

Shaw v TD Bank, N.A.
2020 NY Slip Op 33717(U)
November 9, 2020
Supreme Court, New York County
Docket Number: 151294/2016
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 151294/2016

KAREN SHAW and JAMES OLSON,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

TD BANK, N.A., TD BANK US HOLDING COMPANY, TD BANK USA, N.A., GREEN 317 MADISON LLC, SLG 331 MADISON LLC, SLG 48E43 LLC, 51E42 OWNER LLC, SL GREEN REALTY CORP., and GREEN 110 EAST 42ND LLC,

Defendants.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this slip and fall action commenced by plaintiff Karen Shaw (plaintiff) and James Olson (Olson) (collectively plaintiffs), defendants TD Bank, N.A., TD Bank U.S. Holding Company, TD Bank USA, N.A. (collectively TD Bank) and Green 317 Madison, LLC (Green) move for an order, pursuant to CPLR 3212, for summary judgment.¹ Plaintiffs oppose the motion. After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

TD Bank leased a location at 42nd Street and Madison Avenue (the Premises) from Green, which was an out-of-possession landlord. The Premises had two entrances. One of the entrances

¹ Olson asserts a claim for loss of consortium.

was on 42nd Street and the other was on Madison Avenue. Upon entering at the 42nd Street entrance, one would pass through an ATM vestibule which had a carpeted floor, and there were two main doors into the main lobby where the check counter was to the left and a staircase to the right. The floor in the lobby was black and white marble.

On March 12, 2013, the date of plaintiff's accident, Natalie Baker-Waterman (Baker-Waterman), TD Bank's Sales and Service Manager, was working at the Premises. She testified at her deposition that "the mats were out [that day], so I can only assume that it was raining" since there were "mats on the floor when it rains or snows" (Scarcella affirmation, exhibit A at 45). According to Baker-Waterman, "anyone that's working" determines whether "the mats should go out" (*id.* at 45-46). During her deposition, she did not recall who decided to put the mats out on the day of plaintiff's accident, but was certain that "[o]n the day of the incident, all six (6) mats were out on the floor" (*id.* at 46). Specifically, she testified that "two mats were in front of the doors, one in front of the check writing counter, one in front of the teller line, and one in the waiting area where the customer stands to approach the teller" (*id.* at 46). She further testified that on that day: "A wet floor sign was out at the time of Shaw's fall, and was placed in front of a large marble post in front of the main entrance doors" (*id.* at 70). A "wet floor" sign was placed a few paces away from where the mat ended.

Baker-Waterman testified that there was no way to determine when the mats were put out on the day of the incident. She further testified that, during the day, there were inspections of the floor area by anyone on the staff (*id.* at 62), but that there was no written protocol concerning these inspections:

"Q: Was everyone expected to make inspections of the floor?"

A: That's an unwritten rule. As a manager, it's one of those things that I guess it's tradition. We always did that, maintain the floors.

Q: Was there anything in writing, any TD Bank guidelines, protocol regarding conducting inspections of the bank during the course of the day?

A: No”

(*id.* at 63).

Additionally, she testified that she did not recall any employee mopping any portion of the Premises on the day of plaintiff’s accident (*id.* at 60). Finally, Baker-Waterman testified that a greeter was sometimes stationed at the door of the Premises, and that the greeter would examine the floor, there was no greeter stationed in the bank on the day of plaintiff’s incident. With respect to floor inspections that day, Baker-Waterman testified:

“Q. So as you sit here today, are you able to tell me whom is the last person who actually inspected the area where Ms. Shaw [fell]?”

A. I cannot”

(*id.* at 65).

Barbara Koudellou (Koudellou), TD Bank’s Branch Manager, was also working that day, and she testified that the mats and the wet floor sign were placed out in inclement weather (Scarcella affirmation, exhibit B at 37).

