Ellsworth v County of Broome
2020 NY Slip Op 32530(U)
August 4, 2020
Supreme Court, Broome County
Docket Number: EFCA2017001669
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 5th day of June, 2020.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

NICOLE ELLSWORTH,

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2017001669

COUNTY OF BROOME, FLOYD L. MAINES VETERANS MEMORIAL ARENA, WORLD WRESTLING FEDERATION,

Defendants.

APPEARANCES:

Counsel for Plaintiff:

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County of Broome and Floyd L. Maines Veterans Memorial Arena:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion of Defendants Broome County ("County") and Floyd L. Maines Veterans Memorial Arena ("Arena") seeking Summary Judgment pursuant to CPLR 3212 and dismissal of the Complaint; and the cross motion of Plaintiff Nicole Ellsworth ("Ellsworth") seeking an Order denying the motion, or in the alternative, ordering a continuance to permit affidavits and disclosure to be had pursuant to CPLR 3212(f). The parties appeared for oral argument via Skype on June 5, 2020. After due deliberation, this constitutes the Court's Decision and Order related to the motion and cross motion.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On or about January 20, 2017, Ellsworth was attending a the World Wrestling Federation event at the Arena. She claims that she had gone to the use the restroom and then stopped at a concession stand during an intermission, and as she was returning to her seat, she slipped and fell on wet stairs. She further claims that another patron had spilled Sprite on the stairs while she was away from her seat, and that Arena staff had negligently cleaned the spill, leaving it still wet and dangerous, thereby causing her to fall. Ellsworth filed a Notice of Claim on or about February 28, 2017 and filed a Summons and Complaint on July 26, 2017. The County filed an Answer on September 22, 2017.

In July, 2019, Plaintiff filed a motion seeking an Order to extend her time to effectuate service on World Wrestling Federation, and World Wrestling Federation filed a cross-motion seeking dismissal of the complaint under CPLR §306-b, based on Plaintiff's failure to serve the Summons and Complaint within 120 days of filing. The Court denied Plaintiff's motion to extend the time to serve and granted World Wrestling Federation's cross motion to dismiss, without prejudice. Thus, at this point, the claim is only proceeding against the County and the Arena.

The County filed the instant motion seeking summary judgment and dismissal of the complaint pursuant to CPLR 3212. The County also sought dismissal of the complaint against the Arena, on the basis that the Arena is an arm of the County, without any legal identity separate and apart from the County. Plaintiff does not object to the dismissal of the complaint as against the Arena.

Plaintiff filed opposition papers to the County's motion for summary judgment and filed a cross motion seeking a continuance to permit affidavits to be obtained or disclosure to be had with respect to evidence of facts essential to Plaintiff's opposition. Plaintiff contends that there are issues of fact precluding summary judgment.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept.

2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

With respect to premises liability claims, "'[a] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.'" *McMullin v. Martin's Food of S. Burlington, Inc.*, 122 AD3d 1103, 1104 (3rd Dept. 2014) *quoting Johnson v. Culinary Inst. of Am.*, 95 AD3d 1077, 1078 (2nd Dept. 2012) (other citations omitted); *see Minutolo v. County of Broome*, 130 AD3d 1202, 1203 (3rd Dept. 2015) (citation omitted); *Cardinale v. Watervliet Hous. Auth.*, 302 AD2d 666 (3rd Dept. 2003). "The actual or constructive notice rule is premised on the concept that some observable condition exists that the landlord either has discovered or, in the exercise of reasonable care, should have discovered and remedied." *Stover v. Robilotto*, 277 AD2d 801, 802-803 (3rd Dept. 2000) *citing Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986). After a defendant has obtained actual or constructive notice of the existence of a dangerous condition, "the defendant has a reasonable time to correct or warn of its existence." *Scherer v. Golub Corp.*, 101 AD3d 1286, 1287 (3rd Dept. 2012) (citations omitted)

The County has submitted evidence in an attempt to show that it did not create the alleged hazardous condition, and that it did not have actual or constructive notice of any hazardous condition. With respect to actual or constructive notice of the alleged hazardous condition, the County argues that there is no evidence that anyone observed a spill on the stairs in the same area where Plaintiff fell, or any evidence that Arena staff was aware of any spill. According to the County, the only evidence comes from what Plaintiff allegedly heard someone else say regarding the spill, which would be hearsay, and insufficient to show actual or constructive notice. The

County further argues that there were handrails available for use, which might have prevented a fall, but Plaintiff did not utilize the handrails due to her hands being full. In opposition, Plaintiff claims that Arena personnel had been informed of a spill on the steps, but did not clean it up adequately. Plaintiff claims there were actually two spills. The first was the Sprite spilled by another patron, and the second was the beer Plaintiff spilled when she fell.

