiff fall on the video, which was inside of the vestibule (*id.*, P. 42, L. 12-20). Wentworth also indicated that Plaintiff fell when she walked off the rain mats (*id.*, P. 63, L. 20-23).

He maintained that on the day of the accident, Western Management maintenance staff placed black rain mats on the lobby floor because it was raining (*id.*, P. 44, L. 19-P. 45, L. 5). According to Wentworth, the mats were non-slip, rubber adhesive on the bottom, and the top was comprised of a water absorbent, cleaning walk-off fabric material (*id.*, P. 48, L. 3-11). Wentworth also indicated that he ordered the mats, which were the width of the entrance doors and ran the length of the lobby, based upon their durability and use in the industry, and the black color to match the color of the lobby floor (*id.*, P. 45, L. 10; P. 56, L. 7-20).

Wentworth also testified that Western Management did not maintain any written policies, procedures or manuals regarding the placement of rain mats, but rather orally instructed maintenance staff to place rain mats at the Premises when there was any threat of rain (*id.*, P. 49, L. 6-13). Lastly,

³ Plaintiff and Altus entered a stipulation of discontinuance with prejudice on April 11, 2018 (see NYSCEF Doc. No. 116).

Wentworth maintained that no slip and fall accident occurred at the Premises two years prior to the accident, and that he never received any complaints regarding the lobby floor during such time (*id.*, P. 69, L. 7-16).

ARGUMENTS

Defendants argue that they are entitled to summary judgment dismissal of the complaint because they neither created the wet condition nor had actual or constructive notice of same. Defendants argue that they implemented reasonable measures to address the water tracked into the lobby when maintenance staff placed rain mats at the Premises during inclement weather.

Defendants annex to their moving papers video footage from a security camera at the Premises which depicts Plaintiff's accident. According to Defendants, the security video depicts a person walking on the marble floor, off of the mat without incident, as well as a male appearing to shake moisture off his umbrella in the area where Plaintiff stepped off of the rain mat seconds before her accident occurred.

Plaintiff submits an affidavit in opposition to the motion and in support of her cross-motion in which she states, *inter alia*, that:

“[a]fter viewing the video recording carefully, I realize that, at the time of my accident, I was compelled to walk around a woman who stopped dead ahead of me. As I spontaneously maneuvered around this unknown person so I would not bump into her, I unknowingly stepped off a rain mat upon which I had been walking, and I stepped onto the wet, slippery floor . . .” (Goldszmidt Supporting Affidavit, ¶6).

“As shown in the video recording, the accident was so sudden and unexpected that my left foot was still on the rain mat as my right foot slipped out from under me thereby causing me to fall forward . . .” (*id.*, ¶7).

Plaintiff contends that while wet umbrellas may have wet the floor, she disputes Defendants' characterization of the video. Plaintiff also argues, among other things, that defendants had actual

and constructive notice of the wet floor, and that it was totally foreseeable that a person would slip and fall on the wet lobby floor on the date of her accident.

DISCUSSION

“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 . . .” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

The defendant on a summary judgment motion in a slip and fall accident must establish that it did not create the dangerous condition, or that it had no actual or constructive notice of such condition that caused plaintiff’s injury (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Actual notice exists when a defendant either created the condition or was aware of its existence prior to the accident (*see Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011]). “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]).

Here, the evidence demonstrates that it was raining at the time of the incident and that Plaintiff admitted during her deposition that she had no knowledge of the length of time that the water was on the floor prior to her accident. Plaintiff also admitted that she did not observe anyone slip in the area where her accident occurred on the morning of the incident. She also testified that she made no complaints about wet or slippery conditions at the Premises at any time prior to her accident. Plaintiff also acknowledged that the video which showed her accident was a fair and accurate depiction of the incident. The video showed that Plaintiff stepped off the carpet covering the marble floor to step

around a person who had stopped walking on the carpet and that was when she fell. Further, the evidence demonstrates that Western Management placed mats in the lobby on the date of the accident, as well as on days whenever it rained, and that Plaintiff also testified that mats were placed in the lobby whenever it rained.

“The fact that it was raining and water was being tracked in does not constitute notice of a dangerous situation [,] warranting more than laying floor mats” (*Garcia v Delgado Travel Agency*, 4 AD3d 204, 204 [1st Dept 2004] [internal citations omitted]). Further, property owners are not obligated to provide a constant remedy for conditions created by tracked in rainwater (*see Polanco v Newmark & Co. Real Estate, Inc.*, 172 AD3d 602, 602 [1st Dept 2019]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [1st Dept 2000]).

Lastly, the evidence presented established that mats were placed in the lobby, which constituted reasonable maintenance measures to address the wet conditions (*see Polanco v Newmark & Co. Real Estate, Inc.*, *supra*; *O'Sullivan v 7-Eleven, Inc.*, 151 AD3d 658, 658-659 [1st Dept 2017]; *Guntur v Jetblue Airways Corp.*, 103 AD3d 485, 486 [1st Dept 2013]).

Defendants demonstrated their prima facie entitlement to summary judgment dismissal of the complaint by establishing that it neither created the condition nor had actual or constructive notice of same (*see Gonzalez-Jarrin v New York City Dept. of Educ.*, 50 AD3d 334, 335 [1st Dept 2008] [defendants entitled to judgment as a matter of law where defendants placed mat on the vestibule floor, and had no actual or constructive notice of alleged wet condition of floor]). Plaintiff has failed to raise a triable issue of fact to warrant the denial of summary judgment.

Accordingly, it is

ORDERED that the motion for summary judgment by Defendants 589 Fifth TIC I, LLC, 589 Fifth TIC II, LLC, Western Management Corp., 589 Associates, L.P., Reliant Security Co., Inc., “Reliant Security,” and Kenneth Wentworth is granted and the complaint is dismissed with costs and

disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs;
and it is further

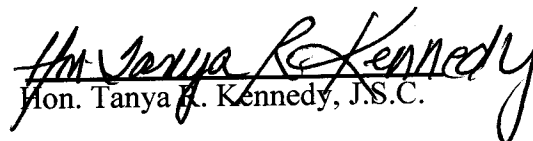
ORDERED that Plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
December 23, 2019

ENTER:


Hon. Tanya R. Kennedy, J.S.C.

HON. TANYA R. KENNEDY