During her deposition, plaintiff testified that, on the date of the accident, she entered through the 42nd Street entrance (Scarcella affirmation, exhibit C at 13). It was 6:00 pm when she entered and the bank was open. She had visited this TD Bank branch every month for approximately two years before the accident occurred. She testified that it had been raining all day

that day and she was wearing flat “boot-type shoes” (*id.* at 17). She also recalled that “[w]hen entering the bank proper, there was a runner going straight from the door directly to the teller station, teller platform, whatever it’s called” (*id.* at 18). The floor underneath the runner was marble. She did not recall seeing caution signs and, according to her testimony, there were no other runners or mats that she saw (*id.* at 19). She walked on the runner for “probably” one or two steps “[b]ut then the stairway was immediately off to the right, so I immediately took my right turn” (*id.* at 19).

Plaintiff further testified that she “fell when [she] turned to the right, [and] took a couple of steps. I must have hit some water on the floor. My feet went up. I went down. And that was before going up the steps” (*id.* at 24). In answering questions about the fall, she stated:

“Q: Before you fell, did you notice that the floor was wet?

A: I was – I did not see. I don’t believe – I did not notice any water on the floor. But the material of that floor, very shiny, very glossy. If I can say, I always wondered why TD Bank chose aesthetics over safety, because that marble floor—”

(*id.* at 24- 25).

At the time plaintiff fell, she was looking “clearly ahead of [her] observing everything and walking to the stairs:

“Q: But did you actually notice any kind of precipitation, puddles, anything on that before you fell?

A: I was concentrating on getting to my meeting”

(*id.* at 25).

Asked whether her shoes were wet when she entered the bank, plaintiff responded: “I would imagine that my shoes were wet, because I was coming in from the outside and it had been

raining on and off all day, and there were puddles. The streets were wet. So probably my shoes were wet” (*id.* at 31). She testified that, after her fall, she noticed that the floor was slightly wet:

“Q: Immediately after you fell, before Mr. Edwards or anyone else came over to assist you, did you notice anything on the floor while you were still down on the ground?”

A: While I was still down on the ground, I noticed that the floor was slightly wet.

Q: Just can you describe what you mean by ‘slightly wet’?

A: It was – there were –it was wet. Maybe strike ‘slightly.’ It was wet.”

Q: Did you notice any puddles?

A: I noticed that there was water on the floor”

(*id.* at 38).

Additionally, plaintiff stated: “The floor was wet, and I don’t recall, but I know that the floor was wet and that I was in the puddle on the floor” (*id.* at 38).

The incident report that plaintiff completed reflected that it was “raining all day” (Scarcella affirmation, exhibit F at 2), that the cause of the accident was “slippery floor-no rug,” and she added a comment that the “floor was wet and slippery” (*id.*).

LEGAL CONCLUSIONS:

“A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence” (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]; *Graham v YMCA of Greater N.Y.*, 137 AD3d 546, 547 [1st Dept 2016]). “[T]o impose liability for an allegedly dangerous condition caused by precipitation tracked into a building, the defendant must have either created the condition or had actual or constructive notice

of the condition and a reasonable time to” remedy it (*Radosta v Schechter*, 171 AD3d 1112, 1113 [2d Dept 2019]). “A defendant has constructive notice of a dangerous condition when the dangerous condition is visible and apparent, and existed for a sufficient length of time before the accident that could have been discovered and corrected” (*Radosta*, 171 AD3d at 1113). ““To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell”” (*id.*, quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008]).

A store owner is not obligated to provide a constant remedy for tracked-in water during rainy weather (*see Radosta*, 171 AD3d at 1113), nor is a store owner obligated to cover the entire floor with mats or to continuously mop up all tracked-in water (*see Garcia v Delgado Travel Agency, Inc.*, 4 AD3d 204, 204 [1st Dept 2004]).

In support of its motion, TD Bank argues that it took all reasonable precautions to remedy any wet conditions caused by the ongoing rain. It argues that the following undisputed facts support a finding for dismissal as a matter of law:

- multiple mats were placed on the lobby floor, immediately in front of the entrance doors and in other areas of the lobby (Exh. A; T46:17-T47; Exh. B; T36:9-18; Exh. C; T18:2-23; Exh. D; Exh. E);

- [Plaintiff] not only walked on these mats which were placed out due to the inclement weather, but she also walked through a carpeted ATM vestibule in order to enter the main lobby (Exh. A; T47:15-19; Exh. C; T14-8; see also Exh. F, Pltff’s witness statement);

- Photographs taken from the surveillance [camera] clearly show that the mats were placed on the floor along with a yellow ‘wet floor’ sign warning customers (Exh. D; Exh. E)

- Police Officer Phillips was standing right next to the spot where [plaintiff] fell immediately before the incident, and no complaints had been received by TD Bank regarding a wet floor (Exh. E);

- Baker-Waterman also testified that TD Bank employees would ‘constantly have a mop out’ and ‘if it’s raining, you know, we are constantly just cleaning up the floor’”

(memo in support at 12).

In opposition, plaintiffs argue that TD Bank and Green assert that they had usual monitoring and cleaning procedures, but that those procedures were, by their own admission, sporadic in nature. Plaintiffs further assert that defendants have failed to demonstrate that even the sporadic inspection and cleaning procedures were performed on March 12, 2013 at any point during the day, and have failed to demonstrate when, on the date of the accident, the area where she fell was last inspected or cleaned. According to plaintiffs, defendants have offered no evidence to establish they undertook any articulated efforts on March 12, 2013 “to ensure the area of plaintiff’s slip and fall was safe and free from hazards or dangers, such as water on the shiny black marble floor prior to her entering the bank” (memo in opp at 5). Plaintiffs also maintain that, on the date of the accident:

“it is without dispute that no cleaning services were provided during all the hours the bank was operating prior to her accident as the defendant only employed cleaning personnel to work after hours of operation”

(memo in opp at 5).

Accordingly, plaintiffs insist, the defendants have failed to meet their prima facie burden on their motion for summary judgment, this Court should deny the motion, and plaintiffs’ papers need not even be considered.

This Court agrees with plaintiffs that defendants offer no support for their contention that they did not create a hazardous condition, and that they therefore cannot establish their prima facie entitlement to summary judgment on this ground. Where a defendant establishes that it took reasonable precautions to remedy a wet condition, it is entitled to summary judgment (*Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 465-466 [1st Dept 2009]).

In *Pomahac*, the court found that defendant met this burden where it: (1) provided two mats in the entranceway, one in the vestibule and one in the lobby; (2) placed at least one yellow “caution” sign, in the immediate area of plaintiff’s fall, in the lobby; and (3) assigned a worker to mop the lobby periodically, including at the time of plaintiff’s fall (*id.* at 467). Similarly, in *Radosta*, the Court found that the defendant was entitled to summary judgment where it was undisputed that:

“it was raining heavily on the day of the accident, and that there was a mat just inside the front entrance to the store. [The franchisee of the store] testified at her deposition that store employees were instructed to dry-mop water from the floor every 15 minutes on days it rained. At his deposition, one of [the franchisee of the store’s] employees testified that he mopped water as soon as he observed it. Moreover, the evidence submitted in support of the defendants’ motion demonstrated that the employee dry-mopped the area of the floor where the injured plaintiff allegedly fell approximately 15 to 25 minutes before the accident occurred”

(*id.* at 1113-1114).

Furthermore, defendants argue that no water was visible on the floor immediately before plaintiff's fall, citing to surveillance photographs annexed to defendants' motion which were taken at the Premises on the day of the accident. (*see* Scarcella affirmation, exhibit E). Defendants argue that, based on Baker-Waterman's testimony that she inspected the area after plaintiff's fall and saw no water, no water was observed on the floor immediately after her fall. However, plaintiff testified at her deposition that, after she fell, and was still on the ground, she noticed water on the floor. She further testified that she did not notice water on the floor prior to her fall because she was concentrating on getting to a meeting. This conflicting evidence about whether there was water on the floor at the time of plaintiff's accident, coupled with questions about when TD Bank last inspected and/or mopped the area, creates a question of material fact which precludes the granting of summary judgment to TD Bank.

