

Harris v Kings Hotel, Inc.
2020 NY Slip Op 30871(U)
February 25, 2020
Supreme Court, Bronx County
Docket Number: 25222/2014E
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART STP

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LATOYA HARRIS,

Plaintiff,

Index No. 25222/2014E

-against-

KINGS HOTEL, INC.,

DECISION and ORDER

Defendant.

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KINGS HOTEL, INC.,

Third Party Plaintiff,

-against-

CENTERLIGHT HEALTHCARE, INC., d/b/a
CENTERLIGHT and CENTERLIGHT CERTIFIED
HOME HEALTH AGENCY d/b/a CENTERLIGHT,

Third Party Defendants.

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PRESENT: HON. DORIS M. GONZALEZ

Upon the forgoing papers, Defendant/Third Party Plaintiff, KINGS HOTEL, INC, (“Kings”) seeks summary judgment dismissing plaintiff’s complaint or, alternatively, partial summary judgment and a conditional order granting common law indemnification against the Third Party Defendant, CENTERLIGHT HEALTHCARE, INC., (“Centerlight”). Centerlight has cross-moved seeking summary judgment dismissing the complaint. After review of the papers, together with the opposition submitted thereto; review of the Court file; and upon due deliberation, the motion and cross-motion are decided as follows.

Plaintiff claims she was injured when she slipped and fell in the dining room of the Kings Hotel on November 23, 2012. At the time of her accident she was working as a home health aide. Plaintiff was in the process of clearing plates from a table and was discarding refuse in the garbage can located in the dining room. Plaintiff claims to have slipped on a wet substance.

Defendant Kings contends that it had no notice, either actual or constructive, of any alleged dangerous condition; that it did not have any employees working in the dining room and that it did not have any responsibilities regarding food service and clean up duties in the dining room, and that food services were provided by Third Party Defendant Centerlight.

Defendant Kings argues that Plaintiff is unable to establish, other than through speculation, that Kings had actual or constructive notice of any potentially dangerous condition that caused her to fall, and therefore Kings is entitled to summary judgment. Should the Court not so find, Kings argues that Centerlight was responsible for maintenance and cleaning in the dining room and therefore Kings is entitled to a conditional grant of summary judgment on the claim for common law indemnification.

Centerlight argues in support of its cross motion for summary judgment seeking dismissal of the complaint that the plaintiff is unable to make out a prima facie case against Centerlight because the plaintiff is unable to establish either actual or constructive notice of any alleged dangerous condition. In support of these arguments, Centerlight has highlighted portions of Plaintiff's deposition not raised by Kings all of which tend to demonstrate that the plaintiff herself did not see any water or other liquid on the floor before her fall.

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]). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, [1st Dept 2011]; *Manning v Americold Logistics, LLC*, 33 AD3d 427 [2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [2006]). Actual notice exists when a defendant either created the condition or was aware of its existence prior to the accident (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, [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]). Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [2006]; *Bosman v Reckson FS Ltd. Partnership*, 15 AD3d 517 [2005]).

A landowner and its managing agent have a duty to maintain premises in a reasonably safe condition (*Gronski v County of Monroe*, 18 NY3d 374 [2011]; *Basso v Miller*, 40 NY2d 233 [1976]; *Westbrook v WR Activities Cabrera-Markets*, 5 AD3d 69 [1st Dept. 2004]). Landowners and their agents may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136 [2017]).

As stated in *Smith v Costco Wholesale Corp.*, "[i]t is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk," (20 AD3d 499 [1st Dept. 2008]; *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275 [2005]). In order to subject a property owner to liability for a hazardous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Alexander v New York City Tr.*, 34 AD3d 312, 313 [2006]). In the case of actual or constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation (*Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [2007]; *Morales v Shelter Express Corp.*, 26 AD3d 420 [2006]).

In opposition to the motion by Kings the plaintiff argues that there is an issue of fact with respect to Kings' obligations regarding the maintenance and cleaning of the dining room based on the contract entered into between Kings and the New York City Department of Administrative Services. Pursuant to the contract, Kings agreed to provide services including cleaning and maintenance of the facility. This, in addition to duties assumed by Centerlight to provide additional cleaning services. Plaintiff further argues that the contract between Kings and the City stated that Kings retained responsibility to comply with all regulations under Part 7, Subpart 7-1 of the NYS Health Code which covers hotels. Plaintiff argues that this forecloses any argument by Kings that

it can not be held liable if the condition was as a result of the negligence of Centerlight.