The County argues it did not create the condition and did not have actual or constructive notice of any spilled liquid. To satisfy its burden, the County is in the position of arguing that the facts show something did not happen (i.e. it did not create the condition nor obtain any actual or constructive notice) as opposed to showing some particular thing did happen. Proving the negative can be a difficult proposition. "A defendant may demonstrate a lack of constructive notice by offering evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Beck v. Stewart's Shops Corp.*, 156 AD3d 1040,1041 (3rd Dept. 2017) (internal quotation marks and citations omitted); *Faville v. County of Albany*, 163 AD3d 1297, 1298 (3rd Dept. 2018). Thus, "[o]nly where the record is 'palpably insufficient' to establish constructive notice 'that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it' can it be said that there is no factual issue to submit to the trier of fact." *Giambrone v. New York Yankees*, 181 AD2d 547, 548 (1st Dept. 1992) (*quoting Lewis v. Metropolitan Transp. Auth.*, 99 AD2d 246, 251 (1st Dept. 1984) *aff'd* 64 NY2d 670 [1984]).

The County has submitted reports, statements and deposition excerpts from Arena employees and deposition excerpts from Plaintiff's testimony in an effort to establish a prima facie case. Essentially, the County argues that none of the employees has information that would confirm that there was any liquid spilled on the floor where Ellsworth claims to have fallen, or that it was negligently cleaned up, and Ellsworth's recollection is faulty or not credible.

An Incident Report was completed by Broome County Security Officer Devoe on January 23, 2017, three days after the event. Devoe had been contacted by the Arena General Manager, and asked to obtain a report from Ellsworth about the circumstances of her slip and fall.

Ellsworth told Devoe that she had attended the wrestling event with her family, and that she had left prior to intermission to go to the restroom and then get refreshments. She was carrying a bucket of popcorn in her left hand and a beer in her right hand, and was descending the stairs to her seat when she slipped and fell spilling the beer but not the popcorn. The County maintains that Plaintiff could not have been using the available handrails because her hands were full. Ellsworth also told Devoe that she landed on her left thigh and broke her fall with her right hand. She had recently undergone surgery on her right hand so it was bandaged. Ellsworth further reported that an unknown man told her that another person had spilled a bottle of Sprite earlier in the intermission, and maintenance had come to clean up the spill while she was out getting refreshments, but must have missed some. Maintenance personnel also came over to clean up the beer that Ellsworth spilled. In addition to Devoe's incident report, Ellsworth also signed a 2 page affidavit confirming these facts.

The County contends that Ellsworth's subsequent deposition testimony was not consistent with her report to Devoe. In her deposition conducted on September 20, 2019, Ellsworth testified that her children met her at the top of the stairs and took the popcorn from her, so she was only carrying the cup of beer, as she descended the stairs to her seat. In her prior statement, she indicated that she was carrying beer and popcorn down the stairs. Ellsworth also testified that the unidentified man she spoke with said he had spilled the soda, while she had previously said the man told her someone else had spilled the soda. The County points to these inconsistencies as showing the Plaintiff's testimony to not be credible.

John Rowley, a County seasonal laborer working at the Arena, was also deposed. He explained that Arena staff have radios and they receive calls over the radio to respond to maintenance issues such as spilled food or drinks. He recalled hearing two different calls on his radio about two separate spills in the area where Plaintiff's seats were, and he made sure someone responded to them. He could not recall who went to clean it up. In general, whoever was closest to the report would have gone to clean it up. He was not aware anyone had fallen until the end of the show.

The County also submitted an Incident Report from Brian Norris, who spoke with several Arena employees working that evening. Joseph Pisani did not recall responding to a mop up call for a spilled drink at the time Ellsworth allegedly fell. Nick Dadamio recalled hearing a call for maintenance to clean up liquid spills around that time, but he did not go handle it, but dispatched either Pisani or Alex Leonard to handle it. Mr. Leonard did not remember anything with respect to this spill. Norris also spoke with Rowley and Rowley told him that he did not respond to either of the two mop up calls, but did check a little later to make sure it had been cleaned. Rowley said the second spill had been cleaned but just to be sure he used a towel to finish drying the area of any spilled drink or snow that may have been brought in from outside.

It cannot be said from review of the evidence that the County has established that it lacked actual or constructive notice of a spilled Sprite drink in the area where Plaintiff allegedly fell. None of the witnesses disputed that there was a spill (or two spills) where Plaintiff alleges to have fallen. The witnesses are not able to establish that there was no spill, or that there was a spill and it was properly cleaned. All they were able to say was that they did not recall, or that they did not clean the area personally. Rowley did not recall what he was doing when the call about the first spill came in, but he did not respond to the first call because he thought someone else was probably closer and would respond. Later, Rowley came over to check on the spill and dried up some liquid with a towel, but he was not sure if it was after the first or second spill and he was not aware anyone had fallen. Plaintiff claims that there were two spills; one which caused her to slip and fall, and the second when she spilled the drink she was carrying. Rowley seems to confirm that claim because he said he remembered hearing the calls go out for the clean up but he did not respond to either mop up call. That would suggest there were indeed two spills and the Arena employees had actual notice of them, and responded. This is not a situation where the defendant did not have time to remedy the condition (*see, e.g. Scherer v. Golub Corp.*, 101 AD3d 1286), but rather, the clean up was completed. "Where the defendant causes or permits a temporary slippery condition to exist, there may be liability - which issue is for the jury to decide." *Kelsey v. Port Auth. of New York and New Jersey*, 52 AD2d 801, 802 (1st Dept. 1976) (citation omitted). If Defendant had actual notice, and did not clean the spills appropriately and adequately, the County could be liable for Plaintiff's fall.

Defendant has also not shown that it lacked constructive notice in this case. "Constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendants to discover it and take corrective action." *Boyko v. Limowski*, 223 AD2d 962, 964 (3rd Dept. 1996). "A defendant may demonstrate a lack of constructive notice by offering 'evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell.'" *Beck v. Stewart's Shops Corp.*, 156 AD3d at 1041 *quoting Granillo v. Toys "R" Us, Inc.*, 72 AD3d 1024, 1025 (2nd Dept. 2010) [internal quotation marks and citation omitted]. The record is devoid of any evidence to establish that any Arena employee inspected the stairs prior to Plaintiff's fall, and could say that they were free of liquid. The witnesses either lacked personal knowledge of when the steps were last cleaned or inspected prior to Ellsworth's fall, or they were unable to state with any particularity when they were in the vicinity prior to Ellsworth's fall. Although there may not have been a long time that elapsed after the Sprite was spilled to the time Ellsworth fell, Plaintiff alleges that there was enough time for Arena employees to come and attempt to clean it. She estimated that she was gone for 5 to 15 minutes and the Sprite would have had to have been spilled and cleaned within that time frame, before she returned to her seat. That timing is not implausible, and the County has not shown that a spill and clean up could not have occurred in that timeframe. Thus, the County cannot show that the record is "palpably insufficient" to establish constructive notice. The Court finds that the County has failed to meet its initial burden of lack of actual or constructive notice, and therefore summary judgment should be denied regardless of the sufficiency of Plaintiff's submissions. *Granillo v. Toys "R" Us, Inc.*, 72 AD3d 1024; *See e.g. Sherry v. Wal-Mart Stores E., L.P.*, 67 AD3d 992 (2nd Dept. 2009). Any issues regarding inconsistencies in Plaintiff's account of the accident present issues of fact to be resolved at trial. *Giambrone v. New York Yankees*, 181 AD2d 547.

However, even if the Court concluded that the County had met its prima facie burden, the Court would still deny summary judgment because Plaintiff has raised triable issues of fact. In opposition to the County's motion, Plaintiff submitted an affidavit of Kenny Cotto-Escobar, who is in a long term relationship with Plaintiff and they reside together. Cotto-Escobar stated that he observed a man in the row behind them open a bottle of Sprite, which spilled out of the bottle

and onto the stairs. The man alerted an Arena employee, who came over and quickly wiped the spill with a towel, but according to Cotto-Escober, the employee failed to clean the additional stairs where the Sprite had also dripped. Cotto-Escobar saw Plaintiff slip on the spot where the Sprite had been spilled. The County contends that this affidavit should not defeat summary judgment because Plaintiff had failed to identify any witnesses who observed the Sprite being spilled, and now she has offered an affidavit from her own boyfriend to show that someone else saw the Sprite being spilled. The County's arguments with respect to the affidavit go to the weight afforded to the affidavit but those questions of fact and credibility would have to be resolved at trial, not by way of summary judgment.

Furthermore, the County has claimed that Plaintiff's hands were full and she was not making use of available handrails which could have prevented this fall. Plaintiff has submitted her own affidavit stating that she had given the popcorn to one of her boyfriend's sons at the top of the stairs, so she was only carrying the beer in one hand. She also stated that there was no handrail in the area where she slipped. Plaintiff has also submitted internet photos and photographs posted on the website of the architectural firm that installed the seats at the Arena, and these show that there are no handrails in the area where Plaintiff's seats were located. At the very least, Plaintiff has raised a triable issue of fact with regard to the existence of the handrails as well as whether her hands were free to utilize any available handrails.

Therefore, even assuming *arguendo* that Defendant had made out a prima facie case of entitlement to summary judgment, the Plaintiff has submitted evidence that raises triable issues of fact that require denial of Defendant's motion. In light of that determination, Plaintiff's alternative request for a continuance to permit affidavits or disclosure to be obtained is academic. Plaintiff's primary relief of an Order denying Defendant's summary judgment motion is being granted, so her alternative relief does not come up for consideration.

CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Defendant's motion to dismiss the claim as against the Arena is GRANTED; and it is further

ORDERED, that the County's motion for summary judgment is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: August 4, 2020
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice