

Cevallos v First Quality Maintenance II, LLC
2020 NY Slip Op 33702(U)
October 29, 2020
Supreme Court, Kings County
Docket Number: 519951/2016
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 29th day of October 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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JULIO M. CEVALLOS and MARIA GABRIELA
ALTAMIRANO,

Index No.: 519951/2016

Plaintiff,

DECISION & ORDER

-against-

FIRST QUALITY MAINTENANCE II, LLC,
RXR HB OWNER LLC, ALLIANCE BUILDING
SERVICES, LLC, ALLIANCE BUILDING
SERVICES/METROPOLITAN BUILDING
SERVICES LLC, and RXR PROPERTY
MANAGEMENT LLC,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>60-74, 75-89, 97</u>
Opposing Affidavits (Affirmations) _____	<u>90-92, 97, 101-104</u>
Reply Affidavits (Affirmations) _____	<u>99, & 122</u>

Introduction

Defendants, First Quality Maintenance II, LLC, Alliance Building Services, LLC

And Alliance Building Services/Metropolitan Building Services, LLC's (FQM/Alliance)

moves by notice of motion, sequence number five, pursuant to CPLR § 3212, for

summary judgment. Defendants RXR HB OWNER LLC and RXR PROPERTY MANAGEMENT LLC's (hereinafter "RXR defendants") moves by notice of motion, sequence number six, pursuant to CPLR § 3212 for summary judgment.

Background

This action arises out of personal injuries allegedly sustained by plaintiff Julio Cevallos on December 5, 2015, when he slipped and fell on a puddle located on the loading dock floor where vehicles are parked at the premises located at 230 Park Avenue, New York, New York. Plaintiff testified that he fell in the loading dock in the early morning hours, between 4:00 and 5:00 a.m. of December 5, 2015. The weather conditions were good; it had not snowed or rained. Plaintiff was present in the loading dock as part of his usual duties as a driver of a garbage truck for Five Star, picking up the recyclable items. He started his shift at 8:00 p.m. and typically worked 13-15 hours until his work was completed. He worked with a helper named Selso Gomez Cuello.

Plaintiff testified at an examination before trial (EBT) on April 5, 2018 (*see* NYSCEF Doc. No. 68, Exhibit G, Plaintiff's EBT). The entrance to the area was wide and the area could fit two garbage trucks inside. A view from the street showed on the right there was a ramp to walk up and down. Directly ahead was the platform of the loading dock. On the loading dock, were the garbage bags and cardboard for pick up. Plaintiff routinely backed his truck onto the loading dock. At first attempt, plaintiff could not pull into the dock since cars were parked in the loading dock area. He took photographs to prove to his supervisor that he could not do his pick-up, and to ask his

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supervisor to call the building to have someone remove the vehicles so he could pull his truck into the dock. He e-mailed the photographs to his supervisor. He then left the location and went to different stops. He returned to the building and the cars were gone.

He does not recall the time it took him to make the other stops, but he noted that he returned possibly three hours later to pick up the recycle material. During this period, a different Five Star truck picked up the regular garbage. Plaintiff backed the truck in, with the help of his helper, directing him. Plaintiff exited the truck, walked back along the driver's side of the truck, behind the truck, picked up the bags, and threw them into the truck. He then walked to the ramp, to move the truck further back. At the bottom of the ramp he took two or three steps and he slipped on a puddle. Although not very big, the puddle was dark, consisting of an "oil and water" mixture. At his deposition, plaintiff marked the dark spot where he fell on the photograph. At the time of the slip and fall, plaintiff wore work boots.