With respect to the claims of lack of actual notice of a dangerous condition, Kings and Centerlight have satisfied their burden. This is so for two reasons. The first, as testified to by the plaintiff herself, she did not see any dangerous condition on the dining room floor prior to her fall, she had no idea what caused her to slip; she has no idea of the source of the alleged dangerous condition, and she has no idea how long the alleged condition existed prior to her fall. Second, it is Kings contention as testified to by its owner and president, Mr. Boeteng, Kings Hotel employees did not supervise the Centerlight employees and it was the Centerlight which provided the food in the dining room and was responsible for maintaining that area and keeping it clean. Thus there were no Kings Hotel employees present before this accident occurred who would have seen any alleged dangerous condition and thus had actual notice. With respect to Centerlight, Plaintiff has failed to come forward with any proof of actual notice or demonstrate that the condition was created by a Centerlight employee.

With respect to the issue of constructive notice, Kings and Centerlight have failed to satisfactorily establish entitlement to summary judgment. It is incumbent upon the defendant to affirmatively establish that the alleged defect did not exist for a sufficient period of time to become aware of the condition and take necessary remedial steps to correct the situation. Here, neither Kings nor Centerlight has made such a showing. Because plaintiff testified she did not see a dangerous condition, does not establish that it did not exist. It is defendant's burden to establish entitlement to the relief sought in the first instance before the opposing party even has to respond (*Spector v. Cushman & Wakefield, Inc.* 87 AD3d 422 [1st Dept. 2011]). Unlike the defendant in *Gagliardi v Compass Group, USA, Inc.* (173 A.D.3d 574, [1st Dept. 2019]), Kings and Centerlight have not established that they can not be found to have had constructive notice because it has not demonstrated that they satisfied the duty to reasonably conduct inspections of the premises. (*Graham v. YMCA of Greater NY*, 137 AD3d 27 [1st Dept. 2016]). It is the Defendant's burden to establish entitlement to the relief sought in the first instance. If the moving party fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, the motion must be denied regardless of the sufficiency of the opposing papers (see *Winegrad v New York University Medical Center, supra*; *O'Halloran v City of New York, supra*; *Giaquinto v Town of Hempstead*, 106 AD3d 1049 [2d Dept 2013]).

While the court in *Escobar v. New York Univ* (172 AD 3d 535 [1st Dept. 2019]), held that for summary judgment it is sufficient to establish the lack of constructive notice via plaintiff's testimony that "He did not see anything ... immediately before he fell, and neither he nor anyone else ever identified the cause of his accident." Here, the plaintiff testified that after her fall she felt wetness on her hand and boots. Affording every reasonable inference in favor of the party opposing the motion, as this Court must, this testimony is sufficient to create an issue of fact with respect to constructive notice. Accordingly, the motion and cross motion seeking summary judgment with respect to constructive notice are denied.

Kings asserts that it is entitled to conditional summary judgment on its claim for common law indemnification against Centerlight on the theory that Centerlight was solely responsible for the food service in the dining room and charged with the duty and responsibility for maintenance and cleaning the dining room. Thus, if Kings is found liable to the Plaintiff it can not be based on any act of negligence by Kings but only based on the negligence of Centerlight.


There is a question of fact based upon the above referenced contract between Kings and the City regarding the obligation of Kings for the maintenance and cleaning of the premises, in addition to its statutory duty to maintain the facility in a safe manner. Additionally, Kings has not demonstrated that it was free from negligence in the performance of its duties with respect to the maintenance and cleaning of the dining room. Therefore the motion seeking common law indemnification against Centerlight is denied. **ACCORDINGLY**, it is hereby

ORDERED, that the motion by defendant KINGS HOTEL, INC for summary judgment is denied in its entirety; and it is further

ORDERED, that the cross-motion by defendant CENTERLIGHT HEALTHCARE, INC is denied.

The foregoing shall constitute the decision and order of the Court.

Dated: 



Hon. Doris M. Gonzalez, J.S.C.