

Rodriguez v New York Presbyt. Brooklyn Methodist Hosp.

2022 NY Slip Op 31845(U)

June 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 508113/2019

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

ALVARO RODRIGUEZ,

Plaintiff,

-against-

**NEW YORK PRESBYTERIAN BROOKLYN
METHODIST HOSPITAL,**

Defendant.

_____X

DECISION / ORDER

**Index No. 508113/2019
Motion Seq. No. 2
Date Submitted: 5/26/22
Cal No. 52**

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>34-49</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>50-54</u>
Reply Affirmation.....	<u>55-56</u>

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

This is a tort action, following plaintiff's slip and fall on January 18, 2019, at approximately 9:30 a.m. at the defendant's hospital in Brooklyn, New York. Plaintiff claims that he slipped and fell on the stairs inside the lobby because they were wet. This action was commenced a few months later.

Defendant claims it is entitled to summary judgment dismissing the complaint as the defendant did not have actual or constructive notice of the condition which plaintiff claims caused him to fall. Defendant supports the motion with an attorney's affirmation, a memo of law, a statement of material facts, the pleadings, plaintiff's bills of particulars, the plaintiff's EBT transcript and the EBT transcripts of two witnesses who testified for

defendant, along with the exhibits to the EBT (photos) and a subsequent affidavit from the witness, Mr. Paul Giurdanella, a security guard who responded to the scene of the plaintiff's accident.

The plaintiff testified at his EBT on 2/3/21. He said that he was at the hospital to take his wife for an exam. It was snowing outside. He brought her to the exam room then left to get some coffee. On the way to the exam room, they walked up the ramp from the lobby to the floor above. When he left the exam room, he took the stairs down. He testified that he did not see any water on the stairs before he fell. Once he started slipping, he realized the stairs were wet [Doc 42 Page 29]. After he slipped and fell down the entire flight of stairs, he saw that there was water on the steps. He did not take any photos after he fell. He said the stairs had "wet prints of shoes" [Page 33]. He testified [Page 34] that "There was no signs that said the floor was wet or anything like that."

Defendant's witness Alvin Jeremiah testified at an EBT on 10/1/21. He testified that he has worked for defendant for 27 years, and currently is a manager in the housekeeping department, which is called Environmental Service Department or "EVS". There are other managers, and they report to a director. He is on the midnight shift usually, which is midnight to 8:00 a.m., but sometimes he is on the night shift, which is 4:00 to midnight. He did not know which shift he worked the day of plaintiff's accident. Or if he worked at all, as he was not told what day of the week it was. He said, when asked about the steps at issue, that [Pages 48-49] "There are times in the past where, yes, the steps may have water in it, or how people walk, the steps may, you know, accumulate some kind of wet stuff, sensation where we will send somebody just to mop it up with a dry mop. Yes, that do happen in the past. . . I never really seen that where

we have an issue with a step there unless there is some type of snowing where we have large snow. So, yes, if there snowing, then with people walking in the snow and walking up the steps, so every so often, you have to pay attention to the step. We'll have a sign right close to the step. We'll have signs not only close to the step, but once you enter the hospital, we have caution sign come right through. And yes, if there is snow, we will have to give that step some type of attention.” He was then asked [Page 53] “What I want to know is, focusing on this Kirkwood Pavilion, when there was a weather event, how would the routine cleaning in that area change if there was a weather event? In any way you can describe it for me.” A. “Well, it would change it on a whether we -- one, we will ensure that we have bags in that area. So the employee will assign to ensure that we have bags, umbrella bags in that area. We will have caution signs up in that particular area. Majority every entrance. Doesn't particularly have to be that area, but throughout we have to, every entrance is -- just to ensure that umbrella bags and caution sign is placed. And, of course, to maintain that the floor is dry.” Q. “And what would -- what equipment would be used to make sure the floor was dry?” A. “To make sure the floor is dry, we'll have the employee with a dry mop, just to -- you know, because there will be just spots. It's not the entire floor, but there might be spots -- especially if it's snowing. Not too much with rain. I don't really seen too much issue with rain. But when it's snowing, then you will have, you know, snow tracks from the hospital. So yes, you will have somebody with a dry mop just to ensure that different spots is mopped up.” His generic testimony with regard to usual practices is not helpful for this motion, and he said he had no recollection of the specific date or of plaintiff's accident [Page 14].

Defendant's other witness, Paul Giurdanella, testified on May 11, 2021. He said

he is a sergeant for defendant, and supervises the overnight tour of security officers. He has worked for defendant since approximately May 11, 2018, as he testified that he started working for defendant three years earlier, as a security officer. On the date of plaintiff's accident, he worked from 7:00 a.m. to 3:00 p.m. as a security officer. He stood at a podium in the lobby to greet everyone who entered, and to direct people where they needed to go. If something needed to be cleaned up, he would call it in to "operations" who would notify Environmental Services and [Page 17] "we would remain in the area to secure it and to direct patients or visitors or our staff workers around the area so there are no incidents." He said he does not have access to warning signs. He testified that on the day of the plaintiff's accident, he was the only security guard at the entrance that plaintiff had used. He was asked if there were any mats in the entrance area and he said, "not that I can recall" and when asked what the floor was made of, said "I'm not a contractor."