Although Baker-Waterman testified that it was raining on the day of plaintiff's fall and that mats and a yellow caution sign had been put out, she also testified that she did not know who made the decision to put these items on the floor or whether any specific employee had inspected the premises. Despite giving general testimony about the custom and practice of TD Bank employees mopping and inspecting, she was unable to provide any specifics about what, if anything, was actually done on the day plaintiff fell. Further, she did not recall anyone mopping that day (*Scarcella* affirmation, exhibit A at 60) and did not know when the area where plaintiff fell was last inspected before her fall:

“Q: So as you sit here today, are you able to tell me whom is the last person who actually inspected the area where Ms. Shaw [fell]?”

A: I cannot”

(*Scarcella* affirmation, exhibit A at 65).

Because Baker-Waterman testified that she did not know when the floor was last mopped; there was no protocol for mopping on a rainy day; there was no specific person designated to inspect and/or mop the floor; and defendants offer no other testimony or evidence on this issue, the defendants have not established a lack of notice of water in the location where plaintiff fell. Therefore, defendants are unable to establish as a matter of law that they did not have constructive notice of the allegedly dangerous condition. (*See Radosta*, 171 AD3d at 1114; *see also Hill v Manhattan North Management*, 164 AD3d 1187[(1st Dept 2018)](the court denied summary judgment where the plaintiff slipped and fell as a result of water in the vestibule of a building as the defendant could not demonstrate when the area was last inspected and, therefore, burden did not shift to the plaintiff to establish how long the condition existed)). Thus, there is no need to consider the sufficiency of plaintiff's papers on this point.

Defendants further assert that Green, as an out-of-possession landlord, has no liability in this matter. Specifically, defendants argue that in "section 7.1.7.," "the lease between TD Bank and Green stated that it was TD Bank's duty to maintain the premises in good condition and repair" (memo in support at 15). The Lease annexed to defendants' motion, dated July 30, 2004, indicates that Green was the landlord and Commerce Bank, N.A. was the tenant (Scarcella affirmation, exhibit J at 1)(the Lease). Defendants state in their reply, without any supporting documentation, that Commerce Bank, N.A. is TD Bank's predecessor in interest.

In opposition, plaintiffs argue that, in their answer, defendants admit that Green was the owner and the lessor of the Premises in March of 2013. She further argues that, while TD Bank, N.A. admitted that it leased and maintained the subject premises in March of 2013, the Lease submitted in support of defendants' application for relief is not between TD Bank and Green but rather is between Green and Commerce Bank, N.A., and defendants do not submit any proof that

TD Bank assumed the lease from Commerce Bank, N.A. The Appellate Division, First Department has held that an out-of-possession landlord is:

“generally not liable for negligence with respect to the condition of property, unless it is contractually obligated to make repairs and/or maintain the premises or had a ‘contractual right to reenter, inspect and make needed repairs at the tenant’s expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision”

(*Sapp v S.J.C. 308 Lenox Ave. Family LP*, 150 AD3d 525, 527 [1st Dept 2017] [internal citations omitted]).

This Court notes that the Lease does not identify TD Bank as the tenant. However, the Lease has a term of 15 years and was, therefore, in effect on the date of plaintiff’s incident. The Lease pertains to “those certain premises located on and comprising a rentable portion of the ground floor and the entire rentable portion of the second floor . . . in the building known as 317 Madison Avenue,” (Scarcella affirmation, exhibit J at 7), which is the Premises in this action. The Lease also reflects that Green is the landlord.

Further, the Lease submitted to this Court does not contain a provision numbered “7.1.7.,” nor was this Court able to locate in the Lease the alleged language in the Lease quoted above. However, plaintiffs do not dispute that Green was an out-of-possession landlord. Nor do plaintiffs identify any provisions of the Lease that would render Green responsible for making repairs or maintaining the Premises, which would of course be relevant to Green’s potential liability. Therefore, defendants’ motion is granted to the extent that it seeks summary judgment dismissing all claims against Green.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants TD Bank, N.A., TD Bank U.S. Holding Company, TD Bank USA, N.A. and Green 317 Madison LLC for summary judgment is granted only to the extent of dismissing this action as against defendant Green 317 Madison LLC, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of this action as against defendants TD Bank, N.A., TD Bank U.S. Holding Company, TD Bank USA, N.A. is severed and continues; and it is further

ORDERED that this constitutes the decision and order of the court.

11/9/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE