Macri v Fluor Enters., Inc.
2020 NY Slip Op 34849(U)
April 28, 2020
Supreme Court, Westchester County
Docket Number: Index No. 60904/2017
Judge: Charles D. Wood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

To commence the statutory time period for appeals
as of right (CPLR 5513[a]), you are advised to serve
a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

LEONARD MACRI,

Plaintiff,

-against-

FLUOR ENTERPRISES, INC., FLUOR CORPORATION, EMBE HOME SOLUTIONS, INC. a/k/a/ CERTA PRO PAINTERS, INTERNATIONAL BUSINESS MACHINES CORPORATION a/k/a IBM CORPORATION,

Defendants.

---X

DECISION & ORDER
Index No. 60904/2017
Sequence Nos. 1&2

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 52-170 were read in connection with the separate motions for summary judgment pursuant to CPLR 3212, by Embe Home Solutions, Inc. A/k/a Certa Pro Painters (hereinafter referred to as EMBE), (Seq 1); and Fluor Enterprises, Inc., Fluor Corporation, (collectively, "Fluor"), and International Business Machines Corporation a/k/a IBM Corporation ("IBM"), (Seq 2), dismissing plaintiff's complaint. Both IBM and Fluor also move for summary judgment on their Fifth Cross Claim against EMBE for full indemnity for all of their economic losses stemming from EMBE's failure to purchase contractually-required insurance.

Plaintiff brought this action to recover damages from injuries allegedly sustained on October 14, 2014, when he allegedly slipped and fell on a recently painted walkway in the loading dock area at IBM CHQ at One New Orchard Road in Armonk, New York. The subject walkway was completed

by a subcontractor of EMBE between September 12 and 27 of 2014, some seventeen days prior to plaintiff's alleged accident.

Based upon the foregoing, the motions are decided as follows:

It is well settled that "a 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 the absence of any material issues of fact" (Alvarez v Prospect Hosp. 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp. 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist. 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic

remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital 68 NY2d 320,324 [1986]). CPLR 3212(b), specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

Here, plaintiff claims that while he was working as a mail courier, he slipped and fell, due to the existence of two different walking surfaces on the recently painted loading dock floor, which he was allegedly unaware of, the color of the entire floor was the same, but the walking surface changed from sandpaper to a slippery as ice consistency without a visual warning, tape, signs, or painted lines. Plaintiff testified that prior to the incident, he had walked over the specific area where he slipped three to four times per day during the month before the accident.

In EMBE's motion for summary judgment, EMBE argues that it properly relied on a commercially available floor finish that it satisfactorily used previously without any slipping problems.

Mitchell Berliner testified that he is one of the owners of EMBE. The Citadel Floor system used for the subject project has never been known to him or EMBE to be dangerously slippery and was not known to create any dangerous or defective conditions. The subject Citadel Floor System installed prior to October 14, 2014, at ArmonkIBM CHQ was done pursuant to the manufacturer's installation instructions. He personally inspected the floor after the installation and found that the Citadel Floor system had been applied properly. Prior to October 14, 2014, he was not aware of any accidents relating to the installation of the Citadel Floor system that was used on the subject floor. Berliner claims that he had three crews, including the crew that did the subject installation, which were all trained in Citadel systems.

Shawn Gallagher testified that he has been employed as a sales associate by EMBE since March of 2004; and he received training to do estimates and sales for CertaPro at its corporate headquarters in Pennsylvania. Prior to working for EMBE, he had worked as a painter for 19 years. He created the proposal for the floor finish system installed at the Armonk IBM CHQ. Prior to the subject accident, he had estimated other projects using the Citadel Floor system, and he believes that it was an appropriate and proper floor finish for the loading dock floor. It was not known to him to be dangerously slippery, and was also not known to create any dangerous or defective conditions. Prior to October 14, 2014, he was not aware of any slip and fall accidents relating to the Citadel Floor system that had been installed at the loading dock at the Armonk IBM CHQ.

Fluor also moves for summary judgment severing and dismissing all claims against it, upon the grounds that: i) Fluor was not itself negligent because it did not perform any of the work which purportedly created the alleged dangerous condition; ii) if CertaPro or its subcontractor created a dangerous condition in applying the coating to the loading dock floor, Fluor was not negligent because it did not supervise or control the work of CertaPro or its subcontractor; iii) Fluor cannot be vicariously liable for any alleged negligence of an independent contractor in allegedly creating a dangerous condition; and iv) Fluor owed no other duty to the plaintiff upon which liability can be based.

IBM moves for summary judgment severing and dismissing all claims against it upon the grounds that IBM did not perform any of the work which purportedly gave rise to the alleged dangerous condition; did not supervise or control those who did perform the work; did not create nor have actual or constructive notice of any alleged dangerous condition with respect to the loading dock floor.

Michael Fleury testified on behalf of the Fluor defendants. He was employed by Fluor from 2010 to 2018. In 2014, he was a site manager for Fluor for various IBM properties including the subject premises. He confirmed that Fluor issued notices of acceptance of the work performed by EMBE. The notices of acceptance would have been signed after someone from Fluor inspected the work to make sure it was done properly. The work would also have been inspected by Lorraine Vigliotti on behalf of IBM.

Lorriane Vigliotti, who was produced as a witness on behalf of IBM. She is employed by IBM as a technical coordinator at the Armonk IBM CHQ building. Her duties are to oversee the business operations of the building. She was to make sure projects got done and to interface between Fluor and IBM. IBM had a contract with Fluor which required Fluor to manage the cleaning and maintenance of the buildings and perform projects. She requested that the subject floor project be done because the existing floor was aesthetically unpleasing.

It is well-settled that a defendant moving for summary judgment in a slip or trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. Defendants may not be held liable for the application of "wax, polish, or paint to a floor...unless the defendant had actual, constructive, or imputed knowledge" that the product could render the floor dangerously slippery (Faiella v Oradell Constr. Co., Inc., 171 A.D.3d 1013, 1014 [2d Dept 2019]).

EMBE has made a prima facie entitlement to summary judgment as it has established that it did not have actual, constructive or imputed knowledge that the Citadel floor system used could render a floor slippery or create a dangerous defective condition. EMBE, before the subject accident, also

did not know of any prior accidents arising out of the application of the Citadel floor system. There also exists no proof that the Citadel floor system was applied in a negligent manner. Mitchell Berliner testified that the floor finish was installed pursuant to manufacturer's instructions and that the finish had a proper coefficient of friction. After the Citadel floor finish was installed, it was also looked over both by representatives of Fluor and IBM and found to be satisfactory as evidenced by the certificates of acceptance that were issued by Fluor, and the work was paid for.

Significantly, EMBE claims that between late September when the floors were finished, and the plaintiff's accident of October 14, 2014, plaintiff admittedly walked over that area three to four times per day while making deliveries to that building, thus, making him aware of the different textures of finish on the floor. Thus, EMBE argues that this constitutes further proof that there is no evidence of any negligent application of the floor finish as plaintiff walked over it numerous times himself prior to this accident without incident, and was previously familiar with the difference of textures.

Although a property owner has a duty to maintain its property in a reasonably safe condition, there is "no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (Jang Hee Lee v Sung Whun Oh, 3 AD3d 473 [2d Dept. 2004]).

Summary judgment may also be granted to a defendant on the basis that the plaintiff never found the floor to be slippery himself prior to his accident. (Hernandez v BPAm. Inc., 123 AD3d 1095, 1096 [2d Dept 2014]).

Plaintiff concededly traversed the subject loading dock area without incident three to four times per day five days per week(Plaintiff Tr. at 166), prior to his alleged fall. He had the same routine every day. The fact that plaintiff was in the subject area and stepped in that area countless times probably at least 30 times, prior to the accident, is a very significant factor,

together with plaintiff's testimony that there was no water or liquid in the area at the time of the fall. Nothing had changed in the condition of the subject area weeks before plaintiff's fall, and there is no evidence that plaintiff ever made a formal complaint about the condition of the subject area. Accordingly, in light of this record, EMBE establish their prima facie entitlement to judgment as a matter of law.

