

Clarke v Atrium Ctr. for Rehabilitation & Nursing

2022 NY Slip Op 30013(U)

January 4, 2022

Supreme Court, Kings County

Docket Number: Index No. 515995/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____ X

MICHELLE CLARKE,

Plaintiff,

DECISION / ORDER

-against-

Index No. 515995/2018

Motion Seq. No. 1

Date Submitted: 12/2/21

**ATRIUM CENTER FOR REHABILITATION & NURSING,
RIVER MANOR ACQUISITION I, LLC
and EXCELSIOR CARE GROUP, LLC,**

Defendants.

_____ X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>22-33</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>34</u>
Reply Affirmation.....	<u>35-37</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action which arises from a slip and fall accident which took place on September 16, 2017 at Atrium Center for Rehabilitation, 611 East 103rd Street, Brooklyn, NY. In plaintiff's supplemental bill of particulars, she alleges that she slipped and fell on a liquid which had been spilled in a fifth-floor employees' pantry and which spread out from there into the public hallway. In her EBT she testified that she had learned that the refrigerator in the pantry was leaking [Doc 32 Page 118]. Plaintiff was at the facility to visit her mother, who resided there. This action was commenced on August 6, 2018, and the case is on the trial calendar. The only cause of action in the complaint is for negligence.

Defendants contend that they are entitled to summary judgment dismissing the

complaint as they did not have any actual or constructive notice of the condition. The notice of motion seeks summary judgment “directing the entry of judgment dismissing the action with prejudice in its entirety in favor of Defendants; and, in the alternative, pursuant to CPLR §3212 and §3212(e), granting partial summary judgment as to the moving Defendants on any theory of liability as to which the Court determines that Plaintiff has failed to raise an issue of fact.” Movant’s thoughtless cutting and pasting of this nonsensical alternative request for relief shall be disregarded by the court.

Defendants support their motion with an attorney’s affirmation, the pleadings, plaintiff’s deposition transcript, a deposition transcript of Peter Pederson (defendants’ witness), and an affidavit from an engineer, Jeffrey J. Schwalje, P.E.

At the outset, the court must point out that to make a prima facie case for dismissal in an action which arises from a slip and fall on a liquid, a transient condition, the moving defendant, "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Skerrett v LIC Site B2 Owner, LLC*, ___AD3d___, 2021 NY Slip Op 06386 [2d Dept 2021]; *Jeremias v Lake Forest Estates*, 147 AD3d 742 [2d Dept 2017]; *Ellis v Sirico's Catering*, 194 AD3d 692, 693 [2d Dept 2021]). Counsel for defendants in this motion makes no mention whatsoever of this burden of proof in his affirmation in support, instead stating [¶56] “Plaintiff’s testimony alone, let alone in conjunction with the findings of Jeffery J. Schwalje, P.E., clearly establishes that the substance Plaintiff slipped on was not visible and apparent long enough for Defendants to have discovered and cleaned it, and that accordingly Defendants did not have actual or constructive notice of it.” This is total speculation on the attorney’s part and does not constitute evidence. An engineer would not ordinarily have knowledge of the facts with

regard to a defendant's cleaning or inspecting for dirt, debris, spills, and the like. Here, he did an inspection on September 9, 2021, four years after the plaintiff's accident. It is not probative on the issue at hand, clearly. The plaintiff would not have knowledge of the applicable facts either. This inquiry, whether the defendant had actual or constructive notice of the spill which plaintiff claims caused her to fall, requires the court to review the deposition transcript of defendants' witness.

Peter Pederson's EBT transcript is at Doc 32. His deposition was taken on July 21, 2021. He testified that he has been employed by defendant Atrium for six years and is the "maintenance director." Asked to explain what his duties are, he said "I am in charge of the equipment, the heating, electrical, air conditioning, painting, spackling, renovation, plumbing." He said his office is in the basement, and there are four maintenance workers and one painter whom he supervises. They "perform repairs to the building and equipment in the building and other duties as assigned." He testified that they switched over to keeping records on a computer at some point, he could not remember when, but when he searched the computer for the date of plaintiff's accident, he did not find anything. So, then he searched for paper records, which were kept in binders, and learned that they were thrown away [Page 17]. He testified that his general work schedule is 8 a.m. to 4 p.m. Monday to Friday. Plaintiff's bill of particulars [Doc 26] states that the accident took place at "approximately 5:25 p.m. on September 16, 2017, which was a Saturday. Mr. Pederson then would not have been at the premises since 4:00 p.m. the day before plaintiff's accident, more than 24 hours before the accident. He was asked which maintenance worker would have been assigned to work the weekend of plaintiff's accident, and he said he did not know [Page 25]. At this point, he was finally asked if there were "cleaning personnel" in addition to his maintenance workers, and he said "yes." He did not know who the cleaning supervisor

was in September of 2017. He named four supervisors but did not know when they worked at Atrium specifically enough to know which one was the supervisor on the date of plaintiff's accident. Then he said he did not know how many people were in that department. He then was asked to list all of the departments. No other department except housekeeping or maintenance (his department) sounded like one that would clean the floors. He then said he sometimes managed the housekeeping department when they were in between supervisors. He did not know if any records were kept by that department [Page 34]. On the weekends, the housekeeping staff worked from 7:00 a.m. to 3 p.m. [Page 39] and some people worked on the next shift, but he did not know how many. Asked "Of the less than three workers who work after three on weekends, what would their job duties be? He answered, "Answer calls, deliver linen, remove the trash, clean common areas." The witness was then asked, "what did you mean when you said the staff, whoever it might be, cleaned common areas?" He said [Page 45] "After meals, the evening meal, the housekeeping staff is required to clean the dining room and the dayrooms generally speaking." Then, Mr. Pederson was asked "During the weekend after three p.m., was any routine mopping or sweeping done ? He answered "Yes." Then he was asked "Was there a schedule for that?" and he said, "I don't know."

Mr. Pederson then testified that he did not look for any accident report for plaintiff's accident [Page 47]. He said the building has nine floors, and there is a pantry on each floor. They were locked, and he had a key. He was asked if the housekeeping department was supposed to clean the pantries and he said "I don't know" [Page 50]. He testified that the fifth-floor pantry had [in 2017] a sink and a refrigerator. Again asked [Page 53] "Did anybody from the housekeeping staff to your knowledge mop or sweep the floors on a regular basis back in 2017, and I'm talking about the floors of the pantry?" he said, "I don't know." Finally,

he was asked if he was aware of the refrigerator in this fifth-floor pantry needing repair or replacement in 2017, and he [Page 54] said “I don’t know.”

It is black letter law that “[m]ere 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” (see *Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept 2019]; see also *Griffin v PMV Realty, LLC*, 181 AD3d 912, 913 [2d Dept 2020]).

Here, the court finds that the defendants have failed to demonstrate, prima facie, that they lacked constructive notice of the allegedly dangerous condition on the fifth floor so as to establish their entitlement to judgment as a matter of law (see *Lauzon v Stop & Shop Supermarket*, 188 AD3d 856 [2d Dept 2020]; *Lebron v 142 S 9, LLC*, 151 AD3d 835, 836 [2d Dept 2017]). The defendants did not submit any evidence regarding specific cleaning or inspection of the area in question, or any other affirmative proof to demonstrate how long the condition had existed. Since the defendants have failed to meet their initial burden, the motion must be denied, regardless of the sufficiency of the plaintiff’s papers in opposition (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Another word is necessary. Defendants’ reply affirmation annexes an affidavit from the administrator of the nursing home, which counsel describes [¶27] as “indicating that the flooring, lighting, handrails, and other conditions regarding the fifth-floor hallway and pantry have remained unchanged since 2017. See the affidavit of Michael Schaffer, attached hereto as Exhibit A.” This is improper. It is also irrelevant to the issue of the wet floor. While a reply may contain a correction, such as a notarization which was omitted, or a page of a document which was omitted, if pointed out in the opposition, it cannot contain new evidence. Therefore, the court did not consider what was said in this affidavit. “Any

attempt to submit additional evidence in its reply papers in further support of its motion was improper and should not have been considered by the court” (see *U.S. Bank N.A. v Kohanov*, 189 AD3d 921, 923 [2d Dept 2020], citing *Lee v Law Offs. of Kim & Bae, P.C.*, 161 AD3d 964, 965 [2d Dept 2018]; *Board of Mgrs. of Foundry at Washington Park Condominium v Foundry Dev. Co., Inc.*, 111 AD3d 776, 777 [2d Dept 2013]; *Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]).

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: January 4, 2022

ENTER:



Hon. Debra Silber, J.S.C.