Joan Dooley, a project manager for FQM/ALLIANCE, was deposed on April 17, 2018 and February 14, 2020 (*see* NYSCEF Doc. No. 69, Exhibit H, Dooley EBT). Dooley previously worked at 230 Park Avenue and presently works out of the RXR property manager's office in the building. Her duties are to oversee the efforts of RXR's forty-eight porters/cleaning staff in the building. These staff members are responsible for cleaning and maintaining the common spaces. FQM/ALLIANCE had three other employees, all contract porters, who worked in the building. However, each worked only at night, cleaning tenant spaces. They did not clean common areas, including the loading

dock. Dooley testified that Jan Kleback is the only employee who cleaned the loading dock; he swept and mopped each morning. Kleback used a broom, mop and sometimes a hose. He worked the morning shift 6:00 a.m. to 2:30 p.m. The RXR porters brought the garbage down between 5:00 p.m. and 12:30 a.m. There are no employees who work on the dock after 12:30 a.m., before Kleback arrived at 6:00 a.m.

Leandro Tavares, the day-shift foreperson of cleaning for RXR was deposed on February 14, 2020 (*see* NYSCEF Doc. No. 70, Exhibit I, Taveras EBT). Tavares routinely inspected the area three times a day. He testified that no FQM employees clean the loading dock; Jan Kleback cleaned the loading dock first thing each morning. Taveras did not receive any complaints about grease, oil or slippery substances in the area where the accident allegedly occurred.

Discussion

Summary Judgment

“[T]he 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 demonstrate absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v.*

Nassau Health Care Corp., 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party 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 *Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; see also *Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

“In a slip-and-fall case, a defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence” (*Johnson v. 101-105 S. Eighth St. Apartments Hous. Dev. Fund Corp.*, 185 A.D.3d 671, 124 N.Y.S.3d 852 [2 Dept., 2020], quoting *Parietti v. Wal-Mart Stores, Inc.*, 29 N.Y.3d 1136, 61 N.Y.S.3d 523 [2017]). “A party ... who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific [recurrence] of that condition” (*Asprou v. Hellenic Orthodox Cmty. of Astoria*, 185 A.D.3d 641, 127 N.Y.S.3d 584 [2 Dept., 2020] [internal citation omitted]).

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... To meet its burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the accident... Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the

area in question, is insufficient to establish a lack of constructive notice.

(*Johnson v. 101-105 S. Eighth St. Apartments Hous. Dev. Fund Corp.*, 185 A.D.3d 671, *supra* [internal citations and quotation marks omitted]).

In the case at bar, the RXR defendants' failed to meet the prima facie burden on notice, as the deposition testimony of both the foreman and the building superintendent merely referenced "general inspection and cleaning practices" and failed to "submit evidence regarding specific cleaning or inspection of the area in question relative to the time when the plaintiff's accident occurred" (*Griffin v. PMV Realty, LLC*, 181 A.D.3d 912, 119 N.Y.S.3d 876 [2 Dept., 2020], citing *Rodriguez v New York City Hous. Auth.*, 169 A.D.3d 947, 94 N.Y.S.3d 318 [2 Dept., 2019]). Here, the record contains photographic evidence and sworn testimony indicating that a defective condition existed for several hours prior to the accident. The record also contains sworn testimony that porters and Jan Chebak, under the supervision of FQM/ALLIANCE, performed work, including separating garbage and cleaning, at the accident location as part of their duties. The record also shows that two vehicles were within the locked, security-gated area of the loading dock in the hours prior to the accident and were removed upon request from the plaintiff and his employer. The moving defendants failed to submit any maintenance records from the night of the accident, or any affidavit or other sworn testimony from the porters, Chebak, or any other person working or present in the loading dock in the hours prior to the accident, denying that they created the defect. Further no evidence was submitted demonstrating that the defect was not present when they last cleaned or inspected the accident location.

Even assuming, arguendo, that the RXR defendants met their prima facie burden on the notice issue, the photographic and testimonial evidence in the record indicating that the defective condition existed from as early as 11:00 p.m. Friday evening, while the accident occurred between 4:00 and 5:00 a.m. Saturday morning, raise issues of fact as to constructive notice.

Conclusion

Accordingly, defendants FQM/ALLIANCE's motion (sequence number five) and the RXR defendants' motion (sequence number six) for summary judgment are denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

KINGS COUNTY CLERK
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