In opposition to the motions for summary judgment, plaintiff's experts claim (among other things) that the subject loading dock was made to be a dangerous "surprise" condition.
Plaintiff contends that there are triable issues of fact whether the loading dock was structurally unsafe or that a dangerous and defective condition existed upon it the flooring was inherently dangerous.

Plaintiff also claims that the "Citadel" polyurea surfacing that had recently been applied to the loading dock floor was inherently slippery because it purportedly lacked sufficient non-slip material. on the interior loading dock floor of IBM CHQ Armonk. Citadel materials exchanged by Certa Pro reveal that Citadel warned Certa Pro and/or its contractors on the specification materials Certa Pro proposed that when polyurea floor coatings cure they are completely non-porous and therefore can become very slippery when wet. But plaintiff emphatically testified that the floor was not wet at the time of the accident.

Plaintiff offers the Affidavit of William Marletta, plaintiff's safety expert, who performed his on-site inspection on April 4, 2019, which was almost four and a half years after the accident date of October 14, 2014. Marletta opined that EMBE was negligent in repainting the floor, that the same level of abrasive should have been used throughout the floor; and that the loading dock floor with the standard amount of anti-slipping had a high slip potential compared to the flooring with the extra

anti-slip aggregate in it. The expert went on to opine that the floor should not have had two different degrees of walking surface roughness, or if it did, a sign should be posted warning pedestrians of such. The expert referred to the publication "Safer Surfaces to Walk On", which appears to compare floors when wet (which is not the case here). Marletta also opines that IBM and /or Fluor should have posted warning signs about the floor being slippery; and that EMBE should have used clear silica sand or the fractured flint for this floor as it was subject to moisture, rain water and dripping vehicle fluids. IBM and Fluor point out that the plaintiff's safety expert's methodology for determining floor surface roughness was not in accord with the procedures required by the same literature that the safety expert cited as authoritative–notably that throughout plaintiff's deposition testified that there was no water on the surface of the floor where he fell. IBM and Fluor point out that the base coat used on the loading dock is hard dry within three to six hours of its application, and plaintiff's fall was weeks after the floor was treated.

Plaintiff's retained engineer, cites building code and other provisions that require slip resistant floor surfaces that were allegedly violated. He claims that the subject accident site as having a floor surface that was significantly less abrasive floor surface. Plaintiff's contractor expert also opined that the EMBE workers who installed the Citadel floor finish were not trained, and that the loading dock was slippery when wet, there was a lack of testing, improper floor installation.

Generally, in the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence" (Kociecki v EOP-Midtown Properties, LLC, 66 AD3d 967, 967–68 (2d Dept 2009).

Based upon plaintiff's submissions including his experts' opinions, the court finds that plaintiff failed to raise triable issues of fact. Plaintiff failed to show that the difference in the dry floor

textures gave rise to the alleged dangerous surprise condition, especially in light of the sheer number of times plaintiff walked across it without incident prior to the accident. Accordingly EMBE's motion for summary judgment is **granted**.

Finally, in light of the foregoing, IBM and Fluor's summary judgment motion is also **granted**, and all other applications are denied as academic.

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court. In light of the foregoing, it is:

ORDERED, that the summary judgment motion (Seq 1) by defendants Embe Home Solutions, Inc. A/k/a Certa Pro Painters. Inc is granted; and it is further

ORDERED, that the summary judgment motion of Fluor and IBM (Seq 2) is granted; and it is further

ORDERED, that the complaint is dismissed, and this action shall be marked as disposed.

The Clerk shall mark his records accordingly.

Dated: April 28, 2020
White Plains, New York

Signed virtually during the COVID-19 Court shutdown

____

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties By NYSCEF