Mr. Giurdanella was then asked what the housekeeping schedule was for inspecting the public areas for "anything wet on the floor or anything of that nature" [Page 21] and he said, "I do not know their schedule." He was asked how the floor is maintained, and he said, "I do not know Environmental's procedure, no." Then he was asked "whether or not there's any regular mopping that goes on in that area on a day when there's precipitation" and he said, "I do not know Environmental's schedule." Asked if he remembered what the weather was on the date of plaintiff's accident, he said [Page 28] "I do not recall". He said he learned of the plaintiff's accident when he "heard a thud" at about 9:34 a.m., turned around and saw plaintiff on the floor, and went over to him. He called operations and requested a stretcher to bring plaintiff to the emergency room. He did not speak to plaintiff [Page 34]. He said he visually inspected

“the floor” and “it was dry.” He did not take any pictures. Nobody from housekeeping came. He had done a visual inspection at 7:00 a.m. when he arrived. He was again asked about what would happen if there was “water or precipitation being tracked into the hospital by visitors or employees entering” and he again said [Page 42] “that’s Environmental Services. I don’t know their schedule or their frequency.” It is noted that plaintiff’s accident was more than two hours after his 7:00 inspection, and that for “weather” on the Incident Report, he checked “other” and could not explain what he meant by this at his EBT.

Mr. Giurdanella also provides a recent affidavit dated 3/16/22 and says it is provided for “reiterating portions of my deposition testimony . . . as well as to address certain issues left unaddressed at the time of my deposition.” He “reiterates” that he “became subsequently involved in investigating the incident and assisting the plaintiff, while memorializing the events in an Incident Report.” While he testified that he did not see any water on the floor after plaintiff’s accident, and that the floor (with no mention of the stairs) was dry, in his recent affidavit he states [at ¶5] that when he first arrived at 7:00 a.m. he did a complete inspection: “I followed my usual practice and procedure on that particular day, which involves conducting a comprehensive inspection of the entirety of the subject lobby space at the beginning of my shift, starting at 7:00 a.m. The purpose of that inspection is to ensure that there are no potential safety concerns for anybody who would access this lobby space, including employees and guests, whether walking on the floor surface, any of the stairwells, or ramps within the lobby space. My inspection in this regard would seek to determine if there were any potential structural or other potential tripping or slipping hazards for anyone who would use this space and, if any such hazards were identified, they would then be addressed at that time. My

inspection on the morning of the plaintiff's incident did not reveal any tripping or slipping hazards anywhere within the lobby space (including all ramps and stairwells)."

Then, for the first time, Mr. Giurdanella states in the affidavit "I again inspected the location when I attended to the plaintiff just seconds after his incident. An inspection of the stairs at issue did not reveal any water or other liquid substance of any kind on the stairwell. On the day of the incident, subsequent to my initial inspection at 7:00 a.m., and prior to plaintiff's incident, I did not see any liquid substance of any kind on the subject stairwell. Additionally, during that period of time, no one commented, complained or otherwise advised of any liquid substance or other hazardous condition existing on the subject stairwell." This is testimony that seems to be tailored to comply with the requirements of the law, and is not what he testified to at his EBT.

Plaintiff opposes the motion, and provides an affirmation of counsel, opposition to defendant's statement of material facts, and a weather report from NOAA for the month of plaintiff's accident, which indicates that on the day of plaintiff's accident, at the Central Park Weather Station, about a half inch of snow fell between midnight and 9:00 a.m.

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 a dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Beceren v Joan Realty, LLC*, 124 AD3d 572, 2 NYS3d 155 [2015]; *Payen v Western Beef Supermarket*, 106 AD3d 710, 964 NYS2d 583 [2013]). While a "defendant [is] not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain" (*Negron v St. Patrick's Nursing Home*, 248 AD2d 687, 687, 671 NYS2d 275 [1998]; *see Paduano v*

686 Forest Ave., LLC, 119 AD3d 845, 989 NYS2d 379 [2014]; *Sarandrea v St. Charles Sch.*, 118 AD3d 690, 691, 986 NYS2d 351 [2014]; *Dubensky v 2900 Westchester Co., LLC*, 27 AD3d 514, 813 NYS2d 117 [2006]), a defendant may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action (see *Mentasi v Eckerd Drugs*, 61 AD3d 650, 651, 877 NYS2d 149 [2009]; *Ruic v Roman Catholic Diocese of Rockville Ctr.*, 51 AD3d 1000, 1001, 858 NYS2d 761 [2008]; *Williams v JP Morgan Chase & Co.*, 39 AD3d 852, 834 NYS2d 310 [2007]). In a case where water was tracked into an ATM vestibule when the bank was not open, the defendant bank was found not have had constructive notice (see *Murray v Banco Popular*, 132 AD3d 743, 744 [2d Dept 2015]). But when a pre-school classroom was in operation, with children being brought in throughout the morning by their parents, not cleaning and mopping for more than an hour after the children started to arrive was not sufficient (*Allen v Fedn. of Jewish Philanthropies of NY*, 175 AD3d 1226 [2d Dept 2019]). Further, when a customer spilled a soda with ice, then herself slipped on it before the ice had even melted, the business defendant was not entitled to summary judgment, as the court could not take notice of the short time interval between the spill and the slip and fall -- the only way to prevail was for defendant to "offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Mahoney v AMC Entertainment, Inc.*, 103 AD3d 855, 855-856 [2d Dept 2013]).

It is clear as well that "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 (see *Goodyear v Putnam/Northern*

Westchester Bd. of Coop. Educ. Servs., 86 AD3d 551, 927 NYS2d 373 [2011]; *Schiano v Mijul, Inc.*, 79 AD3d at 726-727; *Farrell v Waldbaum's, Inc.*, 73 AD3d 846, 847, 900 NYS2d 453 [2010]; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d at 598-599; *cf. Perez v New York City Hous. Auth.*, 75 AD3d 629, 630, 906 NYS2d 299 [2010]).

The court finds that defendant has failed to make a prima facie case for summary judgment. An inspection two and a half hours before plaintiff's accident on a snowy morning was insufficient.

Accordingly, it is **ORDERED** that defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: June 8, 2022

ENTER:



Hon. Debra Silber, J.S.C.